June 10, 2022

Hon. Jeffrey R. Jablonski, A.J.S.C.
New Jersey Superior Court
595 Newark Avenue – Room 906
Jersey City, NJ 07306

Re: New Jersey Conservation Foundation, et. al. v. Township of North Bergen, et. al.,
Docket No. HUD-C-174-21.

Dear Judge Jablonski:

Eastern Environmental Law Center and New Jersey Appleseed Public Interest Law Center co-represent the Plaintiffs (New Jersey Conservation Foundation and Save Braddock Park-Safe School) in this matter. Please accept this letter brief in reply to the Hudson County and North Bergen Township defendants' opposition to Plaintiffs' cross-motion for summary judgment on Counts I and II of their Complaint. Defendant DEP did not file a reply brief in support of its Motion to Dismiss and did not oppose Plaintiffs' Cross-Motion.

The County and Township defendants rely entirely on the argument that this Court does not have jurisdiction to hear Plaintiffs' claim for declaratory and equitable relief under the Environmental Rights Act ("ERA") pursuant to the doctrine of primary jurisdiction or its claim under the Prerogative Writ Clause of the New Jersey Constitution for failure to exhaust administrative remedies. The County and Township defendants take the novel and untenable position that merely because they have filed a pre-application for an "after-the-fact" diversion, which might speculatively at some point in the future

turn into a full application, the Court does not have jurisdiction to correct the ongoing and unlawful encumbrance of dedicated parkland that has been ongoing since 2001. It is a position that cannot be supported by Green Acres regulations or public policy. Critically, the DEP has already issued a notice and order (also known as a final agency decision) which declared the County and Township defendants to be responsible for an ongoing violation of the Green Acres laws and associated regulations. The DEP issued its final agency decision in this regard on March 16, 2011. The DEP submitted this critical final agency decision to this Court as Exhibit A to the Certification of the Deputy Attorney General. It is a critical piece of the record before this Court. Therefore, it is indisputable that the County and Township defendants are liable for an ongoing environmental violation and this Court must now grant equitable relief to the Plaintiffs pursuant to the Environmental Rights Act.

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LEGAL ARGUMENT

I. The DEP Issued a Final Agency Decision on March 16, 2011, Regarding the County and Township Defendants' Ongoing and Illegal Impairment of Braddock Park.

On March 16, 2011, the DEP issued a notice and order to the County and Township defendants. See Certification of Deputy Attorney General Jill Denyes, Esq., Exhibit A. The authenticity and correctness of the document presented by the DEP in this matter is undisputed. In that Notice, the DEP stated, as follows:

> 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** (see N.J.A.C. 7:36-25.2), which states that a local government unit shall not divert to a use other than recreation and conservation purposes any funded or unfunded parkland without prior approval from the Commissioner of the Department of Environmental Protection and the State House Commission. **The Township will need to take immediate action to address this issue.**
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> In order to resolve this compliance issue, please submit to this office a plan that includes a reasonable timetable for the removal of the school trailers from the Green-Acres funded property and restoration of the site to its preexisting park condition by April 22, 2011.
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> [Denyes Cert., Exhibit A, emphasis added.]

The DEP's March 16, 2011 Notice of Violation and associated findings therein constitute an agency "order" in the context of the Green Acres laws and regulations. See Gloucester Cty. Improvement Auth. v. N.J. Dep't of Envtl. Prot., 391 N.J. Super. 244, 248 (App. Div. 2007). The appellants in Gloucester County Improvement Authority requested an administrative hearing to challenge a directive contained in a notice of violation letter issued to it by the DEP. The DEP denied the hearing request and took the position that an administrative hearing could only be granted after it made a final agency determination, because the directive in the notice of violation

letter purportedly did not constitute the DEP's requisite final agency determination. The Court disagreed with the DEP's position and held that "the notice of violation does not appear on its face to be a mere warning that has no immediate coercive impact upon the recipient." Ibid. Therefore, the Court held that the notice of violation letter constituted a final agency order that would entitle the recipient to request and receive an administrative hearing. The same logic applies in this matter. The DEP's March 16, 2011 notice and order to the Township and County defendants constitutes a final agency decision.

In this case, Hudson County and North Bergen Township never challenged the DEP's March 16, 2011 order to remove the illegal encumbrance in Braddock Park. Neither defendant ever requested an administrative hearing or filed any appeal of the DEP's March 16, 2011 order. Therefore, as a matter of law, the DEP's March 16, 2011 order is a *de facto* final agency decision and undisputed legal determination that the County and Township defendants are liable for an ongoing and continuing illegal diversion in Braddock Park. It is now too late for the County and Township to challenge the DEP's March 16, 2011 final agency decision and to claim that they are not in violation of the Green Acres laws and DEP's regulations.

II. This Court Has Jurisdiction to Grant Plaintiffs' Request for Relief Under the ERA Because DEP Has Already Determined the Illegality of Hudson County's and North Bergen's 2001 Diversion of Parkland Has Yet to Be Corrected or Legalized.

In its reply brief Hudson County and North Bergen defendants conflate the concepts of standing, ripeness and primary jurisdiction, and misconstrue Superior Air Products Co. v. NL. Industries, Inc., 216 N.J. Super. 46 (App. Div. 1987) to erroneously declare, on one hand, that the ERA does not confer any substantive rights, while admitting on the other hand, that it grants a private right of action (and standing) to parties, such as Plaintiffs, to enjoin continuing

violations of other environmental laws "as an alternative to [prosecutorial] inaction by the government." Twp./Co. Reply Br. at 7-8 (quoting Superior Air Products Co., supra, 216 N. J. Super. at 60).[1]

There is little doubt that since 2011, when DEP issued a Notice of Violation and demanded correction of that violation, that DEP has failed to enforce its order to correct. Early in the process, it was agreed that North Bergen/Hudson County would correct its unlawful impairment of parkland by removing the trailers within two and one-half years of the Notice. Walden Cert., Exhibit B. It was further agreed that if the trailers were not removed within that period time, defendants would have to file a diversion application for a longer term lease, not a permanent after-the fact diversion, in order to legalize the ongoing violation. Id.

For over eleven years, North Bergen has not progressed past the pre-application phase of the diversion process, and DEP has let North Bergen ignore one deadline to remove the trailers from the park after another elapse. In this sense, DEP has not taken any prosecutorial action to compel North Bergen to correct the ongoing impairment of dedicated parkland. It is this

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[1] North Bergen and Hudson County argue that Plaintiffs misconstrue the precedential value of Superior Air Products with respect to the ERA. Twp./Co. Reply Br. at 7. However, in that matter the Court clearly did make reference to the ERA and actually included citations to the ERA when it said that the "statute expressly operates as an additional remedy." In fact, the following quoted language (with citations to the ERA included) makes this perfectly clear and Defendants' instant attempt to distinguish this case as inapplicable to the ERA is another disingenuous attempt to delay removal of its unlawful encumbrances in the park.

> This statute expressly operates as an additional remedy "to existing administrative and regulatory procedures provided by law . . ." without superseding any "existing civil or criminal remedy now or hereafter available to any person or governmental entity. . . ." N.J.S.A. 2A:35A-12. Liberal construction is mandated. N.J.S.A. 2A:35A-13.
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> [Superior Air Prods. Co. v. NL Indus., 216 N.J. Super. 46, 58 (App. Div. 1987)]

inaction, in face of DEP's March 16, 2011 final agency determination of illegality, that requires the Court to exercise its jurisdiction under the ERA, and not defer to DEP's primary jurisdiction over the diversion process. DEP has already determined liability, and has just failed to compel defendants to correct the violation as DEP previously ordered them to do. Cf. N.J.S.A. 2A:35A-8 (requiring court to remit the parties to the administrative procedures if agency is required to make determination of liability). (Twp./Co. Reply Br. at 7).

It is the DEP's failure to enforce its finding of liability and order to correct the impairment of parkland for over a decade that is the heart of Plaintiffs' argument to support its cause of action under the ERA. Defendants are thus simply wrong when they say that Plaintiffs' entire [ERA] claim reduces to nothing more than frustration with the timing of the diversion process" Id. at 7; see also id. at 9 ("diversion process is taking too long").

Furthermore, North Bergen and Hudson County defendants are simply wrong when they state that they have never conceded taking unlawful action with respect to Braddock Park. Id. at 2. No defendant in this action has denied that DEP issued a Notice of Violation to North Bergen and Hudson County. It does not matter whether there is any ongoing consideration of an after-the-fact diversion application. Contrary to defendants' assertion on page 9 of their brief, just because there is an after-the-fact diversion application process available in DEP's regulations, and defendants have filed a pre-application to eventually legalize their unlawful diversion, does not mean a local municipality can begin and continue to unlawfully encumber parkland during the process if the application contemplates only a temporary lease (as was the case here until March 2021), or the applicant does not complete its application for a permanent after-the fact on a timely basis. We think it is safe to say that the DEP would not agree with the County and Township position that any person can unlawfully encumber or impair a park simply

because it might at some point in the future file an "after the fact" diversion application. At this time, the placement and continued presence of the trailers in Braddock Park is an "undisputed, ongoing and continuous violation of the Green Acres laws and regulations," and as a matter of policy and law should be enjoined by this Court in face of DEP's failure to do so for over twenty years.[2]

III. "It is Manifest That the Interests of Justice," Permit This Court to Grant Relief Pursuant to Plaintiffs' Prerogative Writ Action Against the Hudson County and North Bergen Defendants.

As Plaintiffs explained in our initial brief at pp. 15-22, Count II of their Complaint states a prerogative writ action against Hudson County and North Bergen defendants for their failure to satisfy their legal obligations under the Green Acre laws and regulations to correct a final determination of violation, and to act diligently, promptly and in good faith during the diversion

[2] Hudson County and North Bergen also argue that Plaintiffs' reliance on Boss v. Rockland Elec. Co., 95 N.J. 33 (1983) is misplaced. Twp./Co. Reply Br. at 9-10. However, that case is very supportive of the Plaintiffs' position that enforcement of their claim under the ERA does not require resolution of factual issues within the expertise of DEP. It bears repeating, the Court in Boss said as follows:

> We do not imply that the agency may enlarge or contract the legal rights of the parties. When the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their rights. . . [cases omitted] But when the determination of a legal issue must be preceded by "the taking of the necessary evidence and the making of the necessary factual findings,' it best done by the administrative agency specifically equipped to inquire into the facts.
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> [Boss v. Rockland Elec. Co., 95 N.J. 33, 40 (1983)]

The Boss Court, in no uncertain terms, expressed the principle that Plaintiffs now rely on to argue that this court should now exercise its jurisdiction to enforce compliance with the DEP's March 16, 2011 determination that Hudson County/North Bergen violated Green Acres laws and regulations and are obligated under the law to correct such violation, which includes the removal the unlawful encumbrances from the park.

process --- a process that they are required to follow to legalize an after-the fact, unapproved diversion.[3]

Accordingly, Plaintiffs analyzed the case law developed under R. 4:69-5, to establish that under the circumstances presented herein, "it is manifest that the interest of justice require" that Plaintiffs be permitted to seek judicial review of North Bergen's and Hudson County's dilatory and unreasonable conduct, which they have exhibited over the past eleven years during the DEP regulatory process. Because Plaintiffs assert that defendants are abusing the DEP administrative process itself, and DEP has been unwilling (or unable) to enforce its order to correct the ongoing violation on a timely basis, it is futile and senseless to require Plaintiffs to wait until the after-the fact diversion process is completed in order for Plaintiffs to secure the relief they are requesting pursuant to Count II: An enforceable and reasonable timeline to be imposed by this Court on

[3] Specifically, Plaintiffs have submitted documents that they certified they received pursuant to OPRA requests submitted to DEP, the New Jersey Department of Education, North Bergen or the North Bergen Board of Education or downloaded from DEP, Green Acre's website, some of which defendants have re-submitted in their Counter-Statement of Undisputed Material Facts, and have thus accepted as accurate. These documents tell a narrative of what has occurred since North Bergen placed 17 trailers on the ballfield in Braddock Park in 2001, and more specifically, what has occurred since DEP issued its final agency determination that North Bergen/Hudson County had unlawfully diverted Green-Acres dedicated parkland. Such documents directly support Plaintiffs' allegations that defendants did not notify Green Acres in 2001 about their illegal diversion; did not adhere to the terms of their initial 2011 lease (including removing the trailers by July, 2013); did not file a diversion application until 15 years after the unlawful diversion of dedicated parkland; have consistently failed to respond on a timely basis to DEP's incompleteness review leaving the diversion process in its pre-application stage for over eleven years; have failed to adhere to the terms ordered by DEP once the diversion application commenced to remove the trailers no later than August, 31, 2021 (Walden Cert., Ex. F); have failed to ensure the removal of the trailers to implement the will of North Bergen voters as expressed in the 2018 bond referendum enabling the purchase of the Hudson County High-Tech building and the implementation of the reorganization plan approved by NJDOE in October 2018 permitting the reorganization of the North Bergen schools to permit the placement of all pre-K children in existing elementary schools; and, most recently, have further delayed the diversion process by filing a new diversion pre-application in March 2021 for a permanent after-the-fact diversion without adequately explaining why, after twenty-one years they are unable to house their pre-school program in proper and safe educational facilities.

North Bergen and Hudson County to correct the significant impairment of public parkland that has been going on for over twenty years.

In their initial brief, North Bergen and Hudson County defendants acknowledged that Count II constituted a prerogative writ action and simply argued that Plaintiffs must exhaust their administrative remedies, regardless of how long the regulatory process drags on. Implicitly acknowledging that the DEP diversion process is not a remedy for the public, but rather a remedy for themselves (i.e., an opportunity for North Bergen and Hudson County to correct their violation and legalize an after-the-fact diversion[4]), defendants now explicitly argue that their dilatory conduct is permitted simply because Green Acre regulations do not include a timetable. (Twp./Co. Reply Br. at 2-3). They also point to the language "or longer" in Ms. Armstrong's e-mail to Robert Walden, (Walden Cert., Ex. G) to neutralize Plaintiffs' assertion that a diversion process that typically takes "anywhere from 9 months to a year" has now gone on for eleven years with no after-the-fact diversion final agency decision in sight.

The bottom line is that North Bergen and Hudson County are abusing the diversion process by failing to correct the ongoing impairment of dedicated parkland as ordered by DEP. DEP has failed or been unable to control its own regulatory process, and so this Court must compel defendants to adhere to a reasonable timeline to move their diversion application to completion. Such an order must also include a date certain as to when defendants must remove the trailers in accord with their previous commitments to DEP and the public. Members of Plaintiff Save Braddock Park-Safe Schools represent all North Bergen residents who voted in

[4] See Twp./Co. Reply Br. at 2 (Plaintiffs "cast aspersions upon the Township/County for simply exercising the right to avail itself of the diversion process afforded by the Green Acres Program regulations."); Id. at 15 (By seeking judicial review of the Township's/County's conduct during the diversion process, "Plaintiffs seek to preclude the Township/County from exhausting its administrative remedies.").

2018 to approve a bond referendum to finance the purchase of the Hi-Tech building in order to enable the reorganization of the North Bergen school system, which in turn would enable the transfer of the pre-K program to existing elementary schools.

IV. DEP is a Necessary and Indispensable Party to This Action.

Though DEP has not submitted a brief in further support of their motion to dismiss or in opposition to Plaintiffs' Cross Motion for Summary Judgement on Counts I and II of the Complaint lodged against North Bergen and Hudson County defendants, its silence is telling. First and foremost, DEP has not denied Plaintiffs' position that the agency is a necessary and indispensable party, which is required to receive notice under the ERA, which has issued a final agency decision (on March 16, 2011) which is compatible with the relief Plaintiffs now seek, and which has a property interest in the subject matter of this instant action . For over a decade, DEP has let a violation of its regulations continue to exist, and has failed to enforce its numerous deadlines for removal of the trailers. The DEP must protect the public's interest in parkland throughout the State by remaining as a party to this action.

Furthermore, it is clear that pursuant to Counts I and II, Plaintiffs seek declaratory and injunctive relief that DEP itself has been seeking since April 2011: 1) expeditious removal of the trailers from the parkland by a date certain, see Steinhagen Cert., Ex. K (E-mail dated June 8, 2017 between Martha Sapp, Green Acres Program Director to Bernadette, North Bergen official);[5] and timely submission of information and documents needed to move the diversion

[5] The e-mail reads in part, "While we know that [the Township] can't guarantee the acquisition of the High Tech high school, please know that we are not entertaining a back-up plan. Removing the trailers as quickly as possible is the only scenario we are considering, and is what the Township has assured all will happen. Allowing the trailers to remain permanently is not an option." (emphasis added).

pre-application into its next stages: submission of a final application, the holding of a public hearing thereon and a decision that would need to be approved by the Commissioner and the State House Commission. See e.g., Walden Cert., Ex. F1 (E-mail dated August 4, 2017 from Martha Sapp to Susan McCurrie, North Bergen official, expressing frustration with the Township's failure to submit requested documents in a timely fashion). Intervention by this Court to compel North Bergen and Hudson County to comply with the Green Acres' diversion statute by curing the admitted violation, and proceeding on a timely basis to legalize the after-the-fact diversion is required, and most likely would be welcome by DEP.[6]

V. Defendants Do Not Dispute the Facts Necessary to Grant Plaintiffs' Requested Relief Under Counts I and II of Their Complaint.

In their brief, North Bergen and Hudson County malign Plaintiffs' efforts to support their cross-motion for summary judgment by producing documents that they received either from the defendants in this matter or other government agencies by alleging that their sole "goal . . . is clearly to inundate the Court with superfluous and immaterial information in an effort to distract this Court's attention from the procedural bar to their claims." Twp./Co. Reply Br. at 1. They then go through each of Plaintiffs' undisputed facts imposing technical rules regarding authentication and hearsay, but do not deny that the documents produced are relevant and material to Plaintiffs' request for declaratory and injunctive relief. Indeed, in many cases, they

[6] In their brief, North Bergen and Hudson County, assert that Plaintiffs hold "contrasting positions [with respect for the need for discovery while stating that there are no genuine issues of fact, which] are irreconcilable. Twp./Co. Reply Br. at 26. This statement is false. Plaintiffs clearly take the position that with respect to Counts I and II, this Court can render a summary judgment decision based on several undisputed material facts. On the other hand, the need for further discovery is relevant solely to Count III lodged against DEP. Plaintiffs are clear that they are not seeking summary judgment against DEP at this time.

turn around and produce the same documents, such as the lease and addendums between Hudson County and North Bergen that were approved by DEP, in their Counter-Statement of Material Facts.

In addition to telling the court that it must ignore documents Plaintiffs received from government agencies pursuant to OPRA, because they are not authenticated or constitute hearsay (insofar as Mr. Walden or his counsel were not participants in the conversations the exhibits document), defendants repeat the same objections for each material fact without carefully examining the underlying statements. For example, with respect to Plaintiffs' SUMF, ¶24, they say that "Mr. Walden does not provide the basis for his personal knowledge of these facts." However, if one looks at his certification at ¶17, he clearly states that "I notified the Green Acres program of the impending availability of the vacated 10-acre Hi-Tech High School campus and suggested that North Bergen could use HI-Tech as the means of solving North Bergen's noncompliance with Green Acres laws and regulations." The use of the word "I" in describing a certain action is the basis of his personal knowledge for the statement included in Plaintiffs' SMUF.

It is certainly unfair of the defendants to ask this Court to totally dismiss Plaintiffs' statements as incompetent evidence simply because they rely on the authenticity of the documents produced by government pursuant to OPRA, express knowledge that they garnered by participating as voters in a bond referendum election, or rely on statements made by municipal officials as presented in newspaper articles. Though Plaintiffs acknowledge that information presented in newspaper articles is technically hearsay, that does not mean that this Court cannot consider such information when determining a summary judgment motion. In any event, defendants' insistence on imposing technical rules of evidence as a means to deny facts

that are clearly relevant and which they do not deny is not helpful in resolving this matter. This litigation is one of great public import, and Plaintiffs are trying to vindicate important public rights of access to Green Acres dedicated parkland against municipal defendants who have failed to cure an unlawful diversion for over twenty years. This is not a game of cat and mouse, especially since all the defendants in this matter are able to authenticate the documents on which Plaintiffs rely.

Nonetheless, either DEP or North Bergen have produced documents themselves on which this Court can grant summary judgment in favor of Plaintiffs on Count I and II of the Complaint: the March 16, 2011 Notice of Violation and Order; the Lease and Addendums setting forth different dates by which the trailers were to be removed and the parkland restored; the filing of the first pre-application in January 2016 for a temporary lease and after-the fact diversion approval; and the filing of the second pre-application for a permanent after-the-fact diversion on March 5, 2021.

CONCLUSION

For the foregoing reasons and those stated in Plaintiffs' initial brief, North Bergen/Hudson County and DEP's requests to dismiss Plaintiffs' Complaint must be denied and Plaintiffs' Cross- Motion for declaratory and injunctive relief on Counts I and II of their Complaint should be granted.

Respectfully submitted,

/s/ Daniel A. Greenhouse

Daniel A. Greenhouse (ID# 016102005)
Eastern Environmental Law Center
One Gateway Center, Suite 2600
Newark 07102
973.424.1166
dgreenhouse@easternenvironmental.org

Respectfully submitted ,

NEW JERSEY APPLESEED PUBLIC INTEREST LAW CENTER

/s/ Renée Steinhagen

Renée Steinhagen, Ex. Dir.

New Jersey Appleseed
Public Interest Law Center of New Jersey
23 James Street
Newark, New Jersey 07102

Phone: 973.735.0523
Email: renee@njappleseed.org
Website: www.njappleseed.org