

Daniel A. Greenhouse, Esq.
Attorney No. 016102005
Eastern Environmental Law Center
One Gateway Center, Suite 2600
Newark, NJ 07102
(973) 424-1166

Renée Steinhagen, Esq.
Atty No. 38691989
NEW JERSEY APPLESEED PILC
23 James Street
Newark, NJ 07102
(973) 735-0523

Attorneys for Plaintiffs

	X	
NEW JERSEY CONSERVATION	:	SUPERIOR COURT OF NEW JERSEY
FOUNDATION and SAVE BRADDOCK-PARK-	:	CHANCERY DIVISION: HUDSON
SAFE SCHOOLS,	:	Docket No. HUD-CH- -21
	:	
Plaintiffs,	:	Civil Action
	:	
-vs.-	:	
	:	COMPLAINT FOR DECLARATORY
TOWNSHIP OF NORTH BERGEN, NICHOLAS	:	AND INJUNCTIVE RELIEF
SACCO, in his official capacity as Mayor,	:	
HUDSON COUNTY, THOMAS DeGISE, in his	:	
official capacity as County Executive, and NEW	:	
JERSEY DEP, GREEN ACRES PROGRAM,	:	
	:	
Defendants.	:	
	X	

Plaintiffs, NEW JERSEY CONSERVATION FOUNDATION, and SAVE BRADDOCK PARK-SAFE SCHOOLS (collectively “Plaintiffs”), by way of Complaint against Defendants, TOWNSHIP OF NORTH BERGEN (“North Bergen” or the “Township”), NICHOLAS SACCO, in his capacity as Mayor of North Bergen Township, HUDSON COUNTY (“Hudson” or the “County”), THOMAS DeGISE, in his capacity as Hudson County Executive, and NEW JERSEY

DEPARTMENT OF ENVIRONMENTAL PROTECTION, GREEN ACRES PROGRAM
("DEP" or "Green Acres"), state as follows:

NATURE OF THE CASE

1. This case involves a twenty-year, unlawful diversion of dedicated public parkland in violation of the Garden State Preservation Trust Act, N.J.S.A. 13:8C-32(a) & (b)(1), and several Green Acres regulations, which has resulted in the continuing impairment of a significant area of James J. Braddock Park ("Braddock Park") for non-recreational purposes in violation of the Environmental Rights Act, N.J.S.A. 2A:35A-1 *et seq.*
2. Local government officials have failed to properly house North Bergen's pre-school program within or annexed to its elementary school facilities; and instead, have maintained temporary trailers, a tot lot, and a parking area in the public park without prior approval of the DEP Commissioner and State House Commission.
3. Since being notified of the violation in 2011 by DEP, North Bergen and Hudson County have engaged in bad faith delay tactics, while DEP has repeatedly deferred to the Township's deliberate indifference to satisfying its statutory mandate to remove the encumbrances from the public parkland. Specifically, DEP has actively participated in North Bergen and Hudson County's failure to provide the public with the promised benefits of the public parkland.
4. In 2018, North Bergen residents approved a \$60 million bond referendum and the allocation of \$4,958,000. from capital reserves for the explicit purpose of purchasing a former technical high school and campus (the "Hi-Tech site"), which would facilitate a system-wide reorganization that would enable the placement of all pre-school children in existing elementary schools, while removing the temporary trailers from Braddock Park.

5. Despite the undisputed existence of North Bergen and Hudson County's ongoing violation of the Green Acres laws, these defendants have perpetually and continually agreed and then refused to remove the trailers and restore the public parkland property to its former recreational use. Instead of urgently complying with DEP's orders and the Green Acres laws, North Bergen filed its second pre-application for a diversion with DEP on or around March 3, 2021, as part of a concerted effort to continually and perpetually delay compliance with the relevant laws.

6. On October 5, 2021, NJDEP issued some responsive questions to North Bergen's pre-application, indicating that the current iteration of the pre-application for a diversion is incomplete and that this administrative process will continue with no associated deadlines or timeframes. The Defendants' ongoing disregard for the relevant Green Acres statute and regulations must end, as a matter of law and as a matter of equity. An enforceable and reasonable timeline to cure this significant impairment of public parkland must be ordered by this Court, because the administrative process is being abused by the Defendants in this case and will not result in timely compliance with the law.

PARTIES AND JURISDICTION

7. Plaintiff NEW JERSEY CONSERVATION FOUNDATION ("NJCF") is a non-profit corporation organized and operating under the laws of the State of New Jersey, with offices in Far Hills, Camden, and Stockton, New Jersey. Its primary place of business is located at 170 Longview Road, Far Hills, NJ, 07931. Its mission is to protect strategic lands, promote strong land use policies, and forge partnerships through education and assistance programs to achieve conservation goals. Several of its members, including Eleanor Gruber, and employees have been involved in the administrative process over the past several years.

8. Plaintiff SAVE BRADDOCK PARK-SAFE SCHOOLS (“Save Braddock Park”) is a local, grassroots unincorporated organization whose members include North Bergen residents and taxpayers. The group has over 7 members. Its sole purpose is to advocate to preserve parkland in Braddock Park, remove the trailers from the park, and to ensure that North Bergen preschool children are housed in safe, secure and appropriate facilities. Its mailing address is 7855 Boulevard East #15i, North Bergen, NJ 07047.

9. Defendant TOWNSHIP OF NORTH BERGEN is, and has been at all times relevant, a municipal corporation formed under the laws of the State of New Jersey pursuant to N.J.S.A. 40:43-1, and is governed by the commission form of government known as the Walsh Act, N.J.S.A. 40:70-1 *et seq.* The Township is governed by five commissioners, one of whom is elected Mayor, and each of whom supervises a department of the Township. Its official address is 4233 Kennedy Blvd., North Bergen, New Jersey 07047.

10. Defendant NICHOLAS J. SACCO is, and has been at all times relevant to this Complaint, Mayor of the Township of North Bergen. He has been Mayor since 1991 and a member of the Township Commission since 1985. Defendant Sacco has also served as a New Jersey State Senator since 1993, and was North Bergen’s Director of Primary and Secondary Education until June 2017, at which time he retired from such position. He is being sued in his official capacity as Mayor.

11. Defendant HUDSON COUNTY is, and has been at all times relevant, a county corporation formed under the laws of the State of New Jersey pursuant to N.J.S.A. 40:18-1, and is governed by the County Optional Charter Law, N.J.S.A. 40:41A-1 *et seq.* The County is governed by the Board of County Commissioners, and the County Executive is the chief executive officer. Hudson County owns James J. Braddock Park located in the Township of North Bergen. Its official business address is 583 Newark Avenue, Jersey City, NJ 07306.

12. Defendant THOMAS DeGISE, is, and has been at all times relevant to this Complaint, the Chief Executive Officer of Hudson County. He has held such position since 2002, and was a former school teacher and administrator in the City of Jersey City. Mr. DeGise is being sued in his official capacity as Hudson County Executive.

13. Defendant NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, GREEN ACRES PROGRAM is, and has been at all times relevant to this Complaint, the government agency in the State of New Jersey responsible for managing the state's natural resources. NJDEP's Green Acres Program was created in 1961 to "meet New Jersey's growing recreation and conservation needs." Its governmental purpose is to "preserve and enhance New Jersey's natural environment and its historic, scenic, and recreational resources for public use and enjoyment" and is responsible for overseeing diversions of parkland. See Green Acres Mission, <https://www.nj.gov/dep/greenacres/mission.html>

14. All defendants are complicit and necessary parties in the **ongoing** violation of law: The unlawful diversion of at least a 1.915-acre portion of Braddock Park, which serves as a critical source of recreational space in one of the nation's most densely populated neighborhoods. Specifically, North Bergen (and its lessor, Hudson County) are engaged in a continuing effort to subvert the law, or at best, avoid their legal obligations, as recipients of Green Acres funding for the adversely impacted area of Braddock Park pursuant to Green Acres Project, #0908-88-059; 0908-83-068; 0908-02-026; and 0908-91-059; while NJDEP actively allows North Bergen to abuse its Green Acres Program administrative procedures.

STATEMENT OF FACTS

The Unauthorized Diversion

15. In 1998, the New Jersey Supreme Court issued a remedial order in Abbott v. Burke, 153 N.J. 480 (1998)(“Abbott v. Burke V”), requiring Abbott school districts to provide pre-school education for all 3 and 4-year-old children. Contrary to representations made by North Bergen representatives to NJDEP, North Bergen is not, and never was an Abbott school district. Notwithstanding, North Bergen was and continues to be eligible for and receive Early Childhood Program Aid (“ECPA”), pursuant to N.J.S.A. 18A:7F-16. North Bergen first received ECPA funds to operate an early childhood educational program as early as 1996; however, its pre-school program did not commence until the 2001-2002 school year.

16. In preparation for use as a pre-school, North Bergen commenced building an addition to its Lincoln Elementary School. When it became apparent that the annex would not be completed in time for the 2001-2002 school year, the Township leased sixteen extra-wide trailers, soon thereafter seventeen trailers, to serve as temporary classroom units (“TCUs”) and placed them on a fully functioning recreational field in Braddock Park located at Block 437.02, Lot 1. The lot was encumbered with a Green Acres restriction.

17. At the time, Defendant Sacco (who also served as North Bergen’s Assistant Superintendent of Schools at that time) and other North Bergen officials explained to the public that this use of the dedicated public parkland was temporary. Specifically, the public was told that use of this recreational property field was necessary only for the 2001-2002 school year, while North Bergen completed the Annex to the Lincoln Elementary School.

18. Only one-year earlier, Township voters had overwhelmingly rejected a referendum question seeking to finance the construction of a high school within Braddock Park.

19. On information and belief, officials intended the Lincoln Elementary School Annex to be completed in time for pre-school children to attend such facility by the start of the 2002-2003

school year. However, upon completion of the Annex, which did not occur until sometime in 2005, North Bergen did not relocate pre-school children to the Annex or remove the TCUs from Braddock Park.

20. On information and belief, at the time the TCUs were installed, Hudson County did not enter into a formal lease agreement with North Bergen to use funded parkland for public, educational purposes, and no funds were transmitted between the two government entities at that time or for years thereafter.

21. Neither North Bergen nor Hudson County notified DEP of North Bergen's placement of the TCUs on dedicated parkland and neither entity sought prior authorization for such use, in violation of N.J.A.C. 7:36-25.14 (requiring submission of a lease at least 45 days prior to intended execution date, and making sure, *inter alia*, that displaced recreational use is available at other facilities).

22. On information and belief, Hudson County and North Bergen had a long-term lease permitting North Bergen to develop and use a softball field on County property; such a lease was required in order for North Bergen to receive Green Acres funding for such recreational purpose.

23. Not only has the initial diversion remained since 2001, but it appears that North Bergen and Hudson County expanded the diversion of encumbered parkland to include an adjacent parking area, an area for dumpsters, and a "tot lot" developed by North Bergen Board of Education.

24. Approximately ten years after the placement of the TCUs in Braddock Park and the completion of at least three routine Green Acres inspections of the program's funded Hudson County parkland, NJDEP noted the diversion of the softball field, and adjacent parking lot during an inspection held on November 18, 2010.

25. Subsequently, DEP sent a formal Notice of Violation (“NOV”) to Hudson County and North Bergen, dated March 16, 2011, stating that neither party had ever applied for nor received approval for such use of the land. The NOV stated in part:

It appears that seventeen (17) trailer units serving as a North Bergen-run preschool are located on the County Park. During the inspection it was also found that the parking area adjacent to the football field and school trailers are used for teacher and North Bergen Parking Authority parking. Our records do not indicate North Bergen Township or Hudson County ever making application or receiving prior approval to remove the Green Acres-funded field and place school trailers on the park property . . . The placement of school trailers and other parking uses on Green Acres-encumbered parkland is a violation of the Green Acres regulations.

26. The notice also stated that in order “to resolve this compliance issue,” North Bergen and Hudson County needed to submit to the Green Acres program “a plan that includes a **reasonable timetable** for removal of the school trailers from the Green Acres-funded property and restoration of the site to its pre-existing condition. . .” For the next ten years, that “reasonable timetable” requested by DEP has continued to shift without final agency action or enforcement.

The DEP Diversion Process

27. In accordance with conversations held primarily between Green Acres personnel and North Bergen administrators, who in a letter dated April 18, 2011, “recognize[d] the gravity of the violation,” Mayor Sacco and Hudson County Executive DeGise entered into a 24-month lease dated October 19, 2011 (running from July 1, 2011 to June 30, 2013) for use of “a portion of Braddock Park which includes a parking area in the Township of North Bergen.” North Bergen was to pay Hudson County \$10,000 annually (to be paid quarterly) for use of the encumbered property for educational purposes, and there was a commitment that submission of a diversion pre-application to DEP, including the holding of a public scoping hearing, would be completed by December 31, 2011.

28. That deadline was not satisfied, nor is there any evidence that North Bergen paid Hudson County the full \$10,000 annually during the term of the lease, which could then be used by Hudson County for maintenance of its recreational programs, as required by N.J.A.C. 7:36-25.14(g). These missing lease payments continue to deprive Hudson County residents of revenue to support public recreational programs operated by the County.

29. Following the October 19, 2011 lease, North Bergen and Hudson County entered into a First Addendum, dated November 2, 2011, to alter several deadlines set forth in the original lease. The addendum indicated a commitment, which proved to be meaningless in nature, to remove the trailers by July 2013, and to complete restoration of the property by September 2013. Both the Mayor and the County Executive signed this agreement.

30. In late October 2012, Hurricane Sandy started a fire which caused irreparable damage to two TCUs, at a time when none of the TCUs had fire exits, as required by N.J.A.C. 6A:26-8.1. Notwithstanding the serious limitations of the TCUs as revealed by the storm, the Township and County again missed their deadline to remove the TCUs from Braddock Park by July 2013, and restore the property by September 2013.

31. As a result, a Second Addendum, dated June 25, 2013, followed; it extended the term of the “temporary” lease for an additional six months (which is permitted pursuant to N.J.A.C. 7:36-25.14 (b)(2(i))), and again made a commitment to remove the trailers and complete restoration, now by February 2014. If any deadline was not met, the parties agreed that a pre-application, including scoping hearing, would have to occur by April 1, 2014-- **a date more than three years after the notice of violation issued by DEP.**

32. North Bergen also committed that it would give the County and DEP monthly progress reports on removal of the trailers. Again, on information and belief, these monthly updates did not

occur, the full amount of the lease payments were not made by North Bergen or received by Hudson County during the time period of the lease, and alternative recreational facilities were not provided to North Bergen residents, as required by N.J.A.C. 7:36–25.14(d).

33. The Second Addendum was not signed by any North Bergen official but was signed by the Hudson County Administrator, not Mr. DeGise.

34. Pursuant to resolution, dated September 11, 2014, Hudson County authorized its officials to proceed with the Green Acres “major” diversion process. One month later, on October 28, 2014, it entered into a Memorandum of Understanding (“MOU”) with North Bergen allocating responsibilities, liabilities, and costs with respect to the diversion of the portion of Braddock Park leased by North Bergen--which included the land on which the trailers sit; the adjacent gated, and often locked parking lot (with restrictive parking signs); and the “tot” play area developed by the North Bergen Board of Education. **This MOU was entered into four months after the date on which the Township and County had committed to filing their diversion pre-application** if the TCUs were not off the property and the property was not restored by February 2014.

35. During this period, a member of Plaintiff Save Braddock Park complained to the Township about the County’s-Township’s proposed diversion plans for Braddock Park. In a letter dated October 31, 2014, Laurie Cotter, Hudson County Deputy Administrator, Christopher Pianese, Township Administrator and Dr. George Solter, North Bergen Bd. of Educ. Superintendent, assured this resident that “No additional parking, building, or any other form of coverage would be brought to this location or any other location within the park.”

36. On November 5, 2014, the required public “scoping hearing” was held. Individuals from each of the Plaintiff groups spoke or submitted comments protesting the diversion of the softball field and parking lot for non-recreational purposes. Several speakers noted that there were

alternative properties on which the pre-school facilities could be located. And while a few parents of pre-school children stated that they were glad that their children were able to attend the program in a park setting, the general consensus of the attending public was that trailers were neither appropriate nor safe for such young children; and, for sure, should not replace valuable recreational parkland in what is a highly dense urban community.

37. Following the scoping hearing, a member of Plaintiff Save Braddock Park asked Caroline Armstrong, Green Acres Program Specialist, how long the diversion process typically takes. In an email dated November 21, 2014, Ms. Armstrong noted that major diversions “typically” take “anywhere from 9 months to a year (or longer) before obtaining a determination from the NJDEP Commissioner and State House Commission.” She additionally noted that a second public hearing is required at the time of final application, and that the SHC “usually meets only four times per year.” North Bergen has yet to file a final application.

38. At the time Ms. Armstrong’s e-mail was written, **approximately 3-½ years had passed since DEP notified Hudson County and North Bergen** that they needed to seek approval for their after-the-fact diversion.

39. More than one year after Hudson County resolved to proceed with the diversion process (which occurred on September 11, 2014), it passed a resolution dated November 8, 2015, approving the pre-application documents it intended to submit to NJDEP. This pre-application had been approved by North Bergen on August 19, 2015. The pre-application, however, was not filed with the Green Acres program until January 26, 2016 – almost **fifteen years after the North Bergen Board of Education first placed the trailers on encumbered parkland.**

40. To everyone’s surprise, the pre-application called for a new, more permanent modular structure to be built on the property, a 19-year lease for \$1.00 per year, and improvements to the

property that include lighting, landscaping, protective fencing and proposed changes to the “existing parking area” to create a more permeable surface.

41. Despite the documented illegal diversion of the parking lot, North Bergen officials insisted that the parking lot was open to the public and should not be included in the replacement property acreage calculation. In a letter from Mr. Pianese, to DEP, dated March 7, 2016, Mr. Pianese reported that all parking lot restriction signs that had existed on the property since 2001 had been removed (implicitly admitting that they had existed), and that the parking lot was open to the public.

42. However, a photograph as late as January 6, 2017, revealed that a restrictive parking sign that Mr. Pianese claimed was taken down was still posted, indicating that the parking lot adjacent to the school was still severely restricted. Moreover, to date, there is a fence and a gate with a lock at the entrance to the pre-school parking lot (that do not exist at the other two parking lots in the Park), which is often closed, rendering the lot inaccessible to and unusable by the public.

43. On April 12, 2016, Green Acres notified North Bergen and Hudson County that their pre-application was incomplete, noting several significant deficiencies. DEP’s response noted, inter alia, that the Township and County must supply a justification for lowering the replacement acreage ratio of 5:1 otherwise applicable to an after-the-fact diversion, that the applicants had not met its the burden, under N.J.A.C. 7:36–26.1(d)(2), to prove that no alternative site is feasible, reasonable or available, and that the Township’s budget surplus and unused grant funds cast doubt on any claim of financial distress barring the acquisition of an alternative site for educational purposes.

44. One month later, in a phone meeting with Hudson County officials, Green Acres officials told the County to commit to removing the trailers and restoring the public parkland by September

2016 and told them that the applicants had “not demonstrated mitigating circumstances warranting less than 5:1” replacement property and that the Program believes that there are viable alternatives to diverting Braddock Park.

45. On August 19, 2016, the Township and County made a second submission to the Green Acres program.

46. In its submission, North Bergen reiterated that North Bergen was an “expensive [real estate] market,” but proposed a plan to purchase or lease the Hi-Tech site in order to relieve alleged overcrowding in the elementary schools and create space therein to place all the pre-school children and remove the TCUs from Braddock Park. The estimated commencement of this plan was September 2018. (The NJ Department of Education (“NJDOE”) did not approve North Bergen’s Long Range Facility Plan (“LRFP”) until October 5, 2018, which was tied to the bond referendum election that was held in December 2018).

47. Four months after receiving North Bergen’s response, Green Acres issued, on December 20, 2016, its second completeness review. North Bergen and the County came up empty-handed once again; Green Acres required the lease to be modified with a termination date of no later than August 31, 2021, at which time the trailers were to be removed and the property restored. Comments were also addressed to the qualification or lack thereof of replacement properties that were proposed by the applicants. One of three replacement properties proposed by North Bergen could not satisfy the replacement requirement because it had already been converted to parkland, even though North Bergen claimed in its pre-application that the property “was never used as parkland” and was “vacant and unimproved.”

48. Specifically, NJDEP stated that viable alternatives appeared to be available and therefore, the TCUs must be removed as soon as possible. NJDEP also required that appropriate

compensation be provided for past years during which North Bergen and Hudson County had diverted encumbered parkland without proper authorization.

49. NJDEP accepted the September 2018 date, which was provided by North Bergen and Hudson County as the earliest date that middle students could start to be relocated to the Hi-Tech site and pre-school children could be housed in the elementary schools. It thus accepted the 2019-2020 school year as the earliest date at which time the TCUs could be removed. As a result, DEP required the lease to be modified with a termination date of no later than August 31, 2021, providing a generous one-year cushion for North Bergen and Hudson County to relocate the students to a safe, appropriate, and permanent facility.

50. DEP also reiterated that compensation under Green Acres regulations must begin from 2001, when the TCUs were first placed in Braddock Park, through the start date of the temporary lease agreement approved by Green Acres (effective July 1, 2011).

51. DEP additionally required proof of past lease payments from July 1, 2011 until January 1, 2014 (the term of the permissible 2.5 year-long lease) and a new lease agreement was required that would cover required payments from 2014 through August 2021. Moreover, all lease payments were to be structured to reflect market value.

52. DEP also noted that signs and gates at the parking lot and “tot” lot adjacent to the trailers, indicated that this area was not open to the public and therefore must be included in the diversion application; though NJDEP later changed its position regarding the parking lot.

53. Approximately eight months later, on August 25, 2017, the Township made its third submission. A lease was proposed, but not executed; it had a termination date of August 31, 2021, and a lease payment structure that was separated into three periods (July 1, 2011-December 31, 2013; January 1, 2014-December 31, 2017; and January 1, 2018-August 31, 2021), with the rent

payments blank for the latter two periods. Replacement property was proposed and an environmental analysis for such properties was provided. The Township also agreed that it would remove the TCUs by August 31, 2021.

54. Nonetheless, on October 31, 2017, Green Acres notified North Bergen that the pre-application was still incomplete. For the first time, in this response, DEP noted that the DEP Commissioner had decided that the Township had shown some mitigating circumstances warranting the replacement property ratio to be lowered to 3:1. However, the replacement property was insufficient and there were deficiencies in the environmental analysis.

55. **Over one year later, on December 19, 2018, North Bergen made a fourth submission,** which on its face acknowledged that the applicants' pre-application was still incomplete. Additional replacement property had not yet been located and secured, the environmental analysis had not been redone (and would not be until the additional property was purchased), proof of payment of lease payments had not been provided, and no lease from January 1, 2018 until August 31, 2021 had been executed.

56. Approximately one week earlier, on December 11, 2018, 74% of North Bergen voters had approved a \$60 million bond referendum question to fund the purchase and renovation of the Hi-Tech building and 10-acre campus (and to renovate existing elementary schools) in order to create space in the existing elementary schools so the pre-school program could be removed from Braddock Park.

57. On information and belief, North Bergen was to be responsible for repaying \$34 million of the \$60 million total, while State or additional outside funding would repay the remaining \$26 million. (In late July 2021, Governor Murphy announced a \$10 million "gift" to North Bergen specifically to be used for the Hi-Tech acquisition and reconfiguration plan).

Re-Boot of the Diversion Process

58. In a letter dated, June 2, 2020, Plaintiffs sent a Notice, pursuant to the Environmental Rights Act, N.J.S.A. 2A:35A-11, addressed to the NJ Attorney General, Mayor Sacco, Hudson County Executive Thomas DeGise, and Martha Sapp, Section Chief of the Green Acres Program. This Notice demanded that Hudson County and North Bergen cure, as soon as possible, the ongoing unlawful diversion of a significant portion of Braddock Park for non-recreational purposes.

59. Rather than submitting the additional information and documents DEP required in order to move the diversion process to its next stage, North Bergen asked DEP to restart the diversion process from scratch. It no longer desired to comply with DEP's previous decision to treat its application as a request for a temporary diversion, with removal of the trailers by September 1, 2021; rather, it wanted to permanently divert the public parkland property to a non-recreational, pre-school use.

60. On August 11, 2020, a second Public Scoping Hearing took place, as required by Green Acres regulations prior to the filing of a pre-application to divert dedicated parkland. (This hearing also involved a second property that DEP discovered during the preceding process had also been unlawfully diverted by North Bergen)

61. Despite the fact that this hearing occurred during the height of Covid restrictions, numerous residents, including members of the Plaintiff organizations, attended the scoping hearing via Zoom, and, on information and belief, hundreds of written comments were received separately by DEP about this matter.

62. On November 4, 2020, North Bergen officials passed a resolution to move forward with the restarted major diversion process, seeking to permanently divert the parkland they had illegally

occupied since 2001. On November 12, 2020, Hudson County officials similarly passed a resolution to move forward with the rebooted process.

63. This dramatic shift occurred after nearly a decade during which both North Bergen and Hudson County continually expressed a commitment to the public to remove the trailers from Braddock Park and to place the pre-school children in a more appropriate facility.

Continuing Delay and Impairment of Parkland

64. In a letter dated November 10, 2020, Plaintiffs sent a second Notice pursuant to the Environmental Rights Act in light of North Bergen's and Hudson County's decision to pursue a permanent diversion of Block 437.02, Lot 1 in Braddock Park.

65. The letter asserted that North Bergen and Hudson County have deliberately delayed the diversion process for a number of years and have continued to unlawfully use the encumbered property without making proper lease payments. The notice specifically reads as follows:

Ostensibly, [North Bergen and the Hudson County] have started the clock ticking again, delayed the legalization process for another number of years, continued to unlawfully use the diverted property for non-recreational purposes without making proper lease payments, and perhaps have rendered a temporary use permanent in the minds of the public. For certain, it appears that they are intent upon refusing to use bond money, municipal surpluses and other revenues that have been available at various times since 2001 to give North Bergen pre-school children a proper educational home.

Specifically, as they abandoned their plans to use the refurbished Lincoln Elementary School Annex to house the pre-schoolers in 2001-2002, they now appear similarly inclined to abandon their plans to use the retrofitted High School facility and campus to house such children or to enable their placement in already built elementary or middle schools. Review of the materials distributed at the scoping hearing indicates that Hudson County/North Bergen are intent on keeping the trailers in Braddock Park contrary to commitments made to the public when asked to approve a bond referendum. See Peter D'Auria, "North Bergen school alignment delayed again; trailers to remain in Braddock Park until 2022." *Jersey Journal* (April 18, 2020) at <https://www.nj.com/hudson/2020/02/north-bergen-school-realignment-delayed-a-year-trailers-will-remain-in-braddock-park-until-2022.html>.

66. To date, on information and belief, North Bergen has not made any legitimate attempts to relocate the pre-school program nor complete its second diversion pre-application.

Lease Payments, School Enrollment, Safety

67. In response to an OPRA request asking for all documents indicating receipt of lease payments from North Bergen with respect to Braddock Park, and documents indicating how Hudson County allocated or spent such payments, Asst. County Counsel Aurelio Vincitore communicated by e-mail on November 25, 2018 that, "I have received a response from our Finance Department that the County does not have any receipts from lease payments from North Bergen relating to leasing part of Braddock Park."

68. A similar document request was submitted to North Bergen. North Bergen, in an email dated April 14, 2020, produced three documents indicating that \$5,000 was paid to Hudson County on November 22, 2011, and again \$5,000 was paid to Hudson County on April 25, 2012, for the Braddock Park lease. Additionally, North Bergen records showed that \$10,000 was paid for the Braddock Park lease on 9/20/2017 (which was reimbursed by the North Bergen Board of Education).

69. On March 20, 2021, a member of Plaintiff Save Braddock Park made an additional OPRA request to Hudson County asking for proof of payment received with respect to lease payments related to Braddock Park. The response received indicated yet another reality. Now, Hudson County stated that it had received \$25,000 from North Bergen, but did not indicate whether it spent that money for County recreational purposes. (November 29, 2011: \$5,000; May 2, 2012: \$5,000; October 11, 2017: \$10,000; and August 31, 2021: \$5,000).

70. These contradictory and haphazard responses indicate that neither local entity has taken Green Acres regulations seriously with regard to lease payments since neither can provide a

sufficient record to support a good faith major diversion application. Green Acres has the authority to audit the requisite lease payments, but apparently has not used its authority in this regard.

71. Hudson County residents continue to be harmed insofar as all lease payments paid by North Bergen to Hudson County must be allocated to other County recreational programs in accordance with N.J.A.C. 7:36-25.14(g).

72. Under a letter submitted to DEP, dated March 19, 2021, Plaintiffs submitted a report written by Robert Walden, a member of Save Braddock Park, entitled, "North Bergen's 25-year Failure to Build a Facility for Preschoolers." The report concludes that upon completion of the reorganization facilitated by the purchase of the Hi-Tech site, there will be sufficient room for the number of pre-school children in the current schools. The report bases its analysis on the LRF submitted by North Bergen that was approved by the NJDOE in October 2018. Although the plan indicates that 50.08 pre-school children would remain "unhoused" after the realignment is completed, that number was projected based upon a projected enrollment of 383. However, enrollment in the North Bergen school system has been declining generally, and in the entire history of the pre-school program, enrollment has never even reached 300. In 2019-2020 there were 293 children; and in 2020-2021, there were 248 children enrolled.

73. The Plaintiffs' letter also asserts that Green Acres "alternative analysis" regulations, N.J.A.C. 7:36-26.1 and 26.9(d)(2), must be applied more broadly than is typically the case, given the length of time the proposed diversion has existed and the nature of the public use for which the property is proposed to be used on a permanent basis. Essentially, as a matter of law, "reasonable," as that word is used in the context of the requisite alternatives analysis at N.J.A.C. 7:36-26.1(a)(2), would implicate North Bergen's "self-created hardship" via all its associated decisions over the previous 20+ years which led to the pending application. The Plaintiffs' letter to DEP states:

Specifically, the Department must evaluate North Bergen's reasons for insisting on diverting Braddock Park in light of several factors including the fact that they have had twenty-years to find an alternative site, the DOE requires the municipality to engage in long range facility planning, the number of children in the North Bergen school system has been declining, North Bergen has deliberately decided to bypass the opportunity to purchase various sites when they were available, and North Bergen made a commitment to the public and the DOE upon approval of the bond referendum authorizing the purchase of the Hi-Tech site to place all pre-school children in its existing elementary schools. These factors, among others, must inform the Department's evaluation of the applicant's alternative analysis, which cannot be limited to one point in time or even one-year. The general sentiment of the broader North Bergen and Hudson County community that the trailers must be removed should also be heeded. See Jersey Journal editorials urging removal of trailers from Braddock Park. [Cites omitted.]

74. N.J.A.C. 6A:26-3.14(g) states that temporary school facilities, such as the trailers placed in Braddock Park, may be approved for use by the NJDOE for a maximum of 5 years. To date, 15 of the 17 trailers placed in Braddock Park have been there for 20 years. (2 trailers burned down in 2012 and were replaced soon thereafter).

75. Pursuant to an OPRA request, the NJDOE responded, on July 15, 2019, that it does not have any documents indicating that North Bergen submitted plans or specifications to the Department with respect to the placement of its pre-school program in Braddock Park.

The DOE also responded on September 13, 2021 that it does not possess any documents indicating that it approved North Bergen's placement of the pre-school in Braddock Park.

76. N.J.A.C. 6A:26-8.1 requires NJDOE to inspect temporary classroom units for compliance with safety and other regulations on an annual basis. Despite the fact that the North Bergen Superintendent claimed that the TCUs in Braddock Park "are inspected annually by the state Department of Education and have always passed," the NJDOE does not have documents indicating that it inspected the TCUs, except for the years 2019 and 2021, after a member of Save Braddock Park filed an OPRA request for documents of all past DOE inspections of the preschool TCUs.

77. The above 20-year history indicates a troubling pattern of delay, unwillingness to abide by the law, and a deliberate decision to make a *de facto* unauthorized diversion legal simply by failing to remove the trailers and house the pre-school children in proper facilities, as required by law.

COUNT ONE
(Environmental Rights Act)

78. Plaintiffs repeat and reallege paragraphs 1-77 of this Complaint as if set forth at length herein.

79. The New Jersey Environmental Rights Act, N.J.S.A. 2A:35A-1 et seq., permits “any person” to bring a civil action against “any other person alleged to be in violation of any statute, regulation or ordinance, which is designed to prevent or minimize . . . impairment or destruction of the environment.” N.J.S.A. 2A:35A-4. “The action may be commenced upon an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future.” Id.

80. There is no factual dispute that the Defendants’ twenty-year, unlawful diversion of dedicated parkland violates the Garden State Preservation Trust Act, N.J.S.A. 13:8C-32(a) & (b)(1) and several Green Acres regulations, and has resulted in the continuing impairment of a significant area of Braddock Park for non-recreational purposes.

81. This violation is continuous and the Defendants have taken no action to remove the TCUs on the site and to restore the parkland to its original recreational use.

82. Given North Bergen’s and Hudson County’s history of failing to legalize the unlawful and allegedly temporary use Braddock Park to house its pre-school program since 2001, the Defendants’ continued delay in complying with Green Acres regulations (once such violation was purportedly first discovered by DEP in 2011), there is reason to believe that the violation will continue into the future unless remedied by this Court.

83. Plaintiffs submitted a Notice, pursuant to N.J.S.A. 2A:35A-11, to the Attorney General in addition to all parties to this action on June 2, 2020, and again, on November 10, 2020.

WHEREFORE, the Plaintiffs demand relief against defendants North Bergen, Mayor Sacco, Hudson County and Thomas DeGise: (1) adjudging and declaring, pursuant to The Uniform Declaratory Judgments Law, N.J.S.A. 2A:16-50 et seq., that the Township and County have subverted and violated the Green Acres diversion scheme set forth in statute and regulation; (2) requiring North Bergen and Hudson County to (i) remove the TCUs from Braddock Park by August 31, 2022, (ii) restore the public parkland to a valid recreational use by September 30, 2022, and (iii) provide comparable replacement property for its unauthorized use of parkland; and, (3) requiring North Bergen to prove that it made adequate lease payments to Hudson County from 2011 to date, as well as requiring Hudson County to prove that those payments were or will be used for recreational purposes; (4) granting legal fees pursuant to N.J.S.A. 2A:35-10; and (5) granting Plaintiffs such other and further legal and equitable relief as this Court may find just and proper.

COUNT TWO

(Failure to Follow the Law)

84. Plaintiffs repeat and reallege paragraphs 1-83 of this Complaint as if set forth at length herein.

85. North Bergen, Mayor Sacco, Hudson County and Executive DeGise, like all government entities and officials, have a duty to abide by the law, adhere to state regulations, and act diligently, promptly and in good faith.

86. As indicated above, North Bergen and Hudson County have violated the Garden State Preservation Trust Act, N.J.S.A. 13:8C-32(a) & (b)(1), and several Green Acres regulations by failing to receive prior authorization for the diversion of Braddock Park, failing to comply with

DEP's directions and requests during the diversion process on a timely basis, and failing to deal with the public fairly and honestly, especially with respect to the financing of the school reorganization plan designed to permit the pre-school children to attend existing elementary schools.

87. North Bergen's and Hudson County's delay tactics and broken promises to the public and specifically to North Bergen voters, taxpayers and pre-school children, continue to date.

88. By failing to notify Green Acres in 2001 about its illegal diversion; failing to adhere to the terms of its initial 2011 lease (including removing TCUs by July, 2013); failing to file a diversion application for fifteen years after the unlawful diversion of dedicated parkland; failing to respond on a timely basis to DEP's incompleteness review; failing to implement the will of North Bergen voters as expressed in the 2018 referendum; failing to follow through on the reorganization plan approved by NJDOE in October 2018; and, by further delaying the diversion process by starting it anew in August, 2020, Defendants North Bergen, Hudson County, Mr. Sacco, and Mr. DeGise have failed to properly serve their constituents in accordance with state law.

WHEREFORE, the Plaintiffs demand relief against defendants North Bergen, Mayor Sacco, Hudson County and Thomas DeGise (1) adjudging and declaring, pursuant to the Uniform Declaratory Judgments Law, N.J.S.A. 2A:16-50 et seq., that the Mayor, Township, County and Executive abused their authority by failing to follow the law, engaging in delay tactics and misleading the public; (2) directing North Bergen, Mayor Sacco, Hudson County and Thomas DeGise to (i) remove the TCUs from Braddock Park by August 31, 2022, (ii) restore the public parkland to an appropriate and DEP approved recreational use by September 30, 2022, and (iii) provide comparable replacement property for their unauthorized use of parkland; (3) requiring North Bergen to prove that it made adequate lease payments to Hudson County from 2011 to date,

as well as requiring Hudson County to prove that those payments were or will be used for recreational purposes; and (4) granting Plaintiff such other and further legal and equitable relief as this Court may find just and proper, including legal fees.

COUNT THREE

(Failure to Provide Public Access to Funded Parkland)

89. Plaintiffs repeat and reallege paragraphs 1-88 of this Complaint as if set forth at length herein.

90. DEP has a duty to enforce its property rights and interests under the Green Acres statutes and regulations to maintain that all encumbered property is used for open space or recreational purposes only, unless owners receive *prior approval* to divert such property for other uses, and satisfy all procedural and substantive requirements outlined in regulations governing the major diversion application process.

91. DEP has an obligation to take all steps necessary to (i) ensure that property owners file applications to divert in a timely manner, (ii) uncover unauthorized diversions of parkland through its inspection scheme, and (iii) achieve full compliance with its regulatory scheme through the use of fines, penalties or other enforcement mechanisms it is authorized to undertake.

92. Although the Green Acres regulations do not include timetables (other than the requirement to hold a hearing within a certain period of time prior to approval by the Commissioner and State House Commission), it is assumed that DEP will process a diversion application in a timely manner, and it will similarly request applicants to act in a timely, reasonable manner.

93. In this matter, since the diversion process commenced in 2001, approximately twenty years ago, North Bergen and Hudson County have failed to complete their pre-applications and have failed to abide by agreed upon dates for removal of the TCUs from Braddock Park. Not only

has DEP let North Bergen change the date for removal and restoration several times, it has also permitted them to start multiple diversion applications on shifting sands; this time, to file an application for a permanent diversion even though DEP staff had already determined that a permanent diversion was not appropriate, because there were several reasonable alternative locations for the school.

94. The decision to entertain a new application for a permanent diversion of public parkland that has been unlawfully occupied for the past twenty years is unreasonable, arbitrary and capricious.

95. By permitting North Bergen and Hudson County to repeatedly delay the diversion process, change deadlines for removing the TCUs and try to avoid their responsibilities as set forth in regulation, DEP has been complicit in the other Defendants' violation of the legislative mandate to ensure that dedicated parkland is used for open space or recreation purposes only; and, should such property be diverted, that comparable replacement property is secured and lease payments, which are paid, are used by the lessor to support other recreational programs.

WHEREFORE Plaintiffs demand relief against defendant DEP, Green Acres Program (1) adjudging and declaring, pursuant to the Uniform Declaratory Judgments Law, N.J.S.A. 2A:16-50 et seq., that DEP has violated its statutory duty to ensure that dedicated parkland is used for open space or recreation purposes only; (2) directing DEP to (i) reject any applications for an permanent after-the-fact diversion, because "reasonable," as that word is used in the context of the requisite alternatives analysis at N.J.A.C. 7:36-26.1(a)(2), would implicate North Bergen's "self-created hardship" via all its associated decisions over the previous 20+ years which have led to the pending application; and (3) granting Plaintiffs such other and further legal and

equitable relief as this Court may find just and proper, including legal fees.

Respectfully submitted,

NEW JERSEY APPLESEED PUBLIC
INTEREST LAW CENTER, INC.

Dated: December 22, 2021

By: /s/Renée Steinhagen
Renée Steinhagen, Esq.

DESIGNATION OF TRIAL COUNSEL

Renée Steinhagen, Esq. and Daniel Greenhouse, Esq. are hereby designated as trial counsel for Plaintiffs.

/s/Renée Steinhagen
Renée Steinhagen, Esq.

Date: December 22, 2021

CERTIFICATION PURSUANT TO RULE 4:5-1

I, RENÉE STEINHAGEN, hereby certify that:

1. The matter in controversy is not the subject of any other pending Court or arbitration proceeding.
2. I am not aware of any other contemplated Court or arbitration proceeding and;
3. I am not aware at the present time of any other party that should be joined to this litigation.

/s/Renée Steinhagen
Renée Steinhagen, Esq.

Date: December 22, 2021.

CERTIFICATION PURSUANT TO RULE 4:69-4

I hereby certify that there were two scoping hearings related to the subject of this Complaint that were transcribed and are available on the NJDEP, Green Acres website, and that the relevant governmental records related to the claims herein consist entirely of documents. Accordingly, no transcripts have been ordered.

Date: December 22, 2021

/s/Renée Steinhagen
Renée Steinhagen, Esq