Petition for Rule Change

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Nature of and Reason for the Petition

This is a petition for several changes to the Green Acres regulations. All are intended to better reflect the clear purpose of

- the Green Acres bond acts, L. 1961, c. 046 through at least L. 2009, c. 117;
- the dedicated funding amendments to the New Jersey Constitution, Art. VIII, § II, ¶¶ 6 (CBT), 7 (sales tax);
- New Jersey statutes.

Statutory authority: Purpose of the Green Acres program

Bond acts

The bond acts all make it clear that the purpose of the Green Acres program is not simply to purchase open space, but to *increase* the amount of open space and preserved farmland, and the number of preserved historic sites and structures. The relevant text of the 1961 Act is

> 2. The Legislature hereby finds that:
> (a) The provision of lands for public recreation and the conservation of natural resources promotes the public health, prosperity and general welfare and is a proper responsibility of government;
> (b) Lands now provided for such purposes will not be adequate to meet the needs of an expanding population in years to come;
> (c) The expansion of population, while increasing the need for such lands, will continually diminish the supply and tend to increase the cost of public acquisition of lands available and appropriate for such purposes;
> (d) The State of New Jersey must act now to acquire and to assist local governments to acquire substantial quantities of such lands as are now available and appropriate for such purposes so that they may be used and preserved for use for such purposes; and
> (e) The sum of $60,000,000.00 is needed now to make such acquisition possible.

Emphasis added. The findings in the 2009 Act are remarkably similar:

> 2. The Legislature finds and declares that enhancing the quality of life of the citizens of New Jersey is a paramount policy of the State; that the acquisition and preservation of open space, farmland, and historic properties in New Jersey protects and enhances the character and beauty of the State and provides its citizens with greater opportunities for recreation, relaxation, and education; that the lands and resources now dedicated to these purposes will not be adequate to meet the needs of an expanding population in years to come; that the open space and farmland that is available and appropriate for these purposes will gradually disappear as the costs of preserving them correspondingly increase; and that it is

> necessary and desirable to provide funding for the development of parks and other open space for recreation and conservation purposes.

Emphasis added. Similar wording occurs in all the bond acts.

The Constitution requires that funds raised by these bond acts be used only for the stated purpose: Art. VIII, sec. 2, ¶ 3(d) provides that "All money to be raised by the authority of such law [a bond act put before the voters] shall be applied only to the specific object stated therein, and to the payment of the debt thereby created." We have amply demonstrated that "the specific object stated therein" is to *increase* the amount of open space and preserved farmland, and the number of preserved historic sites and structures.

Constitutional amendments

It cannot be reasonably doubted that the Constitutional amendments were intended to continue the Green Acres program as created by the bond acts.

Governor Whitman, addressing the Senate Budget and Appropriations Committee on July 24, 1998, in favor of the proposed dedicated sales tax amendment, alluded to the long string of bond acts: "In the polls and at the ballot box, citizens of this state, time and again, have shown their unwavering support for the preservation of open space, farmland, and historic resources."

Senator DiFrancesco explicitly referred to the bond acts,

> Now, Bob [Sen. Littell, Chair], you recall that beginning with the first Green Acres Bond Act, in '61, the voters of New Jersey have supported every bond issue dedicated for natural resource preservation and open space acquisition—every one. As a result, we've saved 900,000 acres of land. . . . This legislation gives voters the opportunity to vote for a long-range plan, one that will result in the protection of more than half of the remaining open space in our state. . . .

So also did former Assemblywoman Maureen Ogden: "New Jersey's record of passing nine Green Acres bond issues is unequaled, but we are losing the open space race."

Likewise, the Garden State Preservation Trust Act (L. 1999, c. 152, N.J.S.A. 13:8C-1) passed pursuant to Art. VIII, § II, ¶ 7 (the dedicated sales tax amendment), noted that because "it is necessary and desirable to provide funding for the development of parks and other open space for recreation and conservation purposes,"

> there is a need to establish a program to serve as the <u>successor to the programs established by the</u> "Green Acres, Farmland and Historic Preservation, and Blue Acres Bond Act of 1995," P.L. 1995, c. 204, nine previous similar <u>bond acts</u> enacted in 1961, 1971, 1974, 1978, 1981, 1983, 1987, 1989, and 1992, and various implementing laws. . . .

Emphasis added.

Statutes

N.J.S.A. 13:8A-36 echoes the message:

> *Legislative findings* The Legislature hereby finds that:
>
> a. The provision of lands for public recreation and the conservation of natural resources promotes the public health, prosperity and general welfare and is a proper responsibility of government;

b. Lands now provided for such purposes will not be adequate to meet the needs of an expanding population in years to come;

c. The expansion of population, while increasing the need for such lands, will continually diminish the supply and tend to increase the cost of public acquisition of lands available and appropriate for such purposes;

d. It is necessary to provide funds to assure that lands which have been, or which may hereafter be, acquired for recreation and conservation purposes can be developed to provide public recreation and conservation opportunities and to implement the New Jersey Statewide Comprehensive Outdoor Recreation Plan;

d. The State of New Jersey must act now to acquire and to assist local governments to acquire substantial quantities of such lands as are now available and appropriate so that they may be preserved and developed for such purposes. . . .

L. 1975, c. 155, s. 1, eff. July 15, 1975.

Emphasis added.

Green Acres regulations

Thus there can be no rational doubt that the purpose of our body of Green Acres law requires that the program be administered so as to *increase* the amount of open space and preserved farmland, and the number of preserved historic sites and structures.

The Green Acres regulations recognize this fundamental requirement; in particular, the purpose and effect of the entire ROSI concept is to fulfill this requirement. The ROSI regulations were clearly designed to prevent laundering of Green Acres funds into non-Green-Acres purposes, and the authors of this concept are to be applauded. However, some specific regulations lean against this fundamental purpose.

Petitioner's Interest in the Green Acres Regulations

As a retiree, much of Petitioner's time is taken up benefiting from the success of the Green Acres program, *viz.,* hiking in open spaces protected by Green Acres encumbrances: South Mountain and Mills Reservations in Essex County, Watchung Reservation in Union County, Roaring Rock Park in Washington Township (Warren County), Point Mountain in Hunterdon County, and numerous others. (Petitioner has a hiking companion who makes a point of hiking in a new (to us) location whenever possible.) Moreover, like most New Jerseyans, Petitioner benefits virtually every time he visits a local park, or encumbered boardwalk: West Hudson in Kearny, Branch Brook in Newark, the local playground near his brother's home when the great-nieces are visiting, Ocean Grove, and so on. Petitioner has been active in speaking out for stronger Green Acres protections in public meetings, cooperating with advocacy groups such as the Sierra Club, The Highlands Coalition, and New Jersey Forest Watch, alerting the Office of Green Acres to problems such as ROSI errors, and through legal action, in which his activities have always earned him standing, if not success on the merits.

Proposed changes to regulations

Proposed additional text is in purple thus; text proposed to be deleted is ~~struck-through thus~~.

Justifications for diversions

As we approach build-out, the refrain is heard more and more frequently: No alternative sites are available!—an ongoing example being sites for the school trailers in North Bergen's Braddock Park. It's true: many of our communities are already built out. In places like North Bergen, if you want to build something new, *and* keep your open space, you're going to have to tear something down—or build upwards, and we're not sure how many New Jerseyans want that.

The Office of Green Acres is caught in a crunch between forces even bigger than preservation issues. Our society has to acknowledge that we just can't keep growing forever. The solution must ultimately be political; meanwhile, the role of the Green Acres regulations must be to faithfully implement the requirements of existing law.

■ Strict construction against disposals and diversions

7:36-26.1 (a) It is the Department's policy to strongly discourage the disposal or diversion of both funded and unfunded parkland. . .defined at (d)1 below. These regulations are to be strictly construed against disposals, diversions, and the sufficiency of proposed compensation packages, and liberally construed in favor of alternatives.

The additional wording may seem redundant, but the regulations are not always strictly construed. In the Stafford solar panels application, the developer claimed that the diversion of Green Acres land to solar production was justified because without it, his shopping center could not meet its goal of using 100% renewable power. We're all in favor of renewable power, but failing to hit 100% should not, in and of itself, justify a diversion. 80% without a diversion would have been very good. Further, it appears that a Federal regulation prevented the owner from generating electricity at a greater distance and transmitting it to the shopping center. If we want both clean energy and open space, efforts should have been directed at relaxing that regulation.

The developer also claimed that panels in the parking lot were unfeasible and unreasonable because shoppers, when they parked, couldn't see which stores were where. That's exactly the sort of excuse that the "strongly discouraged" and "last resort" provisions are intended to thwart.

Fortified language will increase awareness of the need for vigorously enforced regulations to protect our open space as New Jersey moves steadily toward build-out, and pressure on open space increases.

■ Compelling public need / significant public benefit

7:36-26.1(d)1**iv** The following outcomes, by themselves, neither fulfill a compelling public need, as defined in i, nor yield a significant public benefit, as defined in ii:

- the establishment or re-establishment of a business;
- stimulating the local economy;
- delivering electricity generated from renewable sources rather than from non-renewable or CO_2-producing sources.

Again, iv would appear to many to be redundant: stimulation of the economy is clearly does not "mitigate a hazard to the public health, safety and welfare", nor does it 'improve the delivery of essential services". Nevertheless, Seaside Heights sold its proposed beach disposal to DEP, the State House Commission and Appellate Division approved it, and the Su-

preme Court refused certification. Greater clarity is needed to bring this regulation into conformance with the “last resort” standard.

The Stafford solar panel applicant claimed increased generation of green energy as a justification for his diversion of Green Acres land to solar power generation. But neither does solar power, in and of itself, meet the requirement in i. As for ii., “generation” by renewable energy instead of fossil fuels does *not* “improve delivery”—it reduces CO_2 emissions. Only a most elastic construction of “improve delivery” can encompass greener generation of the electricity delivered. If the regulations are going to allow diversions for every proposal that’s in some way beneficial, New Jersey’s entire open space edifice will collapse. Strictly construed, the regulations properly place severe limitations on what justifies a diversion.

■ **Exceptional recreation / conservation benefit**

7:36-26.1(d)1.iii For major disposals or diversions of parkland, provide an exceptional recreation and/or conservation benefit. . .consequences listed at N.J.A.C. 7:36-26.1(e)~~;~~. In order to qualify as an exceptional recreation and/or conservation benefit, a proposed diversion must include a compensation package with an area of compensation land, *and* a total value, in excess of the respective minimum area and value required, and such excesses must be greater than or equal to the standard deviation of such excesses in all previous diversions; that is, such excesses must be ≥ σ = square root of [$\Sigma(x_i - \overline{x})^2 / (n - 1)$], where

- each value of x_i represents the number of acres, or the dollar value, in excess of the minimum required;
- i = 1 to n,
- n > 1, and is the number of past disposals and diversions approved by the State House Commission, and not rejected or voided by the courts;
- $\overline{x}$ = the average or mean of all values of x_i.

Seaside Heights claimed this justification, in addition to compelling public need and significant public benefit. While the 68 excess compensation acres were far and away greater than the standard deviation of such excesses in 24 previous diversions (≈13), the *value* of the compensation package was only 1.2 x the value of the disposed beach, according to the SHC summary. I have not been able to discern the minimum required monetary compensation for the Seaside Heights disposal, but in any case, DEP should not be left without guidance as to what constitutes an exceptional benefit.

Liberal construction in favor of alternatives

■ **Extraordinary costs**

7:36-26.9(e)2ii Would result in the incurring of additional construction costs of an extraordinary magnitude. However, the incurring of increased costs alone shall not disqualify an alternative from consideration unless the cost ~~increase is determined by the Department to be disproportionate to the overall project cost and/or the benefit to be obtained by the proposed project~~ of the alternative is significantly disproportionate to the cost of a project of similar magnitude and complexity in the local government unit which is applying for the disposal or diversion;

As population and development pressures grow, municipalities and even entire counties are reaching build-out, and land prices keep increasing. New projects are becoming increasingly

expensive. The cost of alternatives to a diversion/disposal will more and more be such as could be labeled “disproportionate to the overall project cost”—because no unprotected, undeveloped land is available. If we are to increase the amount of protected open space, land encumbered with Green Acres restrictions must not be treated as a low-cost option previously banked for development.

- **Opposition from neighbors**

7:36-26.9(e)4. An alternative shall not be rejected solely because of opposition from property owners who would lose undeveloped property, or whose homes or other property would border the project, if the alternative is implemented.

When Ocean County applied for a diversion to build the Ocean County College west access road, county officials rejected an alternate route solely because of opposition from residents of an adjoining neighborhood, some of whom would lose part of their undeveloped property should the route be selected. Ocean County did not include this alternative in the alternatives analysis in its application.

But takings are routine when intersections are improved and new roads are built. This is exactly the sort of problem that occurs when buildout is looming: *it’s always easier to pave protected open space;* in this case, easier to fragment habitat for rare species by building a road through the interior of a tract which includes protected open space. If the Green Acres regulations are not more strictly enforced, the entire Green Acres edifice will crumble.

Compensation

- **Who provides it?**

7:36-26.10(a) An applicant shall provide compensation for a major disposal or diversion of funded or unfunded parkland. Applying for and receiving a grant from the Garden State Preservation Trust fund, or any similar fund dedicated to recreation and conservation purposes as defined in L. 1975, c. 155, s. 3 (N.J.S.A. 13:8A-37f), shall not constitute “providing compensation” within the meaning of this section. All such compensation shall meet the minimum requirements of this section. . . .

That sounds obvious, yet Seaside Heights applied for, and the legislature appropriated, money to restore the historic carousel which was part of the compensation package for the disposed beach. (The compensation package approved by the Appellate division included a carousel in good working condition; after the Supreme Court denied certification, Casino Piers announced that the carousel in its possession was not in good working condition, to the tune of $500,000 in needed repairs.) DEP argued in court that the application for funding met all the requirements in the immediately relevant regulations. However, *all* relevant regulations must be considered, including 7:36-26.10(a).

In real life, any mayor who claimed to have “provided” money for some popular or clearly necessary project, when in fact the municipality had merely applied for and received a grant, would immediately become the target of relentless attacks by political opponents. Moreover, funding for open space and historic preservation must *increase* the amount of open space and the number of historic sites and structures, *not enable the disposal* of open space.

- **Replacement land: reasonably equivalent**

7:36-26.10(d)6 The proposed replacement land shall be of reasonably equivalent or superior quality to the parkland proposed for disposal or diversion. . .value for ecological, natural resource and conservation purposes.

- Neither inland forests nor freshwater wetlands shall be considered reasonably equivalent or superior to a sandy, ocean-front beach for recreation purposes.
- If the conservation purpose of holding the land to be diverted or disposed is protection of specific rare, threatened or endangered species, the compensation package must include land that provides habitat for those species, equal to or more suitable than that provided by the land to be diverted or disposed.

In evaluating the usefulness of the proposed replacement land, the Department shall pay particular attention. . . .;

Upholding the Seaside Heights disposal, the Appellate Division noted that both the disposed beach and the compensating inland parcel provided recreational opportunities, without so much as addressing the "reasonably equivalent" standard. By the Appellate Division's reasoning, an urban playground can be compensation for a disposed beach, or for a remote area with opportunities for rock climbing, since all three afford recreation opportunities. This is why we need changes that might seem redundant: clear language is sometimes simply ignored.

DEP also argued that the compensation package as a whole was reasonably equivalent to the beach. But the compensation package consisted of (1) the carousel; (2) the parcel upon which it was to be located; and (3) the inland wetlands and forests. No one can rationally argue that any of these are "reasonably equivalent" to an ocean-front beach in terms of recreational opportunities; grouping them together will not make the entire package reasonably equivalent to sun-bathing on the sand or surfing in the waves. In this case, the whole is not greater than the sum of its parts.

That the carousel will be located across the boardwalk from the beach does not make it reasonably equivalent; nor does the obvious fact that it will serve many of the same individuals. The regulations do not say the replacement facility may offer recreational activities *complementary* to those formerly enjoyed on the disposed parcel; they say it must be "reasonably equivalent."

In the Stafford solar panels diversion, DEP found that the replacement land was habitat for T & E species, but not specifically the ones living on the diverted parcel.

- **Land held as parkland: use as replacement land**

7:36-4.1(d)

1. A local government unit that receives Green Acres funding shall not convey, dispose of, or divert to a use for other than recreation and conservation purposes any lands held by the local government unit for those purposes at the time of receipt of Green Acres funding. The local government unit shall list such lands on ~~the~~ a proposed Recreation and Open Space Inventory (ROSI) described at N.J.A.C. 7:36- 6.5, which, if funding is granted, will supersede any existing ROSI. The proposed ROSI is required as part of the application for Green Acres funding and, if such application is approved, shall become part of the project agreement described at N.J.A.C. 7:36-9.1. The local government unit shall execute a declaration, described at ~~proposed~~ N.J.A.C. 7:36- 9.1(a), which it shall record with the county clerk after it receives a disbursement of Green Acres funding pursuant to N.J.A.C. 7:36-9.4(f).
2. If a local government unit conveys, disposes of, or diverts to a use other than recreation and/or conservation purposes, any lands held for those purposes, which are not on the

local government unit's ROSI, or removes any lands from a pending ordinance providing that certain lands are being held for those purposes, the conveyed, disposed, diverted, or removed lands may not be included in a compensation package offered for a future diversion or disposal.

(Changes to (1) represent the best sense I can make of the existing wording, which does not appear to be what was intended. The struck-through word "proposed" appears to obsolete.)

In 2019 Englewood was in the process of designating land, including Block 3706 lot 4, as open space. It had also applied for a Green Acres grant, the receipt of which would require 3706/4 to be placed on the ROSI if were so designated. But also at the same time, a DOT project required the disposal of some land already on the ROSI. Where to get qualified replacement land? Englewood redesignated 3706/4 as replacement land for the DOT project—just in the nick of time, before the grant was received.

This was an abuse of the regulations. 3706/4 was changed from designated open space to replacement land not because Englewood decided that it didn't need the property for open space, but solely because what had been deemed to be needed parkland was suddenly the easiest source of compensation land. Here's the buildout crisis again—the cheapest source of compensation land was a parcel that was supposed to become parkland.

- **Is a parcel being held as parkland?**

7:36-25.3(f)2iv Whether the parcel is identified as parkland by signs placed by or approved by the local government unit or by any other means~~;~~. The following shall, in the absence of formal action indicating that the property is being held for one or more specific non-recreation and non-conservation purposes, create a rebuttable presumption that the property is being held for recreation and/or conservation purposes, which may be overcome by clear and convincing evidence to the contrary:

- A sign prominently placed on a property, such as a billboard at a busy intersection, identifying the property as preserved open space;
- A statement by an official of the local government unit, at a public meeting, that the property was acquired for recreation and/or conservation purposes.

This was exactly the situation in Toms River when it decided to build a records storage facility on land it had purchased partially with county open space funds. In addition posting the billboard, Toms River marked the purchase with an on-site public celebration. A Green Acres grant was received *after* the property was purchased, and *before* the records storage facility was proposed, so the property should have been placed on the ROSI.

7:36-26.10(d)2ii(4) Land purchased by a local government unit in whole or in part with funds from a dedicated county or municipal open space tax authorized under N.J.S.A. 40:12-15.1 through 15.9, including, but not limited to, purchases in which funds from such dedicated sources paid only for the appraisal, or with bonds financed with a dedicated open space tax; and . . . .

Another change that should have been construed as necessarily implied by the existing regulations. The inland parcel that became replacement land for the disposed Seaside Heights beach was purchased in a transaction in which open space funds paid for the appraisal.

Permitted uses

■ Recreation and conservation purposes, definition

7:36-2.1 *Definitions*
"Recreation and conservation purposes" means. . . .and P.L. 1995, c. 204.
This term does not include

- headquarters of any private or non-profit organization involved in activities whose scope extends beyond the parkland facility on which it is proposed to be located, including, but not limited to, professional sports association headquarters;
- removal of forest products from land held for recreation and conservation purposes, for commercial sale, unless the Commissioner specifies a recreation, conservation, or historic preservation purpose for such removal and sale;
- use as a wetlands mitigation bank, or for the partial or complete fulfillment of any requirement that must be met before
  - any wetlands may be filled, drained or otherwise destroyed, or
  - a conservation or historic preservation easement of any kind, including but not limited to Green Acres encumbrances, may be removed or lifted from any other property.
- Restaurants and other food service facilities, including but not limited to concession stands and fast food restaurants, unless they are
  - ancillary to a recreation purpose of such land,
  - accessible to the public only through the recreation facility, and
  - open to the public only when the recreation facility is open to the public.

- A new headquarters for the New Jersey State Golf Association was built in Galloping Hill Park in Kenilworth.
- A forest management plan for Roaring Rock Park in Washington Twp., Warren County, provided for commercial sale of felled trees. No recreation or conservation purpose was stated for such removal and sale, rather, the proceeds were compensation for the firm conducting the forest management work.
- A Green Acres parcel in Parsippany-Troy Hills was transferred to a non-profit organization, which designated it as wetlands mitigation bank land. While DEP argued that the transferred parcel itself would still be fully protected Green Acres land, that's not the point: its designation as part of a mitigation bank enabled the destruction of open space elsewhere, contrary to the purpose of the Green Acres program. Land "deposited" into a mitigation bank must not be already protected.
- Examples include the Highlawn Pavilion in Essex County's Eagle Rock Reservation, McCloon's restaurant in South Mountain Reservation.

■ Use of Green Acres park development funds on leased land

7:36-10.1(f) Except as described in (f)1 and 2 below, a ~~A~~ development project shall be located on land that is owned in fee simple by the local government unit, or on land for which the local government unit has obtained an irrevocable lease approved by Green Acres for at least 25 years, or for the expected life of the development or any portion thereof, whichever is greater. Permanent projects, including but not limited to altering the landscape, as when leveling land for athletic fields, will be funded only if the local government holds the land in fee simple or through a permanent easement ~~except as described in (f)1 and 2 below~~. The ~~25-year~~ term of the lease shall begin. . . .

Fort Lee applied for parkland improvement funding, including leveling land to create playing fields, on land leased for 25 years from the Palisades Interstate Park Commission. DEP justifies the granting of funds for projects on leased land on the grounds that playground facilities generally have a 25-year life span. However, landscape changes are permanent, Fort Lee is not guaranteed any lease renewals, and Green Acres funds could thus end up creating a facility that reverts to the control of PIPC after 25 years. At last check, it appeared that the land-leveling part of the proposal had been dropped from Fort Lee's application.

■ **Indoor recreation**

7:36-25.7(d) The local government unit or nonprofit may use a portion of any building constructed on funded parkland under this section for public indoor recreation activities. . . . The use of the building for public indoor recreation activities or public meeting or multipurpose space shall take up no more than 25 percent of the square footage of the building. "Square footage of the building" shall include only areas under the roof and within the permanent exterior walls of the building.

Bogota is planning a new building housing activities in support of outdoor recreation, such as locker rooms and administrative offices, but also an indoor gymnasium. Bogota claims the square footage devoted to indoor recreation is less than 25% by including in the building's square footage a covered but otherwise open-air patio. A close examination of the regulations clearly reveals that this is not permitted, but again, more explicit wording is required to prevent flouting of the regulations.

■ **Time limit on resolution of non-compliance issues**

7:36-25.1(e) If it comes to the attention of the Department that a local government unit or nonprofit has disposed of any portion of its parkland, or diverted it to another use, as described in 7:36-25.2, and if the local government unit or nonprofit has not corrected the disposal or diversion of the parkland, or obtained approval of such disposal or diversion from the Commissioner as provided by 7:36-25.2 *et seq.,* within two years of the date of the inspection report required by 7:36- 25.1(c)5, the Department shall initiate suit for injunctive relief, and any other remedies it deems necessary and appropriate, against the local government or non-profit.

The North Bergen school trailers have illegally been in Braddock Park for over 21 years, and over 11 years since the Office of Green Acres belatedly identified the violation, without a resolution. Green Acres has allowed North Bergen to renege on a commitment to remove the trailers by a specific date, and subsequently allowed North Bergen to file a new application for a diversion, that is, to return to square one, despite repeated bad faith representations by North Bergen in connection with its original diversion application.

Compost facilities have been operating on Green Acres land in Jackson Twp. (Ocean County) and South Mountain Reservation (Essex County) for a number of years in each case.

The regulations presently *authorize* DEP to go to court, but do not require it to do so. Allowing DEP unfettered discretion in this respect has resulted in long term violations of the purpose of the Green Acres program.

ROSI Amendments

7:36-25.3(p) Amendments to a ROSI made without the approval of the Department shall be void and of no legal effect.

Medford Township cited its 1996 removal of a lot from its 1989 ROSI as evidence that a sewage facility on the same lot did not constitute a disposal or diversion of Green Acres land. The 1996 remova was not approved by DEP as required by the regulations, and should not have been evidence of anything other than unacceptable disregard for the regulations.