SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-005025-14-T2
A-003417-15-T2

IN RE THE PINELANDS COMMISSION'S CONSISTENCY DETERMINATIONS APPROVING TUCKAHOE TURF FARM INC.'S APPLICATION NO. 1984-0389.009

Civil Action

APPELLANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR CONSOLIDATED APPEALS

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PRELIMINARY STATEMENT

Pinelands Preservation Alliance ("PPA) and New Jersey Conservation Foundation ("NJCF")(together, "Appellants") bring this appeal to ensure that the Pinelands Commission ("PC" or "Commission") abides by its statutory obligation to approve developments, including the use of preserved farmland in the Pinelands Agricultural Production Area for large soccer tournaments, only through proper review and approval procedures, only if the development is consistent with the minimum standards of the Pinelands Comprehensive Management Plan ("CMP"), and only if the use is permitted by the conservation restrictions or deeds of easement for which the landowner, Tuckahoe Turf Farm, LLC ("TTF"), has been handsomely paid in exchange for limiting the uses of its land to genuine farming activities.

In this case, the Commission clearly failed to protect the integrity of the CMP and the existing conservation restrictions on the land when faced with political pressure on behalf of a particular owner; and, subsequently, avoided the rulemaking process required by federal and state law when the State Legislature sought to alter the terms of the CMP for the benefit of this landowner. The Commission's decision to decline hearing the matter despite "substantial issues" of nonconformity with the CMP and the deed restrictions, employ an undefined "settlement" process to avoid strict compliance with the CMP,

and avoid the rulemaking process appropriate to implementing significant policy changes -- all decisions designed to circumvent its own responsibility to protect the integrity of the CMP -- violate its statute and regulations.

STATEMENT OF FACTS

This matter involves two appeals (which have been consolidated) from two final agency decisions of the Pinelands Commission with respect to a development application filed by TTF to permit commercial soccer activities on certain deed-restricted parcels located within the jurisdiction of the Commission. The consolidated appeals involve parcels of land owned by George W. Betts and Thomas H. Betts, referred to herein as TTF, in the Town of Hammonton and in Waterford Township. (TTF has not currently proposed any soccer activities for lots in Winslow Township (Aa155)[1], though such parcels were included in TTF's application filed with the PC, dated January 7, 2015. (Aa111-113)) The relevant parcels in Hammonton include: Block 5001, Lots 5-7; Block 5002, Lot 11, Block 5601, Lots 1-9; and Block 5602, Lots 3-7 (excluding Lot 4.01). (Aa111) The parcels located in Waterford are: Block 7506, Lot 1; Block 7505, Lot 1; Block 7504, Lots 1-4 and 10-12; Lots 7503, Lots 1, 3-5 and 10-12; Block 7502, Lots 2 and 3; and Block 7602, Lots 10-13.

[1] These parcels include Block 6602, Lot 7, Block 7101, Lots 5 and 15, and Block 7104, Lots 1 and 3, all subject to a SADC deed restriction, dated September 30, 2003. (Aa371)

(Aa111-112) Pineland Development Credit ("PDC") restrictions or State Agricultural Development Committee ("SADC") deeds of easement are tied to all of these parcels. (Aa344-404)

In October 2013, the Commission became aware that certain deed-restricted parcels owned by TTF were being used for organized, commercial soccer activities, (Aa17), and such commercial operations may have "already been in existence for approximately two or three years." (Aa32) The relevant parcels were located in the Town of Hammonton, Waterford Township and Winslow Township. All parcels are within the Agricultural Production Area defined by the CMP. In a letter dated January 16, 2014, the Commission issued a letter to TFF stating, "[a] soccer facility, defined by the Township land use ordinance and the Pinelands CMP as an 'intensive recreational facility', would not be a permitted use in Waterford's AG zoning district." (Aa34) In face of an extensive tournament schedule for 2014, (Aa36-39), the Commission issued a Violation Letter, dated April 21, 2014, to TTF concerning such activities, but limited the reach of that letter to parcels located in Hammonton. (Aa40-41)

Town of Hammonton Parcels

After learning of the CMP and zoning violation in late 2014, the Commission engaged in settlement discussions with MSSL, Inc, a nonprofit corporation dedicated to offering soccer programs, tournaments and festivals, including those at TTF

(Aa52-56;72-73;78-104), while political pressure was exerted on the Pinelands Commission and the SADC to change their longstanding agricultural retention policies to accommodate TTF. (Aa42-48; 63-66; 75-77) Throughout 2014, the PC took a public position that the use of TTF for organized soccer events was not consistent with the land use standards included in the CMP and the deed restrictions voluntarily entered into by the landowner in exchange for substantial payments. (Aa51; 61-62; 150-151) Nonetheless, the Commission continued to work with the landowner and the MSSL to minimize the disruption to the tournaments that had already been scheduled, while trying to find a path, such as the implementation of a pilot program, which "would address the issue on a broad scale rather than focusing on just youth soccer at one farm," and avoid enforcing the existing rules and deed restrictions. (Aa150)

On July, 17, 2014, the Pinelands Commission issued a letter stating that all soccer practices and events on all restricted parcels must cease by August 31, 2014. (Aa49-50) The Commission subsequently extended the deadline to November 30, 2014, (Aa57-58), and on August 29, 2014, MSSL filed an application "to continue the use of soccer activities as on-farm direct marketing" for the portion of the farm located in Hammonton. (Aa111) Discussions continued between the Commission and MSSL through November and December, (Aa74; 78-104) and on December

17, 2014, the Commission issued an Inconsistent Certificate of Filing, under N.J.A.C. 7:50-4.34, with regard to soccer activities occurring on the Hammonton properties. (Aa105-110)

On January 7, 2015, TTF amended its application, Application No. 1984-0389.009, "so that Tuckahoe [was] the applicant," and it included parcels of land in Hammonton, Waterford and Winslow. (Aa111-113) Following this submission, the Town of Hammonton Planning Board ("HPB") approved TTF's development application in Resolution No. 10-14, dated February 4, 2015. (Aa114-128) In light of this resolution, PPA asked the Commission, in a letter dated February 18, 2015, to (i) clarify the status of its discussions with TTF, (ii) identify its authority to "settle" the matter if the activities in question violated the CMP, and (iii) set forth the process the PC intended to follow. (Aa146-47) PPA also asked to be notified of any future actions by the Commission with respect to TTF's application so it would be able to comment before the Commission made any decision. (Aa147)

TTF and the Commission continued to discuss "settlement" of TTF's application before and after[2] the Commission issued a "Call-Up" letter with respect to the HPB approval, dated March 27, 2015, stating that the soccer activities violated the CMP and the deed-restrictions and setting a public hearing date of

[2] See Aa142-145; 152-175 (before) and Aa179-191 (after)

April 30, 2015. (Aa176-178) In a letter dated April 1, 2015, TTF informed HPB of TTF's agreement to conditions on the soccer tournaments requested by the Commission's staff, including changes the Planning Board would have to make to its previous approval to incorporate those conditions. (Aa194-196) TTF followed this communication with a letter to the Executive Director of the Commission insisting that TTF "had accepted the terms of the Agreement it negotiated with the Commission staff with the understanding that no action by the Commission [was] necessary." (Aa198-199)

On April 10, 2015, the Commission held its next regularly-scheduled public meeting. The Commission went into closed session, and when it came out it passed a motion by a vote of 10 to 1 "to authorize the Executive Director to continue to negotiate and settle the [TTF] matter consistent with the terms discussed in closed session." Those terms were not disclosed to the public. (Aa207) Two weeks later, the Commission issued an Amended Inconsistent Certificate of Filing to TTF with respect to all the properties at issue located in Hammonton, Waterford Township and Winslow Township, again repeating that the proposed commercial soccer activities were inconsistent with the CMP and the deed restrictions. (Aa209-213)

On May 6, 2015, the Hammonton Planning Board amended its Resolution No. 10-14. (Aa239-271) At the Commission's May 8,

2015 meeting, PC staff informed the Commission that it "recently issued an amended inconsistent certificate of filing for the soccer activities at Tuckahoe Turf to include both Winslow and Waterford Townships." (Aa218) The minutes do not reflect any mention that the Commission staff had reached a settlement with TTF. On May 11, 2015, the PC's Executive Director signed a Stipulation of Settlement with TTF. (As224-230) This agreement was not discussed in open or closed session at the Commission's June 12, 2015 monthly meeting (Aa231-238), was not posted on the Pineland Commission's website, and was not provided to PPA, as it previously had requested, nor to any other member of the public. Rather, on May 26, 2015, the Executive Director terminated the Commission's review of TTF's application, and issued a "No-Call-Up Letter" to TTF (Aa296-297), which is the subject of Appellants' July 6, 2015 Notice of Appeal.[3]

Waterford Township Parcels

In June and July 2015, the Waterford Township Planning Board ("WPB") heard expert testimony regarding TTF's application to conduct soccer activities on its deed restricted properties in Waterford. (Aa328-338) In the June meeting, counsel for TTF

[3] On September 22, 2015, the Hammonton Zoning Office issued a zoning permit for the schedule of events in Hammonton. On October 13, 2015, the Pinelands Commission issued a Call-Up Letter with respect to the permit because the permit exceeded the total hours of soccer events authorized by the HPB's May 6, 2015 approval. (Aa311-313) The permit was revoked on December 4, 2015, and so was withdrawn from Commission review. (Aa325)

noted, with reference to the May 26, 2015 No-Call-Up Letter, that despite the fact that the PC's Certificate of Filing with respect to this application was "inconsistent," the "Pinelands has agreed with [local] restrictions" and TTF "has the opportunity to enter into the pilot program." (Aa299) In the July hearing, it emerged that "during a tournament and at peak parking there were approximately 3200 vehicles" and numerous residents had "an issue with trash." (Aa309) The WPB approved the application at its July 2015 meeting, and memorialized the approval by Resolution 15-12 at a regular public hearing held on September 21, 2015. (Aa329)

On November 6, 2015, the Pinelands Commission issued a Call-Up Letter with respect to the preliminary and final major site plan approved by the WPB on September 21, 2015. (Aa314-318) A second letter was issued on November 9, 2015, correcting the block, lot, municipality and acreage references and scheduling a public hearing for December 15, 2015. (Aa319-323) TTF requested adjournment of the hearing, and yet another Call-Up Letter was issued on January 7, 2016, because the local approval did not contain the number of soccer events and hours per year. (Aa324-327)

On January 19, 2016, the New Jersey Legislature enacted a bill supplementing the Pinelands Protection Act, 1979, c.111. In accord with this bill, which emerged after a conditional

veto, certain field sports, "conducted or occurring in an agricultural production area" within the Pinelands, were declared to be "low intensity recreational" uses under the CMP. N.J.S.A. 13:18A-8.1. On February 1, 2016, the WPB amended its Resolution No. 15-14, and adopted Resolution No. 16-04 in its place. (Aa328-338) The latter limited the number of soccer events and hours permitted annually in a manner consistent with a TTF-PC "Stipulation of Settlement" and the HPB resolution "which the Commission allowed to take effect." (Aa339) The Commission issued a No-Call-Up Letter, dated March 10, 2016, implicitly finding WPB's amended site plan approval permitting the "[e]stablishment of a private commercial soccer use with no site improvements" consistent with the CMP. (Aa340-41) This final determination is the subject of Appellants' April 9, 2016 Notice of Appeal. (Aa420-425) To date, the Pinelands Commission has not established a pilot program, as originally contemplated, nor has it taken any steps to formally amend the CMP and secure the approval the Department of Interior, as required. (Aa448)

STATEMENT OF PROCEDURAL HISTORY

PPA filed a Notice of Appeal and Case Information Statement, involving property located in Hammonton, on July 6, 2015 (Aa405-408), which were amended to add the NJ Conservation Foundation as a party, on August 5, 2015 (Aa409-419). After Appellants filed their appeal, the Appellate Division requested

briefing on whether the Commission's No Call-Up Letter identified in the appeal constituted a final agency decision. Appellants, the State and TTF each submitted letter briefs to the court, and on September 29, 205, the court decided to continue to process the appeal. The State filed its first Statement of Items Comprising the Record ("SICR") on November 25, 2015, and after numerous discussions between the parties, the First Amended SICR was filed on March 28, 2016.

On April 9, 2016, Appellants filed a second Notice of Appeal and Case Information Statement regarding the TTF parcels located in Waterford. (Aa420-425) Appellants simultaneously filed a Motion to Consolidate the two matters (Aa426-433), which was granted by an Order dated May 25, 2016. (Aa447) On or about July 25, 2016, the State filed a Second Amended SICR (Aa437) reflecting the consolidation of the two appeals, and on September 9, 2016 filed a Third Amended SICR (which Appellants did not receive). (Aa438) Upon review, additional documents that had been submitted to or generated by the Pinelands Commission were identified, and accordingly the State filed a Fourth Amended SICR on or about September 28, 2016. On October 21, 2016, Appellants made a motion requesting a 30-day extension to file their initial appendix and brief on November 25, 2016, with the consent of all parties. (Aa434-446) This motion was granted by an Order dated November 14, 2016.

STATUTORY AND REGULATORY FRAMEWORK

This appeal involves the interplay between the Pinelands Protection Act, N.J.S.A. 13:18A-1 *et seq.*, Section 502 of the National Parks and Recreation Act of 1978 (the federal Pinelands Act), 16 U.S.C. § 471i, the Pinelands Comprehensive Management Plan ("CMP"), N.J.A.C. 7:50-1.1 *et seq.*, the Pinelands Development Credit Bank Act, N.J.S.A. 13:18A-38, the Agricultural Retention and Development Act, ("ARDA"), N.J.S.A. 4:1C-13.h, and the Garden State Preservation Trust Act, ("GSPT"), N.J.S.A. 13:8C-3. The Pinelands Protection Act, federal Pinelands Act, and CMP set forth the procedural and substantive requirements of the Pinelands regional land use planning program, including the regulatory limits on uses of land in the Agricultural Production Area. The Pinelands Development Credit Bank Act, the ARDA and the GSPT Act govern Pinelands Development Credits ("PDC") and State Agriculture Development Committee ("SADC")[4] deed restrictions on the properties at issue herein.

The Federal and State Pinelands Acts

The federal Pinelands Act and its state progeny, the state Pinelands Protection Act, were enacted in 1978 and 1979,

[4] The SADC was created pursuant to the Right to Farm Act, N.J.S.A. 4:1C-1 et seq. and was generally tasked with promoting the interests of productive agriculture and farmland retention within the administrative processes of State Government. N.J.S.A. 4:1C-6 and 7.

respectively. Prior to 1978, development within the Pine Barrens or Pinelands was governed solely by the seven counties and fifty-three municipalities whose jurisdiction included the Pinelands Area. Local land use ordinances and regulations were authorized by the Municipal Land Use Law, and there was little if any consistency among the differing jurisdictions.

In 1978, Congress established the "Pinelands National Reserve," with the explicit intent "to protect, preserve and enhance the significant values of the land and water resources of the Pinelands area." 16 U.S.C. §471i(b)(1). The Pinelands were acknowledged as an environmentally and ecologically sensitive area "containing approximately 1,000,000 acres of pine forest, extensive surface and ground water resources of high quality, and a wide diversity of rare plant and animal species, provid[ing] significant ecological, natural, cultural, recreational, educational, agricultural and public health benefits." Id. at §471i(a)(1). New Jersey was directed to develop the CMP for the Pinelands, and to establish a planning entity, which would be responsible for preparing and implementing that Plan. Id. at §471i(d). The CMP was required to include "maximum feasible local government and public participation" in the management of the Reserve, Id. at §471i(f)(7); and if the management of the area or changes to the CMP did not conform to federal requirements, New Jersey risked

loss of funding and a claim for reimbursement. Id. at §471i(g). The Secretary of the Interior was required to approve or disapprove the CMP and any revisions thereto. Id. at §471i(g)(3) and (4).

In 1979, the New Jersey Legislature enacted the state Pinelands Protection Act. The Act created the PC, N.J.S.A. 13:18A-4, and directed it to prepare a CMP for the Pinelands National Reserve and Pinelands Area (including some land in addition to the National Reserve). See N.J.S.A. 13:18A-8 (setting forth the preparation, adoption and content of the CMP). The purposes of the Pinelands Protection Act are set forth in N.J.S.A. 13:18A-2, with an emphasis on conservation, protection and preservation of the Pinelands. See Gardner v. New Jersey Pinelands Com'n, 125 N.J. 193, 198-204 (1991)(for a full discussion of the purposes of the Pinelands Act). The Legislature specified that the CMP should "promote compatible agricultural, horticultural and recreational uses, including hunting, fishing and trapping, within the framework of maintaining a pinelands environment." N.J.S.A. 13: 18A-9(c)(2). The state Act also required the Pinelands Commission to submit the CMP to U.S. Department of Interior for review and approval as provided in the federal Pinelands Act. N.J.S.A. 13:18A-10.

In accord with N.J.S.A. 13:18A-12, each county and municipality in the Pinelands was required to submit a revised

master plan and land use ordinances to the Commission for review; and approval would be forthcoming only if they satisfied the uniform minimum standards set forth in the CMP. The CMP nonetheless permits municipalities, counties, the State or the Federal government to adopt and enforce more restrictive regulations "provided that such regulations are compatible with the goals and objectives of th[e] Plan." N.J.A.C. 7:50-5. See Fine v. Galloway Twp. Comm., 190 N.J. Super. 432 (Ch. Div. 1983)(finding that municipalities have the right to adopt and enforce more stringent standards than those set forth in the CMP). However, to the extent that any other act "pertaining to matters herein" creates a conflict or inconsistency with the Pinelands Act and CMP, "the provisions of the [Pinelands Protection Act] and the rules and regulations adopted hereunder shall be enforced and the provisions of such other acts . . . shall be of no force or effect." N.J.S.A. 13:18A-27.

It is central to the legislative scheme set forth in the Pinelands Act that, subsequent to the adoption of the CMP, no development application occurring in the Pinelands can be approved unless "such approval or grant" conforms to the CMP or the Commission decides to grant a waiver of strict compliance with the CMP. N.J.S.A. 13:18A-10. To ensure this statutory mandate, the Federal and state Pinelands Acts both required that the CMP include provisions sufficient to ensure consistent

implementation of its land use and development standards. (It should be noted that neither the federal nor the state Pinelands Acts include specific development standards; both contemplated that those standards would be set forth in the CMP.) The CMP regulations achieved this end through incorporation of CMP rules into municipal ordinances and certification of municipal ordinances as compliant with the CMP. Local review of private development applications was then subject to PC review to ensure that the minimum standards of the CMP were satisfied.

The PC is required to review all local approvals of development applications in the Pinelands, except for activities specifically exempted by the Pinelands Protection Act or CMP. And, once the Commission decides to review a development application, the Pinelands Protection Act evinces a legislative intent that hearings be held (N.J.S.A. 13:18A-15), and that the Commission will vote on the application. As the Appellate Division expressed in Application of John Madin v. Pinelands Comm'n, 201 N.J. Super. 105, 134 (App. Div. 1985), "[W]hen the Commission reviews or is required to review a development application, or even when its staff does preliminary investigation, it is ultimately the Commission which must determine whether the proposed development complies with the minimum standards of the CMP. In making this determination it must, upon finding the application complete, make findings of

fact and conclusions of law." (citing N.J.S.A. 13:18A-10(c)) certif. granted, 102 N.J. 380 (1985), certif. vacated, 103 N.J. 689 (1986). See also In the Matter of the Petition of South Jersey Gas Company for a Consistency Determination for a Proposed Natural Gas Pipeline, ___ N.J. Super. ___ at *22 (November 7, 2016)(noting that Commission retains "ultimate responsibility" under the CMP to review a proposed project and render a final decision on CMP compliance). (Aa496) Only if the Executive Director finds that local approval of an application does not raise "substantial issues with respect to the conformance of the proposed development with the minimum standards of [the CMP] and the provisions of the relevant certified local ordinance" will the Commission decline review of a final local approval. N.J.A.C. 7:50-4.40(a); see also N.J.A.C. 7:50-4.40(d)(same regarding termination of review). In this consolidated appeal, the Executive Director and her staff repeatedly found not only that the soccer tournaments raised substantial issues of compliance, but that they violated the CMP and deed-restrictions. The Executive Director then twice exercised her authority to terminate review and issue what the agency identifies as a "No-Call Up" letter; Appellants challenge the validity of her actions in both instances.

The CMP

Pursuant to the CMP, "recreational facility, low intensive"

is defined, in part, as a facility that "utilizes and depends on the natural environment of the Pinelands and requires no significant modifications of that environment." N.J.A.C. 7:50-2.11. With respect to the distribution and intensity of land use in an Agricultural Production Area, the CMP permits only low intensive recreational uses, and only permits those uses provided they are limited to less than 50 acres, involve no motorized vehicles, include no access to bodies of water, involve clearance of vegetation not exceeding five percent of the proposed parcel, and result in no more than 1% of the parcel being covered with impervious surfaces. N.J.A.C. 7:50-5.24(a)(6).

Neither the Agricultural Production Area regulation nor the definition of low intensive recreational facility have been amended in the CMP since the Legislature supplemented the state Pinelands Protection Act in January 19, 2016, in order to deem "field sports, including but not limited to soccer and soccer tournaments, conducted in an agricultural production area within the pinelands area to constitute a low intensity recreational use." N.J.S.A. 13:18A-8.1. Nor has the Secretary of the Interior reviewed or approved any such change to the CMP. As of today, the CMP still defines low intensive recreation facility as one that "utilizes and depends on the natural environment of the Pinelands and requires no significant modification of that

environment," N.J.A.C. 7:50-2.11, a definition no party has tried to argue is met by soccer tournaments played on non-native, mowed grass fields.

Amendments to the CMP are governed by Subchapter 7 of the CMP, and are not intended to be used as an alternative to procedures set forth in the CMP, "which are designed to provide relief of particular hardships and to satisfy compelling public needs." N.J.A.C. 7:50-7.1. An amendment to the CMP is also "not intended to confer special privileges or rights as a means of solving the economic, competitive or other interests of particular individuals or as a means of providing a specific benefit to a particular use. . ." Id.

PDC Conservation Restrictions

In accord with N.J.A.C. 7:50-4.2(b)(5)(xi), an application for an approval of a major development must include "[l]egal instruments evidencing the applicant's right, title or interest in any [PDCs] and any existing or proposed deed restrictions or easements relating to the subject parcel." Both appeals involve properties that were assigned PDC certificates that TTF had previously severed, sold and retired. In return, TTF, as owner of the land from which the credit had been obtained, agreed to "deed restrict[] the use of [its] land in perpetuity to those uses set forth in N.J.A.C. 7:50-5.47(b) by recorded deed restriction which is in favor of a public agency. . . and

expressly enforceable by the Commission." N.J.A.C. 7:50-5.44(a). In Agricultural Production Areas, such permitted uses include "low intensity recreational uses," subject to the same restrictions set forth in N.J.A.C. 7:50-5.24(a)(6). N.J.A.C. 7:50-5.47(b)(3)(i).

SADC Farmland Preservation Easements

The Legislative findings of the ARDA include:

> It is necessary to authorize the establishment of State and county organizations to coordinate the development of farmland preservation programs within identified areas where agriculture will be presumed the first priority use of the land and where certain financial, administrative and regulatory benefits will be made available to those landowners who choose to participate, all as hereinafter provided. N.J.S.A. 4:1C-12(c)(emphasis added)

See also ARDA, N.J.S.A. 4:1C-13.h (defining "farmland preservation program" to include any voluntary program which has the "maintenance and support of increased agricultural production as the first prior use of that land"); GSPT, N.J.S.A. 13:8C-3 (defining "farmland preservation" as the "permanent preservation of farmland to support agricultural or horticultural production as the first priority use of that land."). From the statutory emphasis on promoting agricultural production as a first priority, the SADC developed and published, in the form of a regulation, the State Farmland Preservation Program Deed of Easement ("SADC deed of easement" or "SADC deed restriction"), N.J.A.C. 2:76-6.15(a). Such deed

restrictions are to be liberally construed to effect the purpose and intent of all "bond acts or legislation enacted for the purpose of providing funding for farmland preservation purposes, the [ARDA] and the [GSPT]." N.J.A.C. 2:76-6.15(c).

Pursuant to the regulations, no portion of the premises subject to the deed restriction shall be "dedicated, in whole or in part, for a purpose other than maintaining and supporting agricultural or horticultural use and production." Ibid. at 6.15(d)(1). And, "any use, activity or treatment of the land that is prohibited by the Deed of Easement, [such as golf courses and athletic fields specified in Paragraph 9], is prohibited at all times, regardless of duration or frequency." Ibid. at 6.15(e)(3). In accord with a Memorandum of Agreement between the SADC and the Pinelands Commission, dated, October 9, 2001, the Commission is authorized to enforce SADC deeds of easement. (Aa431-434)[5] It appears that the Pinelands Commission declined to enforce either the PDC or SADC deed restrictions in this case.

[5] The Commission's obligation to enforce deed of easement restrictions arises from the fact that the development rights to the parcels at issue were purchased by the public under a special program that promoted the purchase of PDCs within the Pinelands by the SADC. As a result, the Pinelands Commission has concurrent power to enforce the restrictions along with SADC; a responsibility that is reflected in the language of the deed itself. E.g. (Aa353)

LEGAL ARGUMENT

I. THE EXECUTIVE DIRECTOR'S DECISIONS TO TERMINATE REVIEW OF TTF'S DEVELOPMENT APPLICATIONS IN HAMMONTON AND WATERFORD ARE BOTH SUBJECT TO DE NOVO REVIEW.

Review of an administrative agency action is often considered limited, because a court will not reverse the determination of the agency unless it concludes that the decision was "arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies" expressed or implied in the act governing the agency. Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963), quoted in, In re Freshwater Wetlands General Permit Number 16, 379 N.J. Super. 331, 341 (App. Div. 2005). Notwithstanding this deferential standard of review, a court will intervene when the agency action is clearly inconsistent with the agency's statute, mission or other state policy. In re Authorization to Conduct a Referendum on Withdrawal of N. Haledon Sch. Dist., 181 N.J. 161, 176 (2004); Parascandolo v. Dept. of Labor, 435 N.J. 617, 632 (App. Div. 2014). And, when the agency's decision is plainly wrong, "it is entitled to no such deference and must be reversed in the interests of justice." Frazier v. Bd. of Review, 439 N.J. Super. 130, 134 (App. Div. 2015)(citation omitted); see also Tlumac v. High Bridge Stone, 187 N.J. 567, 573 (2006)(no deference when

findings of fact are "wide off the mark as to be manifestly mistaken").

In addition, an appellate court is not bound by an agency's interpretation of a statute or its determination of a strictly legal issue. New Jersey DEP v. Exxon Mobile Corp., 420 N.J. Super. 395, 404 (App. Div. 2011); Pinelands Preservation Alliance v. State DEP, 436 N.J. Super. 510, 524-25 (App. Div. 2014). This is especially the case when "that interpretation is inaccurate or contrary to legislative objectives." G.S. Dep't of Human Servs., Div. of Youth and Family Servs., 157 N.J. 161 (1999). Like all matters of law, the court must apply a *de novo* standard of review to an agency's interpretation of a statute, its regulations, or case law. Russo v. Bd. of Trustees, Police, 206 N.J. 14, 27 (2011); Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002); Pinelands Preservation Alliance v. State DEP, supra, 436 N.J. Super. at 525. Applying a *de novo* review, a court may prevent an agency from using its authority to interpret its own regulations as a means of amending those regulations or adopting new ones. Venuti v. Cape May County Construction Bd. of Appeals, 231 N.J. Super. 546, 554 (App. Div. 1989). See also State, NJDEP v. Stavola, 103 N.J. 425, 434-439 (1986)(finding that DEP needed to do rulemaking and not engage in ad hoc determinations that cabanas came within the definition of "facility" under CAFRA).

Here, the Commission abdicated its statutory mandate to ensure that all development in the Pinelands Area meets the minimum standards of the CMP and to enforce the terms of PDC and SADC deed restrictions existing on land within the Agricultural Production Area of the Pinelands. Specifically, the Commission violated its own statute and regulations by permitting its Executive Director to (i) terminate review of a local approval despite the fact that such approval raised "substantial issues" with respect to the conformance of the proposed activities with the minimum standards of CMP; (ii) make a final determination of consistency by declining further review by the Commission itself, including a public hearing and decision on the application; (iii) use a "settlement" process that does not exist in the CMP to waive compliance with the CMP; (iv) finalize a settlement agreement that was not discussed, disclosed or approved by the Commission at an open Board meeting; and (v) make an invalid final determination of consistency, after the Legislature acted in January 2016, by failing to amend the CMP through rulemaking as required by both state and federal law. Furthermore, because the Commission has taken no direct action to approve the proposed commercial soccer activities and has made no findings of fact or conclusions of law regarding this matter, no deference is due. In any event, all the above issues

with respect to the Commission's action or inaction raise strictly legal questions and are thus subject to *de novo* review.

II. THE PINELANDS COMMISSION'S APPROVAL OF TUCKAHOE TURF FARM'S APPLICATION TO CONDUCT INTENSIVE SOCCER TOURNAMENTS ON ITS DEED RESTRICTED PROPERTY WITHIN AN AGRICULTURAL PRODUCTION AREA LOCATED IN TOWN OF HAMMONTON IS INVALID.

On December 17, 2014, the Commission issued an Inconsistent Certificate of Filing ("COF") with regard to TTF's soccer activities occurring on certain Hammonton properties. (Aa105-110) Following the issuance of the COF, HPB approved TTF's development application in Resolution No. 10-14, dated February 4,, 1015. (Aa114-128) The local approval noted that the approval was specifically limited to soccer games and practices (Aa119) and had to occur on lands "currently actively used for turf production." (Aa124) The HPB also imposed other conditions, including but not limited to restricting the use to 8 events a year or the hourly equivalent not to exceed 192 hours, an event day of no longer than 12 hours, and to a maximum of 35 fields and 15% of the total acreage. (Id.)

On March 27, 2015, the Commission issued a "Call-Up" letter with respect to the HPB approval specifically delineating the issues to be reviewed at the public hearing, including whether the establishment of a commercial soccer use is a permitted use under the CMP and the PDC deed restrictions. (Aa176-178) On May 6, 2015, the HPB amended its initial approval to add a provision

that required TTF to submit certain information to the Hammonton Zoning Officer for review and approval "**annually, at least sixty (60) days prior to the commencement of soccer activities** in any calendar year"; which, in turn, would be reviewed by the PC for compliance with the CMP "prior to the Zoning Office issuing the permit." (Aa249-250) This additional requirement was set forth in a Stipulation of Settlement between TTF and the Commission, executed by the PC's Executive Director on May 11, 2015. (Aa227) On May 26, 2015, the Executive Director terminated the Commission's review of TTF's application, and issued a Consistency Determination, with no findings of fact or conclusions of law. (Aa296-297) By this means the Commission's Executive Director purported to approve the TTF soccer activities in violation of procedural and substantive standards of the Pinelands Protection Act and CMP.

A. THE PINELANDS COMMISSION HAS FAILED TO SATISFY ITS DUTY TO ENSURE THAT ALL DEVELOPMENT IN THE PINELANDS IS CONSISTENT WITH THE COMPREHENSIVE MANAGEMENT PLAN.

Following the process and substantive standards of the CMP, the Executive Director correctly determined that the HPB's approval of the TTF soccer activities was inconsistent with the CMP and the deed restrictions on the land. As required by the CMP, she set the matter for hearing and final decision by the full Commission. She then reversed herself and approved these same activities through the Stipulation of Settlement, without

explanation or justification. The amendment to the HPB approval did not cure the inconsistencies previously noted by the PC's staff, and the application still raised the same "substantial" issues with respect to conformance with the CMP. The Commission therefore had a statutory duty to hold a public hearing and make its own determination of compliance with the CMP on the record.

1. **HPB's Approval of TTF's Application Raised "Substantial Issues" With Respect to Conformance With The CMP.**

Pursuant to the CMP, "Recreational facility, low intensive" means:

> A facility or area which complies with the standards in N.J.A.C. 7:50-5, Part III, utilizes and depends on the natural environment of the Pineland and requires no significant modifications of that environment other than to provide access, and which has an insignificant impact on surrounding uses or on the environmental integrity of the area. It permits such low intensity uses as hiking, hunting, trapping, fishing, canoeing, nature study, orienteering, horseback riding and bicycling.

N.J.A.C. 7:50-2.11. This definition sets forth substantive, content-based requirements that a recreational facility or area must satisfy in order to be considered low-intensity, and does not set forth or rely upon any "time, manner or extent of acreage" standards; certain additional limits on low-intensity recreation in each management area are specified elsewhere in Part III of the CMP. See, e.g., N.J.A.C. 7:50-5.24(a)(6)(Agricultural Production Area). Throughout this process, starting as early as 2013, the Commission staff, and in

particular its Executive Director, took the position that the "establishment of a private commercial soccer use" is not a permitted use in an Agricultural Production Area under the CMP because it is not low intensive recreation as defined by the CMP. (Aa213) This position was set forth in correspondence with individual legislators, county agricultural boards, a national soccer tournament federation and counsel for TTF as well as the December 17, 2014 and April 24, 2015 COFs issued by the Commission, and its Call-Up Letter, dated March 27, 2015. (Aa176-178) See also Statement of Facts, supra. This conclusion is unambiguously correct, because organized soccer events and tournaments played on non-native, mowed grass fields clearly do not "utilize[] and depend[] on the natural environment of the Pinelands," require[] no "significant modifications of that environment," and, because of the scale of the operation proposed herein, do not have "an insignificant impact on surrounding uses or on the environmental integrity of the area." N.J.A.C. 7:50-2.11.

The HPB's May 2015 amendment to its local approval did nothing to change the situation or provide any basis to reverse the conclusion that the activities violated, much less raised a "substantial issue" regarding compliance with, the CMP. The record indicates that the only difference between the HPB's February approval, which the Executive Director deemed

inconsistent with the CMP, and its May approval, which she purported to sanction through the Stipulation of Settlement, was the Commission's retention of authority to review TTF's proposed schedule of soccer events, tournaments and activities before the Hammonton Zoning Officer issued any permit to TTF. There was no change in the substantive nature of the recreational use proposed or the limitations on the frequency and extent of scheduled tournaments. Accordingly, the matter was ripe for further Commission review, because there were still the same "substantial[6] issues with respect to the conformance of the proposed development with the minimum standards of the Plan." N.J.A.C. 7:50-4.37(a).

The Commission's regulations are clear: when there is a material, real issue of whether a local approval is consistent with the CMP, as was the case herein, the Commission must hold a public hearing to review those issues, either by itself or with the assistance of an Administrative Law Judge, and must make the final decision to approve or disapprove the local planning or zoning board action. N.J.A.C. 7:50-4.37(b). Because the Commission did not follow its own regulations, and sought to use a settlement agreement to avoid or amend those regulations, the

[6] In accord with the Oxford Living Dictionary and Thesaurus, the term "substantial" means: of considerable importance, size or worth; or real and tangible rather than imaginary. Synonyms are "considerable," "real," "meaningful," "material" and "significant." https://en.oxforddictionaries.com

Executive Director's decision to terminate Commission review is invalid. See e.g., In re Freshwater Wetlands General Permit Number 16, supra, 379 N.J. Super. at 342 (where DEP Commission issued a permit without a single finding of fact); In re Waterfront Development Permit, 244 N.J. Super. 426, 434 (App. Div. 1990) (DEP violated its own regulations when granting a waterfront development permit while the application was still pending before the Coastal Resources Division).

2. The Pinelands Commission Failed to Hold a Hearing and Render a Decision Based on Conclusions of Law and Findings of Fact.

It is fundamental to the legislative scheme set forth in the Pinelands Act that no development application occurring in the Pinelands can be approved unless "such approval or grant" conforms to the CMP or the Commission decides to grant a waiver of strict compliance with the CMP. N.J.S.A. 13:18A-10(c). Neither the Pinelands Protection Act nor the CMP regulations authorize the Commission to decline exercising its obligation to determine a proposed project's compliance with the CMP, as it appears to have done in this case. Only the PC is chartered and equipped to determine whether a given recreational use complies with the permitted uses in the CMP, even if it shares that responsibility, in the first instance, with a local planning board in a certified municipality. The CMP explicitly states:

> The Commission bears the ultimate responsibility for implementing and enforcing the provisions of the Pinelands Protection Act and this Plan. In addition, it constitutes the planning entity provided for in the Federal Act and is responsible for achieving the purposes and provisions of the Federal Act. The Commission shall exercise the powers necessary to implement the objectives of the Federal Act, the Pinelands Protection Act and this Plan.
> N.J.A.C. 7:50-1.11.

While a certified municipality must respect the CMP and refrain from approving developments that violate its strictures (including those incorporated in local land use ordinances), only the PC is charged with making the final decision as to whether a proposed use complies with the CMP. Indeed, the Pinelands Act authorizes the PC to review all applications for development in the Pinelands and mandates that the Commission, after holding its own public hearing, affirmatively approve the application, reject it, or approve it with conditions. In accord with N.J.S.A. 12:18A-15,

> Subsequent to the adoption of the comprehensive management plan, the commission is hereby authorized to commence a review, within 15 days after any final municipal or county approval thereof, of any application for development in the pinelands area. Upon determining to exercise such [review] authority, . . . [t]he commission shall, after public hearing thereon, approve, reject, or approve with conditions any such application . . . Such approval, rejection or conditional approval shall be binding upon the person who submitted such application, shall supersede any municipal or county approval of any such development, and shall be subject only to judicial review as provided in section 19 of this act.
> Id.

By including the activities encompassed here as "development" subject to its review, and providing for full Commission review of any matter that raises "substantial issues" of compliance with the CMP's substantive standards, the Commission has determined to exercise its review authority in this matter. The Commission cannot avoid or circumvent its obligation to hold a public hearing and make a final decision by permitting the Executive Director to exercise its responsibilities. Doing so not only violates the express terms of its statute and regulations, but would undermine the federal and state Pinelands Acts' intent to require Commission review of all development applications within the Pinelands to ensure consistent implementation of the CMP. In the Matter of the Petition of South Jersey Gas Company, supra, ___ N.J. Super. ___ at *22 (The Commission retains "ultimate responsibility" under the CMP to review the proposed project and "render a final decision on CMP compliance"). (Aa496)

The Commission is carefully constituted as an independent executive agency whose decision-making board consists of individuals nominated by the governor, individuals appointed by the seven counties in the Pinelands, and a representative of the United States Secretary of the Interior, in part to prevent any one governor or other center of power from determining its decisions. The powers of the Executive Director are limited,

and the Commission can act only upon the affirmative vote of eight members. N.J.S.A. 13:18A-4 and -5.

The centrality of the Commission and the importance of N.J.S.A. 13:18A-15 were thoroughly addressed by the court in Application of John Madin, v. N.J. Pinelands Com'n, supra, 201 N.J. Super. at 128-137. In Application of John Madin, concerning a development application within an uncertified municipality (in which, the CMP, at the time, precluded local approval), the court held that public hearings were always required when the Commission considers and makes decisions on applications, such as those submitted by TTF. Specifically, the Appellate Division held that:

> [T]he Pinelands Protection Act itself clearly evinces a legislative intent that hearings be conducted when the Commission reviews a development application. Moreover, even if we were not to so construe the Act, the quasi-judicial functions of the Commission with respect to land use regulation in the Pinelands area within the specific statutory framework . . . mandates that hearings be conducted.
> Id., supra, 201 N.J. Super. at 134-135.

When assessing TTF's application for establishment of commercial soccer activities on deed restricted agricultural land, the Commission was acting in a quasi-judicial capacity, not a ministerial one. As the Madin court further explained:

> [W]hen the Commission reviews or is required to review a development application, or even when its staff does a preliminary investigation, it is ultimately the Commission which must determine whether the proposed development complies with the minimum standards of the

> CMP. In making this determination it must, upon finding the application complete, make findings of fact and conclusions of law . . . The Commission's functions in considering development applications are thus generally akin to land use regulation and, specifically, to the exercise of the variance power. Such functions are quasi-judicial in nature.
> Id., supra, 201 N.J. Super. at 134.

Because the soccer activities fall within the CMP's definition of development requiring review, the CMP and principles of due process required the PC, acting in a quasi-judicial capacity, to conduct a public hearing, permit public participation as encouraged by the Federal and state Pinelands Acts, and make findings of fact necessary for appellate review. See e.g. Noble Oil Co., Inc. v. DEP, 123 N.J. 474, 476-77 (1991))(noting that administrative agencies must "articulate the standards and principles that govern their discretionary decisions in as much detail as possible); I/M/O Issuance of a Permit by Dept. of Environmental Protection to Ciba-Geigy Corp. v. NJDEP, 120 N.J. 164, 173 (1990)(when agency's quasi-judicial decision is not accompanied by necessary findings of fact, the usual remedy is remand). The Commission did none of the above, and in fact failed to memorialize its own decision on whether to approve, approve with conditions, reject the proposed commercial soccer activity, or issue a waiver of strict compliance on the record so that its final decision could be judicially reviewed. See N.J.S.A. 13:18A-10(c) and 18A-15; see also PC Bylaws, I§2(b)

(PC's function to take action on applications) and II§5(g)(Executive Director's duty to review all applications and submit recommendations thereon to the PC)(Aa507;509).

In short, there is no legal authority or policy justification permitting the Commission to evade its obligation to hold a public hearing and make a final decision supported by findings of fact and conclusions of law simply because its Executive Director agreed, as part of a Stipulation of Settlement, not to present this matter to the Commission for approval. (Aa228) As a result, the Commission's No-Call-Up Letter violates the law.

B. THE PINELANDS COMMISSION'S DECISION VIOLATES THE PINELAND DEVELOPMENT CREDIT DEED RESTRICTIONS AND SADC DEEDS OF EASMENT EXISING ON THE PROPERTIES.

The No Call-Up Letter also violates the language and intent of the PDC and SADC deed restrictions existing on the Hammonton properties, dated May 1, 1995 ("PDC"), June 15, 20014 (SADC), and May 11, 1999 (PDC). (Aa344-362)

Interpretation of a land deed is a question of law, Belmont Condo. Assoc'n v. Geibel, 432 N.J. Super. 52, 86 (App. Div.), cert. denied 216 N.J. 366 (2013); and the court exercises *de novo* review of such questions. High Point at Lakewood Condo. Assoc'n, Inc. v. the Twp. of Lakewood, 442 N.J. Super. 123, 133 (App. Div. 2015)(citing Manalapan Realty, L.P. v. Twp. of Manalapan, 140 N.J. 366 (1995). The prime consideration in

determining the meaning of a deed is the intention of the parties. Normanoch Ass'n v. Baldasanno, 40 N.J. 113, 125 (1963), as revealed by the language used in its entirety, Borroneo v. DiFlorio, 409 N.J.Super. 124, 146 (App. Div. 2009), and in light of surrounding circumstances. Steward Title Guarantee Co. Greenlands Realty LLC, 58 F.Supp.2d 360, 366 (D.N.J. 1999), aff'd 281 F.3d 224 (3d Cir. 2000). Only if the meaning of the language employed is not "clear on the face of the deed," may the court consider extrinsic evidence to resolve any ambiguity. Boylan v. Borough of Point Plesant Beach, 410 N.J. Super. 564, 569 (App. Div. 2009). Applying these rules of construction to the deeds at issue, it is evident that the operation of commercial soccer tournaments on these restricted parcels is strictly prohibited.

1. PDC Deed Restrictions Permit Only Low Intensity Recreational Uses.

Pursuant to N.J.S.A. 13:18A-35, a PDC certificate shall be issued only to an owner "who is legally empowered to restrict the use of the property in conformance with the [CMP]." In this way, provisions of the CMP in effect at the time a PDC deed restriction is signed must govern its interpretation. In accord with N.J.A.C. 7:50-5.44(a), the relevant PDC Deed Restriction instruments read, in part:

> 1. The Land, which is located in an Agricultural Production Area, may only be used in perpetuity for the following uses:
>
> Agriculture; farm related housing in accord with N.J.A.C. 7:50-5.24(a)(2); forestry; low intensity recreational uses in which the use of motorized vehicles is not permitted except for necessary transportation, access to water bodies is limited to no more than 15 feet of frontage per 1000 feet of frontage on the water body, clearing of vegetation does not exceed five percent of the parcel, and no more than one percent of the parcel will be covered with impermeable surfaces; agricultural sales establishments, . . .; agricultural products processing facilities . . .
> (E.g., Aa345)(emphasis added)

This language reflects the "Minimum standards governing the distribution and intensity of development and land use in Agricultural Production Areas" set forth in the CMP at N.J.A.C. 7:50-5.24, and employs the term "low intensity recreational uses" in the same way as that regulation. As a result, it is clear from the language of the deed, in light of the relevant regulatory framework, that the parties intended to incorporate the CMP's definition of "low intensity recreational uses" into the deed restriction. N.J.A.C. 7:50-2.11. Such interpretation accords with N.J.A.C. 7:50-5.44(a), which limits land uses on PDC restricted property to those set forth in N.J.A.C. 7:50-5.47(b).

This interpretation is also consistent with the position taken by the Pinelands Commission prior to its May 26, 2015 consistency determination. In each of the two COFs issued in

this matter, the Commission noted that the "proposed private commercial soccer use is inconsistent with the uses of the parcel permitted by the PDC deed restriction previously imposed on the parcel." (Aa110)(12/17/14); (Aa213)(4/24/15). There are no findings of law or fact in the record justifying, let alone explaining, the Commission's complete reversal on this issue.

2. SADC Deed Restrictions Prohibit Athletic Fields.

The June 15, 2004 Deed of Easement between Betts and Betts, LLC (d/b/a TTF) and the SADC provides, in relevant part:

> The Grantor. . . grants and conveys to the Grantee a development easement, **all the Pinelands Development Credit(s)** and nonagricultural development rights on the Premises . . .
>
> **WHEREAS, the Pinelands Commission has certain rights and obligations in this Deed of Easement pursuant to N.J.S.A. 13:18A-1 and N.J.A.C. 7:50.**
>
> *** * ***
>
> 1. Any development of the Premises for nonagricultural purposes is expressly prohibited.
>
> *** * ***
>
> 9. Grantor may use the Premises to derive income from certain recreational activities such as hunting, fishing, cross country skiing and ecological tours, only if such activities do not interfere with the actual use of the land for agricultural production and that the activities only utilize the Premises in its existing condition. Other recreational activities from which income is derived and which alter the Premises, such as golf and athletic fields are prohibited.
>
> (Aa353-355)

In a report entitled "Interpreting the Provisions of the Deed of Easement, Report No.2: Recreational Uses," dated April 23, 2010, the SADC Deed of Easement Assessment Subcommittee

stated, "what the SADC believes are the relevant considerations in determining which recreational activities may be permitted on preserved farms under the deed of easement, and existing applicable statutes and regulations." (Aa463) From the onset, the Subcommittee makes clear that ARDA's and GSPT Act's emphasis on "first priority" means that there can be "no activity on the premises that restricts or inhibits the potential to utilize the entirety of the premises for all types of agricultural production at the present time or in the future." Id. (emphasis added) See also Statutory Framework, supra at 19-20. This statutory mandate informs Paragraph 1 which is concerned not with recreational activities that "merely derive income, but those that are commercial in nature meaning that they constitute recreation-based businesses," such as the commercial enterprise proposed by TTF. (Aa465) Similarly, the explicit prohibition of athletic fields in Paragraph 9 demonstrates SADC's intent that preserved farmland not be used for "sporting events and other organize recreational activities more suited to public parks and playgrounds," an important factor that weighs against TTF's proposed use (Aa466). The significant scale of TTF's application, its steady use throughout the year of its fields for tournaments and the large number of participants also indicate that the proposed activities have nothing in common with the "very passive uses" permitted by Paragraph 9. (A465-

466) Accordingly, the establishment of commercial soccer events on parcels restricted by SADC cannot be defended, even when the current use of the farm is sod production.[7]

The Pineland Commission is obligated to enforce these SADC restrictions on lands within the Pinelands.[8] Its failure to do so here violates the law.

C. THE PROCEDURE EMPLOYED BY THE PINELANDS COMMISSION VIOLATES ITS OWN REGULATIONS AND THE PRINCIPLES SET FORTH IN DRAGON AND WHISPERING WOODS.

In a Stipulation of Settlement, entered into between the Commission, TTF and the Mid-Atlantic Soccer Showcase League, the parties expressed their intent to "amicably resolve all issues pertaining to the Commission staff's review of the [HPB]'s February 5, 2015 Decision and Resolution without the need for an adjudicatory hearing concerning that approval." (Aa226) They therefore agreed that "within fifteen (15) days of receipt of an

[7] It should be noted that the Applicant has characterized the proposed activities as On-Farm Direct Marketing activities permitted under the Right to Farm Act. (Aa52,55). Indeed, at the TTF's behest, Atlantic County and Camden County Agricultural Development Boards passed identical resolutions, dated February 18, 2014 and May 13, 2014, respectively, urging the SADC "to consider the unique nature of a turf grass/sod farm and the limited opportunities that are available to directly market this specialized product." (Aa45;48) Nonetheless, the SADC has not modified or amended its Agricultural Management Practice for On-Farm Direct Marketing Facilities, Activities and Events, which specifically excludes athletic fields from permitted farm-based recreational activities. N.J.A.C. 2:76-2A.13(b).

[8] See Memorandum of Agreement between the SADC and PC, dated October 9, 2001 (Aa449-452) and Deed of Easement, dated June 15, 2004. (Aa353)

amended Decision and Resolution . . . incorporating the conditions set forth in Paragraph 3," the "Commission staff [would] issue a letter of 'No Further Review'. . ." (Aa228) Paragraph 3 simply required TTF to submit to the Hammonton Zoning Officer (1) a copy of the schedule of soccer events to be conducted at TTF; (ii) a copy of the practice schedule for the soccer practices to be conducted at TTF; and (iii) a copy of the schedule of any other soccer activities, such as "camps, games, try-outs, scrimmages, etc.," to be conducted at TTF, which, in turn, would be reviewed by the PC for compliance with the CMP "prior to the Zoning Office issuing the permit." (Aa227) This condition sets forth a procedural requirement that did not impact the central substantive issue raised by the issue of whether the proposed activity constituted a permitted use under the CMP.

As noted in Point IA2, supra, the Commission bears the ultimate responsibility for enforcing the provisions of the Pinelands Protection Act and the CMP, N.J.A.C. 7:50-1.11; and ensuring that no development application in the Pinelands is approved unless "such approval or grant" conforms to the CMP or a waiver of strict compliance is granted. N.J.S.A. 13:18A-10. To achieve this statutory mandate, once the Commission decides to review a development application (and, in particular, a private development application that raises a "substantial issue" of

compliance with the CMP), the Pinelands Protection Act evinces a legislative intent that hearings be held (N.J.S.A. 13:18A-15), and that the Commission will vote on the application. See Application of John Madin v. Pinelands Comm'n, supra, 201 N.J. Super. at 134; N.J.A.C. 7:50-4.37(a)-(c):.

In this case, however, a public hearing did not occur. Pursuant to the Stipulation of Settlement, the Executive Director declined to present this matter to the Commission for a hearing despite the fact that the record indicates that the Commission neither adopted a resolution accepting the final settlement agreement (in either a closed or open session) nor noticed the subject of a settlement agreement for public comment.

In Dragon v. NJDEP, 405 N.J.Super. 478 (App. Div.), certif. denied, 199 N.J. 517 (2009), Judge Parrillo made clear that an administrative agency, such as the PC, cannot use the settlement process to avoid substantive requirements to allow development otherwise prohibited unless authorized to do so by its governing statute or regulations. In Dragon, the court specifically held that the Coastal Area Review Act ("CAFRA") did not grant DEP the authority, either express or implied, to use the settlement process "to circumvent CAFRA's substantive permitting requirements and to allow regulated development in a coastal

region governed exclusively by CAFRA." 405 N.J.Super. at 492. Pursuant to the Pinelands Protection Act,

> [T]he commission is . . . authorized to waive strict compliance with [the CMP] or with any element or standard contained therein, upon finding that such waiver is necessary to alleviate extraordinary hardship or to satisfy a compelling public need, is consistent with the purposes and provisions of this act and the Federal Act, and would not result in substantial impairment of the resources of the pinelands area.
> N.J.S.A. 13:18A-10(c).

Part V of the CMP establishes procedures and standards pursuant to which the Commission may waive strict compliance with the Plan, N.J.A.C. 7:50-4.61 et seq., and the use of settlement agreements is not one of such procedures. In this way, the Executive Director's decision to terminate review of TTF's application in the face of substantial issues of conformity with the CMP not only violated CMP procedural rules, but also unlawfully circumvented application of its substantive requirements. Cf. Warner Co. v. Sutton, 274 N.J. Super. 464 (App. Div. 1994)(vacating consent order where trial judge approved the settlement of land use litigation without the municipality adopting amendments to the zoning ordinance implementing the settlement terms).

Furthermore, the record provides no evidence that the Commission actually reviewed, much less adopted a resolution to approve, the final settlement agreement. Although the April 10,

2015 minutes of the Commission indicate a closed-session resolution authorizing the Executive Director "to continue to negotiate and settle the [TTF] matter consistent with the terms discussed in closed session" (Aa207), no such resolution appears to have been formalized or placed in the record. Nor is there any evidence at all that the Commission ever saw or approved the document actually signed by the Executive Director on May 11, 2015. See May PC Minutes (Aa214-223); June PC Minutes (Aa231-238);see also (Aa199)(Letter from TTF Counsel to Executive Director urging her not to "present the Agreement to the Commission").

Similarly, and equally flawed, is the Commission's failure to give the public any opportunity to be heard on the settlement agreement. The terms of the settlement were not "subject to public presentation, a public hearing thereon and a public vote," as required by the court in Whispering Woods at Bamm Hollow, Inc. v. Twp. of Middletown Planning Board, 220 N.J. Super. 161 (Law. Div. 1987) ("Whispering Woods"). William M. Cox, Zoning and Land Use Administration, §33-7 (2009). The procedures employed in Whispering Woods, involving the settlement of a dispute between a municipal board and a land use applicant while the matter was pending in the Law Division, have

since been approved in several other land use cases.[9] And since the Commission's role in considering development applications is "generally akin to land use regulation and, specifically, to the exercise of the variance power" Application of John Madin v. Pinelands Comm'n, supra, 201 N.J. Super. at 134, the requirements of Whispering Woods pertain to TTF's application before the PC as well.

Silence, closed-session discussions, lack of presentation of the settlement agreement at a Commission meeting or on the Commission's website, and no opportunity to comment are the exact opposition of due notice, public hearings, presentation of extensive evidence and testimony that is open to public comment, public vote and written resolution that since 1987 are the hallmarks of a valid Whispering Woods hearing prior to a public vote on a settlement agreement. The Executive Director's use of a settlement agreement to circumvent substantive requirements of the CMP and its failure to hold a hearing on that agreement are

[9] See, e.g., Friends of Peapack-Gladstone v. Borough of Peapack-Gladstone Land Use Bd., 407 N.J. Super. 404, 424, (App. Div. 2009) (noting that "the process utilized by the Board here, as in Whispering Woods, fulfilled" all of the statutory conditions necessary to vindicate the public interest, including notice, a public hearing, a public vote, and a written resolution); Gandolfi v. Town of Hammontown, 367 N.J. Super. 527 (App. Div. 2004)(upholding a land use settlement after a hearing that comported with Whispering Woods); Warner Co. v. Sutton, supra. 274 N.J. Super. at 464 (remanding a land use settlement where record did not substantiate that the terms of a proposed settlement were ever discussed at a public meeting prior to the entry of a consent order containing such terms).

yet another reason to deem the Commission's No-Call-Up Letter invalid.

D. THE STATUTORY PROVISION SUPPLEMENTING THE PINELANDS PROTECTION ACT IS NOT RETROACTIVE.

Eight months after the Commission declined review of HPB's May 6, 2015 land use approval, and issued the No Call-Up Letter at issue here, the New Jersey Legislature approved an act on January 19, 2016, "supplementing" the Pinelands Protection Act. The new act declared that certain field sports, "conducted or occurring in an agricultural production area" within the Pinelands, were now considered "low intensity recreational" uses under the CMP, without regard to the strictures of the English language or the definition set out in the CMP. (Aa474)

The act, codified as N.J.S.A. 13:18A-8.1, dictates a specific substantive requirement to be included in the CMP, and follows an otherwise more general provision that governs the Commission's preparation and adoption of the CMP and the CMP's content. N.J.S.A. 13:18A-8. By micromanaging the definition of low-intensive recreational use only in the agricultural production area of the Pinelands, the act intends to alter the current CMP regulations and effect a significant change in PC regulatory policy. The one-line act does not address any statute or regulation governing SADC deed restrictions, and does not attempt to change the meaning and requirements of existing

PDC deed restrictions. Chapter 285 clearly states that "[t]his act shall take effect immediately;" (Aa474) and thus has no retroactive impact on the validity of the Commission's action taken eight months earlier.

The extent to which retrospective effect may be given to a statute is governed by principles of law that have been developed by the courts, primarily in the context of constitutional litigation. Daughters of Miriam Center for the Aged v. Matthews, 590 F.2d 1250, 1260 (3d Cir. 1978). It is well established that "statutes generally should be given prospective application." In re D.C., 146 N.J. 31, 50 (1996). Settled rules of statutory construction favor prospective rather than retroactive application of new legislation. See Cruz v. Cent. Jersey Landscaping, Inc., 195 N.J. 33, 45 (2008); Nobrega v. Edison Glen Assocs., 167 N.J. 520, 536 (2001); *see* also Gibbons v. Gibbons, 86 N.J. 515, 522 (1981) ("It is a fundamental principle of jurisprudence that retroactive application of new laws involves a high risk of being unfair.") The presumption in favor of prospective application especially pertains to statutes that change settled law and relate to substantive rights, such as the public's conservation rights at issue in this matter. Campo Jersey, Inc. v. Dir., Div. of Taxation, 23 N.J. Tax 370, 381 (App. Div.) cert. denied, 190 N.J. 395 (2007); see also M. Sexton v. Boyz Farms, 780 F.Supp. 2d 361, 363 (D.N.J.

2011)(citing State, DEP v. Ventron Corp., 94 N.J. 473(1983)(same). It follows that prospective application remains the appropriate default rule, and neither a statute nor an administrative rule will be construed to have a retroactive effect unless its language requires such result. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208(1988); Rock Work, Inc. v. Pulaski Constr. Co., Inc. 396 N.J. Super. 344, 353 (App. Div. 2007), cert. denied 194 N.J. 272 (2008)(statute should not have retrospective operation unless its language is "so clear, strong and imperative that no other meaning can be annexed" to its terms).

There is a two-part test for determining "'whether a statute [should] be applied retroactively.'" In re D.C., supra, 146 N.J. at 50 (quoting Phillips v. Curiale, 128 N.J. 608, 617 (1992)). The first part focuses on whether the Legislature intended to give the statute retroactive effect. The second, if the answer to the first question is affirmative, questions whether such retroactive application will result in "either an unconstitutional interference with vested rights or a manifest injustice." James v. Manufacturers Insur. Co., 216 N.J. 552, 563 (2014). The case law indicates that there are only three

circumstances that justify giving a statute retroactive effect,[10] none of which are present herein.

The first situation is when the Legislature expresses its intent that the law apply retroactively, either expressly or implicitly. Courts find "implied" retroactivity only when retrospective application is necessary to make the statute workable or to give it the most sensible interpretation. Oberhand v. Dir., Div. of Taxation, 193 N.J. 558, 571 (2008) (citing Gibbons, supra, 86 N.J. at 522) In this instance, Chapter 285 expressly states that "[t]his act shall take effect immediately" upon approval. Such language "bespeaks an intent contrary to and not supportive of retroactive application" and does not permit any other intent to be implied. Cruz, supra, 195 N.J. at 48. See also James, supra, 216 N.J. at 556 (finding that legislation by its very terms reformed commercial motor vehicle liability policies "as of date it became effective" thus amending existing policies only from that date forward); Alan Cornblatt, P.A. v. Barrow, 153 N.J. 218, 233 (1998) (finding act that is "to take effect immediately" applies only to causes of action accruing on or after the effective date, not to all complaints filed thereafter).

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[10] See Cruz, supra, 195 N.J. at 46; In re D.C., supra, 146 N.J. at 50; Twiss v. State, 124 N.J. 461, 467 (1991); Gibbons, supra, 86 N.J. at 522-23.

The second circumstance that will support giving a statute retroactive effect is when an amendment is curative. Generally curative acts are made necessary by inadvertence or error in the original enactment of a statute or in its administration and generally occur in close proximity to the original enactment. Here, Chapter 285 did not claim to cure an error that was made over 35 years ago and that only emerged in 2016; rather Chapter 285 provides a new CMP definition that requires further regulatory refinement and implementation, and does "more than clarify original legislative intent." Strategic Envtl. Partners, LLC v. NJDEP, 438 N.J. Super. 125, 141-142 (App. Div. 2014) cert. denied 221 N.J. 218 (2015)(finding that the Legacy Landfill Law enacted a whole new law and did not seek to cure inadvertent error). As is evident from the Pinelands Protection Act, the Legislature in 1979 had no intent to legislate the definition of specific uses to be included in the CMP; it rather directed the PC to develop and implement the CMP. N.J.S.A. 13:18A-8. Its decision to change course in 2016 represents a significant shift in policy that cannot be considered curative and thus does not support retroactive application. See James, supra, 216 N.J. at 564 (curative exception not applicable since the amendment did not cure a judicial misinterpretation of law or merely clarify a pre-existing statutory provision).

Finally, courts have acknowledged that, absent a clearly expressed intent by the Legislature to have a statute apply only prospectively, "such consideration as the expectations of the parties may warrant retroactive application of a statute." Gibbons, supra, 86 N.J. at 523. In this case, however, Chapter 285 stated that it would be effective on the date of approval -- - no sooner, no later. Therefore, there is no basis on which any party can justify retroactive application to an administrative matter that has already been adjudicated and decided by the agency under otherwise lawful regulations.[11] For this reason, the enactment of N.J.S.A. 13:18A-8.1 has no impact on the invalidity of the Commission's May 26, 2015 No-Call-Up Letter.

[11] Cf. M. Sexton, supra, 780 F.Supp. 2d at 363 (accidents occurring before statutory amendment must be governed by law existing at that time; expectations at time of accident control); James, supra, 216 N.J. at 556 (statute prohibiting enforcement of step-down provision in business motor vehicle liability plans did not apply to claim by employee concerning accident that occurred prior to adoption of the law; new law did not retroactively alter "otherwise lawful policy terms"); Rahway Hosp. v. Horizon BCBS of NJ, 374 N.J. Super. 101, 112 (App. Div.), cert. denied, 183 N.J. 217 (2005)(regulation regarding termination of agreements to be applied prospectively since plaintiff never agreed to be bound by a regulation that did not come into existence until after its agreement with Horizon had been terminated).

III. THE PINELANDS COMMISSION'S APPROVAL OF TUCKAHOE TURF FARM'S APPLICATION TO CONDUCT INTENSIVE SOCCEER TOURNAMENTS ON ITS DEED RESTRICTED PROPERTY WITHIN THE AN AGRICULTURAL PRODUCTION AREA LOCATED IN WATERFORD TOWNSHIP IS INVALID.

With respect to the second appeal involved in this consolidated matter, the Commission issued an Amended Inconsistent COF to TTF on April 24, 2015. This COF included TTF's properties located in Waterford Township (as well as the Town of Hammonton, and Winslow Township) and repeated the Commission's previous position that that the proposed commercial soccer activities were inconsistent with the CMP and PDC deed restrictions on the parcels. (Aa209-213) On September 21, 2015, the WPB memorialized its July approval of TTF's application by Resolution 15-12, (Aa329); and, on November 6, 2015, the Pinelands Commission issued a Call-Up Letter with respect to that preliminary and final major site plan approval, setting the matter for a public hearing and decision by the full Commission. (Aa314-318) A second Call-Up Letter was issued on January 7, 2016, because the local approval did not contain the number of soccer events and hours per year. (Aa324-327)

On February 1, 2016, the WPB amended its Resolution No. 15-14, and adopted Resolution No. 16-04. (Aa328-338) In response to the amended Resolution, the Executive Director terminated the Commission's review of TTF's application, and issued a No Call-

Up Letter on March 10, 2016, with no findings of fact or conclusions of law. (Aa340-41)

A. THE EXECUTIVE DIRECTOR'S DECISION TO TERMINATE REVIEW OF TTF'S APPLICATION VIOLATES THE CMP AND CONSTITUTES INVALID RULEMAKING.

The Executive Director's decision to terminate review ignores the fact that even if she believed that the proposed activities had become consistent with the CMP due to the act passed two months earlier, they still raised a substantial issue of consistency with the CMP as it stood and, independently, with the PDC and SADC deed restrictions. These substantial issues required the Commission itself to make a final determination on the record, after a public hearing and proper fact-finding. Since the No-Call-Up Letter contains no findings of fact or law, the Executive Director's reasoning is not apparent, and one does not know whether the January 19, 2016, legislation played any role in her decision.

Even if N.J.S.A. 13:18A-8.1 applies to the WPB approval because Commission review was pending at the time it was adopted,[12] the act is not self-executing and cannot control or determine a specific outcome. By virtue of its placement as 18A-

[12] See Citizens for Equity v. DEP, 252 N.J. Super. 62, 77 (App. Div. 1990), aff'd, 126 N.J. 391 (1991)(regulation here has exclusively future effects for it establishes new procedural requirements for future damage awards, and so can be applied to pending claims imposing a mere "secondary" retroactive impact)

8.1 within the Pinelands Protection Act and its broad content, the act assumes it must be implemented via an amended CMP, which in turn requires approval of the full Commission and the Secretary of the Interior. Furthermore, for reasons more fully explained below, the act did not and could not alter the terms of the deed restrictions. Under such circumstances, the Commission should have proceeded with its review.

1. N.J.S.A. 12:18A-8.1 Is Not Self-Executing.

On January 19, 2016, the New Jersey Legislature enacted Chapter 285 supplementing the Pinelands Protection Act. In accord with this act, which emerged after a conditional veto, certain field sports, including but not limited to soccer activities, "conducted or occurring in an agricultural production area" within the Pinelands, were declared to be "low intensity recreational" uses under the CMP. N.J.S.A. 13:18A-8.1. By placing this provision immediately following N.J.S.A. 13:18A-8, which controls the development and adoption of the CMP, the Legislature contemplated that the Commission would revise the CMP to be consistent with its new directive. In addition, the broad scope of N.J.S.A. 12:18A-8.1 (i.e., permitting all field sports to occur on any parcel in the agricultural production area) and the lack of any intensity standards, necessitate revisions to the CMP to ensure consistency with "the purposes and provisions of [the Pinelands Protection Act] and the Federal

Act." N.J.S.A. 13:18A-10. Cf. Horsemen's Benevolent and Protective Ass'n v. Atlantic City Racing Ass'n, 98 N.J. 445, 453 (finding it appropriate, if not critical, for Racing Commission to adopt regulations governing certain expenditures because in the absence of such implementing rules, the broad statutory language "remains susceptible to arbitrary application"). Under the CMP today, a recreational facility or activity deemed to be low intensity is not automatically permitted in the Agricultural Production Area; it must also meet additional requirements put in place to ensure that even those activities do not undermine the goals of the Pinelands statutes and CMP. N.J.A.C. 7:50-5.24(a)(6). In amending the CMP to deem field sports tournaments to be "low intensity," the Commission would have the obligation to consider such additional requirements while implementing the new act.

In accord with the Pinelands Act and the CMP, revisions to the CMP are subject to rulemaking. N.J.S.A. 12:18A-10(c)("the commission shall. . . after public hearing thereon, adopt rules and regulations which specify the standards for determining" waivers and consistency); N.J.A.C. 7:50-7.4 (proposed revision to CMP subject to rulemaking pursuant to Administrative Procedures Act ("APA"), N.J.S.A. 52:14B-1 et seq.). To date, the CMP has not been revised and the Commission has not indicated that it intends to do through public rulemaking procedures.

In addition, the Commission is required to submit the CMP, or any revisions thereto, "to the Secretary of the U.S. Department of Interior, as provided in the Federal Act." N.J.S.A. 12:18A-10(b); see also N.J.C.A. 7:50-7.10(a)(requiring submission of CMP amendments within five days following adoption); 16 U.S.C. §471i(g)(6) (stating that the Commission must secure approval of the Secretary prior to any modification of an approved CMP). As the Regional Director of the National Park Service wrote Ms. Wittenberg in July 2014 with respect to Senate No. 2125 and Assembly No.A.3257, then pending before the Legislature:

> From our perspective, we think that the . . . (CMP) would need to be amended in order to bring organized sporting events within the definition of low intensive recreation. Any such amendment to the CMP would require that the process for amending the CMP be followed. Should this amendment come forward as a recommendation, it would have to be reviewed and approved by the Secretary of the Interior. Because of the complexity of the issue and the potential impacts of this proposed change, a thorough analysis will be required prior to our approval.
> (Aa448)(emphasis added)

As a result of the Commission's failure to revise the CMP as presumed by Chapter 285, and secure federal approval of such amendments as required by state and federal law, N.J.S.A. 13:18A-8.1 does not control the Commission's March 10, 2016, final agency decision. The existing CMP provides the governing framework, and until it is properly amended, the Commission has

no legal basis in permitting the establishment of commercial soccer activities on preserved farmland in Waterford Township in direct violation of that CMP.

2. The Commission's Action Constitutes Invalid Rulemaking.

The flip side of the foregoing conclusion is that the Commission engaged in invalid rulemaking when, in the absence of regulations implementing the new act for field sports, it declined to review the WPB's February 1, 2016 approval, based on specified conditions. (Aa331-338) That approval contained several conditions that are not apparent on the face of N.J.S.A. 13:18A-8.1, which Appellants assert should have been formalized during the rulemaking process subject to the public notice, hearing and comment requirements of the APA. N.J.A.C. 7:50-7.4. In this way, the Commission's decision to terminate review of the WPB approval on the basis that it contained certain key conditions constitutes *de facto* rulemaking and is thus invalid.

The Commission's approval of the WPB resolution based on specified conditions not found in the CMP (primarily set forth in paragraphs 19-28 of WPB Resolution No. 15-12 (Aa336-337), as amended by Resolution No. 16-04 (Aa329)) constitutes administrative rulemaking under the APA.[13] These conditions

[13] APA, N.J.S.A. 52:14B-2(e) states:

> "Administrative rule" or "rule" when not otherwise modified means each agency statement of general applicability and continuing effect that implements or

include limitations on the nature of the field sports permitted (i.e., only soccer), the agricultural production of the farm (i.e., it is restricted to "utilize[ation] as a turf farm," Aa336, ¶22), the hours of play, the number of fields employed at any given event, the number of persons who can actively participate at the farm, the frequency and duration of tournaments, soccer practices, and other soccer activities, and a host of other conditions that seek to limit the negative impact the proposed use will have on the neighboring uses and the integrity of the Pinelands.

The standards for determining whether an agency decision, such as the Commission's consistency determination, is governed by rulemaking strictures was first articulated in Metromedia, Inc. v. Div. of Taxation, 97 N.J. 313 (1984), which concerned the distinction between rulemaking and adjudication. In Metromedia, the governing statute allowed the Director of Taxation discretionary choice to compute a corporate taxpayer's receipts attributable in New Jersey. Id. at 327. The N.J.

> interprets law or policy, or describes the organization, procedure or practice requirements of any agency. The term includes the amendment or repeal of any rule, but not (1) statements concerning the internal management or discipline of any agency; (2) intra-agency and inter-agency statements; and (3) agency decisions and findings in contested cases.

Supreme Court devised a six-part test[14] under which it found that the Director's tax determination constituted a *de facto* rule, thus rendering the agency's action in assessing the corporation invalid without prior compliance with APA. Id. at 328.

Since Metromedia issued in 1984, the Court has acknowledged that the test may appropriately be used to decide whether any kind of agency decision must be accompanied by formal rulemaking. Doe v Poritz, 142 N.J. 1, 97 (1995). Not all six factors need be present; and various factors may be balanced, even if some are present and others are not. Woodland Private Study Group v. State, 109 N.J. 62, 66 (1987). Courts have found that the six factors should not just be tabulated, but instead weighed, with some factors being more relevant in a given situation than others. Bullet Hole, Inc. v Dunbar, 335 N. J. Super. 562, 585-586 (App. Div. 2000) Indeed, the N.J. Supreme

[14] An agency's action may be classified as a "rule" if its determination (1) is intended to have wide coverage encompassing a large segment of the regulated or general public; (2) is intended to be applied generally and uniformly to all similarly situated persons; (3) is designed to operate prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination or rule or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administration regulatory policy in the nature of an interpretation of law or general policy. Id. at 331-332.

Court in Doe found the presence of the fourth factor, i.e., the similarity or lack thereof of the administrative action in question to an authorizing statute, to be the most important of the Metromedia factors in that instance. Doe v. Poritz, supra, 142 N.J. at 97-98 (finding Megan's Law Community Notification Guidelines "to a great extent merely a formalization of the classification requirements set forth in the statute and thus not subject to APA requirements); cf. Bullet Hole, Inc., supra, 335 N.J. Super. at 588 (requiring State Police to adopt appropriate hours for Brady Act NCIS checks in accord with the APA since Point operating hours "differ[ed] significantly from the hours set forth in the originating or source measure").

Applying the Metromedia factors to the Commission action at hand strongly indicates that the Pinelands Commission engaged in informal rulemaking when it declined to review the WPB's approval of TTF's application. First, there is no indication that this determination will not be applied to all owners of preserved farmland located in the Pinelands that are subject to Commission regulation. Second, there is no indication in the PC No Call-Up Letters that the conditions articulated in the WPB (and HPB) resolutions will not be "generally and uniformly" applied to all similarly situated landowners, including TTF, with respect to its Winslow Township properties (also included in TTF's January 7, 2015, application). (Aa111-113) Indeed,

given the statement made by TTF's counsel at the June WPB suggesting that the Commission would be satisfied if the WPB imposed the same conditions as the HPB imposed on TTF, (Aa299) there is some evidence that local planning boards will view such conditions as a "model" to be followed to ensure Commission acceptance. Whether the Commission designed its decision to operate prospectively (i.e., factor three) is not apparent from the record. What is certain, however, is that landowners will view these decisions as a guide if they too seek approval to conduct field sports on their property.

With respect to factor four, held by the Doe and Bullet Hole, Inc. to be of particular importance, the Commission's determination prescribes intensity standards and limitations on recreational uses that are not "clearly and obviously inferable" from N.J.S.A. 13:18A-8.1. Factor five is also present in this matter because the Commission's effective approval of TTF's application reflects a newly expressed statement of administrative position and constitutes a material deviation from a clear, past position on the subject. And finally, the No-Call-Up Letter indicates, though devoid of findings of fact and law, a decision based on general regulatory policy. See University Cottage Club of Princeton v. DEP, 191 N.J. 38 (2007) (employing Metromedia factors to determine whether DEP's denial of tax-exempt status to private club that provided public access

only 12 days per year constituted rule-making; finding taxpayer entitled to a determination based on prior standards thus denial held invalid)

Because at least five, if not all six Metromedia factors are present in this matter and weigh heavily in favor of finding the Commission's consistency determination(s) to constitute an "administrative rule," its failure to comply with the procedural requirements of the APA render its March 10, 2016 final agency decision invalid rulemaking.

B. THE PINELANDS COMMISSION'S DECISION VIOLATES THE PDC AND SADC RESTRICTIONS EXISTING ON THE PROPERTY.

It is clear from the plain language of Chapter 285, discussed supra, Point IID, that the new law did not revise the meaning of the terms employed in SADC deeds of easement. Nor did the new act purport to amend the statutes and regulations governing those deed restrictions. The legislative history of S.2125 and A.3247 (which, ultimately became Chapter 285) also indicates that the Governor and Legislature intended to leave the deed restrictions alone. Chapter 285 specifically sought to amend the meaning of "low intensity recreational use," as used in the CMP, and sought that amendment to be binding prospectively on the Pinelands Commission in its application of the CMP permitted use rules for the Agricultural Production Area. The act, in accordance with the rules of interpretation

controlling deeds (see Point IIB, supra), however, did not authorize the PC to interpret deed restrictions entered into years ago through the lens of the new legislation; to do so would be unconstitutional.

From June 2, 2014 through December, 2015, the Senate Community and Urban Affairs Committee considered Senate No. 2125; during the same time period, the Assembly was considering a similar bill, Assembly No.A.3257. According to the PC's Executive Director, both bills would permit recreational activities on a preserved farm in the Pinelands that violated the CMP and an existing deed restriction. (Aa148) Pursuant to the proposed bill,

> a landowner engaging in, or allowing any activity determined by a county agriculture development board or the [SADC} to qualify as a farm-based recreational activity pursuant to subsection a. of this sections shall not be deemed to be in violation of any deed restrictions related to allowable uses on the land imposed in accordance with any law, rule or regulation adopted pursuant thereto, or any other government action.
> (Aa429)

In this way, the Committee sought to render decades-old SADC and PDC deed restrictions null and void. Although passed by both houses, this bill was conditionally vetoed by Governor Christie, and this provision among others was eliminated. Chapter 285, instead, is far narrower in scope. The final act only sought to change the meaning of the phrase "low-intensity

recreational use" within the CMP, did not speak to PDC or SADC deed restrictions, and did not seek to deem a decision under the Right to Farm Act as to what qualifies as "farm-based recreational activity" binding on the Pinelands Commission.

As noted in Point IID, supra, Chapter 285 took effect expressly on January 19, 2016, the date the act was approved, indicating a legislative intent that the act apply only prospectively. Therefore, even if N.J.S.A. 13:18A-8.1 governs the PC's determination issued on March 10, 2016, it does not retroactively change the meaning of previously signed and recorded deed restrictions. See United States v. Roebling, III, 244 F. Supp. 736, 742 (D.N.J. 1965)(deed instrument prepared prior to enactment of statute so it is reasonable to assume that the statute was not contemplated by the parties at the time); see also M. Sexton, supra, 780 F. Supp. 2d at 363 (accidents occurring before statutory amendment must be governed by law existing at that time because expectations at time of accident control); Sarasota-Coolidge Equities II v. S. Rotondi, Inc., 339 N.J. Super 105, 116 (App. Div. 2001)(holding that 1995 UCC revision does not apply to promissory notes already in existence on effective date of revision; only to transactions occurring after that date). To find otherwise, moreover, would create constitutional problems.

First, any attempt by the Legislature to retroactively alter the meaning of a deed restriction would run afoul of N.J. Const., Art. 4, §7, ¶3 prohibiting the Legislature from

> pass[ing] any law impinging the obligation of contracts or depriving a party of any remedy for enforcing a contract which existed when the contract was made.

One may only speculate that this constitutional prohibition was a major factor behind the Governor's conditional veto. Additionally, because of the public nature of the contracts involved, altering the terms and nature of the conservation deed restrictions for which the public has already compensated TTF would violate N.J. Const., Art. 8, §3, ¶3.[15] This provision prohibits indirect gifts that result when the state or a municipality confers a private benefit on a private entity by foregoing its vested legal right to receive money or property, such as easement rights, from that entity. See Rariton Engine Co. v. Edison Twp., 184 N.J. Super. 159 (App. Div. 1982)(passage of title to real property from municipal fire district to successor volunteer fire company unconstitutional): Wilentz v. Hendrickson, 133 N.J. Eq. 447 (Ch. 1943), aff'd 135 N.J. Eq. 244 (E & A 1944)(law canceling interest due on back taxes owed by railroads unconstitutional). Retroactive application of a

[15] N.J. Const., Art. 8, §3, ¶3 states, in part: No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society association or corporation whatever.

statute to significantly narrow the nature of the public's conservation deed restriction would essentially be a "pay-back" of a substantial amount, and would therefore be unconstitutional. See In re Voorhees Estate, 123 N.J. Eq. 142 (N.J. Prerog. Ct. 1938) aff'd sub nom. Union County Trust Co. v. Martin, 121 N.J.L. 594 (N.J. Sup. Ct. 1939) aff'd N.J.L. 35 (E & A 1940 (retroactive application of statute exempting certain inheritance taxes owed to state unconstitutional). Accordingly, the Commission's failure to enforce the SADC and PDC deed restrictions on TTF's Waterford properties violated the CMP and the law and must be reversed.

CONCLUSION

For all the foregoing reasons, Appellants request that the Commission's May 26, 2015 and March 10, 2016 No-Call-Up Letters be vacated and this matter be remanded to the Pinelands Commission for further review consistent with the CMP and existing PDC and SADC deed restrictions.

Respectfully submitted,

Renée Steinhagen
NJ Appleseed PILC

Dated: November 23, 2016