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ENVIRONMENTAL PROTECTION
OFFICE OF LEGAL AFFAIRS

Notice of Receipt of Petition for Rulemaking

Green Acres rules, N.J.A.C. 7:36-2.1, 4.1, 10.1, 25, 25.1, 25.3, 25.7, 26.1, 26.9, 26.10

Request to amend Green Acres diversion and disposal requirements

Petitioner: Robert Moss

Take notice that on April 19, 2022, the Department of Environmental Protection (Department) received a petition for rulemaking from Robert Moss (petitioner). Petitioner indicates that he frequently benefits from the success of the Green Acres program as a park user and that he has often been involved in Green Acres matters. Petitioner requests that the Department amend the Green Acres Rules, N.J.A.C. 7:36. Particularly, petitioner asserts that the diversion and disposal application rules need amendment to, among other things, address unintended consequences of the requirements. Specifically, petitioner requests that the Department amend N.J.A.C. 7:36-26.1, Department policy on disposals and diversions; substantive standards, N.J.A.C. 7:36-26.9, Major disposals or diversions of parkland; pre-application requirements, N.J.A.C. 7:36-26.10, Major disposals or diversions of parkland; compensation for parkland proposed to be disposed of or diverted, N.J.A.C. 7:36-4.1, General provisions and funding policies, N.J.A.C. 7:36-25.3, Amendment of Recreation and Open Space Inventory (ROSI), N.J.A.C. 7:36-2.1, Definitions, N.J.A.C. 7:36-10.1, General provisions and funding policies, N.J.A.C. 7:36-25.7, Construction of buildings on funded parkland; use of existing buildings on funded parkland, and N.J.A.C. 7:36-25.1, Maintenance requirements for funded parkland; compliance inspection.

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The Petition

Justifications for Diversions

The regulations at N.J.A.C. 7:36-26.1(a), state that it is the Department's policy to strongly discourage the diversion of funded or unfunded parkland. Petitioner requests the addition of language that the regulations are to be strictly construed against disposals, diversions and the sufficiency of proposed compensation, and liberally construed in favor of alternatives. Petitioner asserts that the Green Acres diversion and disposal regulations are not always strictly construed and cites an example involving a clean energy project where Petitioner believes that the regulations should have prevented the diversion from being approved. The rule changes Petitioner suggests are as follows:

N.J.A.C. 7:36-26.1(a) It is the Department's policy to strongly discourage the disposal or diversion of both funded and unfunded parkland The use of parkland for other than recreation and conservation purposes should be a last resort, and should only be considered by a local government unit or nonprofit when the proposed disposal or diversion is necessary for a project that would satisfy a compelling public need or yield a significant public benefit as 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.**

Petitioner also suggests amendments that would enumerate certain types of projects that are not eligible to qualify as meeting the compelling public need or significant public benefit

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standard for diversion or disposal approval with a new section at N.J.A.C. 7:36-26.1(d)1iv.

Specifically, the amended regulation would state that the establishment or reestablishment of a business, stimulating the local economy, delivering electricity generated from renewable sources rather than from non-renewable or CO2 producing sources would not be a basis for a finding of compelling public need or significant public benefit. Petitioner states that this addition would further clarify the intent of the compelling public need and significant public benefit standards as narrowly construed justifications for diversions and disposals. The rule changes Petitioner suggests are as follows:

N.J.A.C. 7:36-26.1(d)1iv 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 CO2-producing sources.**

Additionally, Petitioner requests amendments to N.J.A.C. 7:36-26.1(d)1.iii that would create a mathematical formula for determining when a disposal or diversion of parkland provides an exceptional recreation or conservation benefit. This amendment would give Green Acres a mathematical standard to use when evaluating whether an exceptional recreation or conservation benefit exists. As evidence of the need for this change, Petitioner points to a diversion application that claimed a significant public benefit existed, and he states that an equation would

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have been useful for Green Acres to use to determine whether an exceptional recreation or conservation benefit was present. The rule changes Petitioner suggests are as follows:

N.J.S.A. 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 $\geq \sigma = \text{square root of } (\sum(x_i - \bar{x})^2 / (n - 1))$, 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;**
- **\bar{x} = the average or mean of all values of x_i .**

Extraordinary Costs

Petitioner proposes amended rule language to the alternatives analysis portion of the Green Acres regulations that discuss when an alternative is not reasonable. Specifically, Petitioner proposes to add language to N.J.A.C. 7:36-26.9(e)2ii stating that the cost of an alternative would not be considered “extraordinary” unless it is “significantly disproportionate to

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the cost of a project of similar magnitude and complexity in the local government unit which is applying for the disposal or diversion.” Petitioner asserts that this change will reflect the rising cost to buy land such that land encumbered with Green Acres restrictions will not be viewed as a low-cost option “banked” for development. The rule changes Petitioner suggests are as follows:

N.J.S.A. 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;**

Additionally, Petitioner cites an example where he contends that objections from neighbors to an alternate route ended the consideration of that alternative. Petitioner would add another paragraph to N.J.A.C. 7:36-26.9(e) specifying that opposition from nearby property owners would not be a basis for ruling out an alternative. Specifically, the suggested language is as follows:

N.J.S.A. 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.**

Compensation

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N.J.A.C. 7:36-26.10(a) provides that an applicant must provide compensation for a major disposal or diversion of funded or unfunded parkland. Petitioner would add a sentence to the effect that receiving a grant from a fund dedicated to recreation and conservation purposes would not qualify as compensation for a disposal or diversion. Petitioner states this is because 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. Specifically, the rule language Petitioner suggests is as follows:

N.J.A.C. 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**

N.J.A.C. 7:36-26.10(d)6 requires that replacement land shall be of reasonably equivalent or superior quality to the parkland proposed for disposal or diversion in terms of its value for ecological, natural resource or conservation purposes. Petitioner suggests adding language stating that inland forests and freshwater wetlands shall not be considered to be reasonably equivalent or superior to oceanfront sandy beaches, and that, if the conservation purpose of an area to be disposed or diverted is to protect specific rare, threatened or endangered species, then the compensation package must include land that is equivalent or superior habitat for those specific species. Petitioner cites a case where he alleges that oceanfront beach was replaced with

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inland forest and/or freshwater wetlands, and another case where the compensation land did not include habitat for the threatened or endangered species present on the disposed parcel. The specific language that Petitioner suggests is as follows:

N.J.A.C. 7:26.10(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.**

Petitioner also suggests that land held or proposed to be held as parkland shall not be used for diversion or disposal compensation. He would amend N.J.A.C. 7:36-4.1(d) to state that land listed on a proposed recreational and open space inventory (ROSI) would not be eligible for use as compensation. Further, Petitioner adds language stating that, if a local government conveys, disposes of or diverts land it holds for conservation or recreation purposes but the land is not listed on the ROSI, that land would not be eligible as compensation for a future diversion or disposal. The same would be true of land that is listed as held for recreation or conservation purposes in a proposed ordinance, but later removed from the ordinance. The purpose of this

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amendment would be to discourage local government from using land that it originally designated as for conservation or recreation purposes for replacement land. The rule language Petitioner suggests is as follows:

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.**

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N.J.A.C. 7:36-25.3(f) lists criteria Green Acres can consider when evaluating whether a parcel should be placed on a ROSI. Petitioner would add at N.J.A.C. 7:36-25.3(f)2iv that Green Acres should consider a sign prominently placed on the property identifying the property as open space, or a statement by an official of the local government at a public meeting that the property was acquired for recreation or conservation purposes as a rebuttable presumption that the property is being held for recreation or conservation purposes and therefore should be listed on the local government's ROSI. This amendment would help to avoid a situation where land that should have been placed on a ROSI was used for a purpose other than recreation or conservation.

The rule language Petitioner suggests is as follows:

N.J.A.C. 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.**

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Additionally, N.J.A.C. 7:36-26.10 discusses whether land is eligible to be used as replacement land for a disposal or diversion. Petitioner would add at N.J.A.C. 7:36-26.10(d)2ii(4) that when funds from a dedicated county or municipal open space tax are used to pay for an appraisal in connection with the purchase of a parcel, that transaction should be considered to have been funded by open space funds and therefore should not be eligible to be used as replacement land.

The rule language Petitioner suggests is as follows:

N.J.A.C. 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

Permitted Uses

Petitioner would amend the definition of “Recreation and conservation purposes” at N.J.A.C. 7:36-2.1 to state what the term does not include in four ways. First, Petitioner would amend the definition to state that the term does not include the headquarters of any private or non-profit organization involved in activities whose scope extends beyond the parkland facility on which it is to be located. This amendment would prevent situations like a new headquarters for a private sports association being built on parkland.

Second, Petitioner suggests that the term should not include removal of forest products for commercial sale unless the Commissioner specifies a recreation, conservation or historic

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preservation purpose for their removal and sale. This amendment would prevent the commercial sale of forest products for private gain. Third, Petitioner would change the regulation so that Green Acres encumbered land could not be deposited into a wetlands mitigation bank. This amendment would prevent land that is already protected by its Green Acres encumbrance from being “double counted” as wetlands mitigation. Further, the mitigation bank allows other open space elsewhere to be developed, contrary to the purposes of the Green Acres program. Fourth, Petitioner recommends that restaurants and other food service facilities, including concession stands and fast-food restaurants, should be excluded from the definition of “recreation and conservation purposes” unless they are ancillary to the land’s recreation purpose, accessible to the public only through the recreation facility, and open to the public only when the recreation facility is open to the public. This amendment would prevent restaurants and food service facilities that are not ancillary to recreation from being located on Green Acres encumbered parkland.

Petitioner’s suggested language is as follows:

N.J.A.C. 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;**

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- **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**
 - o **any wetlands may be filled, drained or otherwise destroyed, or**
 - o **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**
 - o **ancillary to a recreation purpose of such land,**
 - o **accessible to the public only through the recreation facility, and**
 - o **open to the public only when the recreation facility is open to the public.**

N.J.A.C. 7:36-10.1 discusses certain eligibility requirements for Green Acres development funding. Petitioner would modify N.J.A.C. 7:36-10.1(f) such that a local government would need to hold a lease for property it does not own that is at least 25 years long, or for the expected life of the funded development, whichever is longer. Additionally, Petitioner would add that permanent projects would be eligible for funding only if the local government holds the land in fee simple or a permanent easement. These changes would prevent

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development projects funded by Green Acres to benefit other parties once a lease term ends.

Petitioner's suggested amendments are as follows:

N.J.A.C. 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. . . .**

Petitioner would also modify N.J.A.C. 7:36-25.7(d) which discusses the use of buildings constructed on funded parkland for indoor recreation to clarify how the square footage of a building is calculated. The language Petitioner suggests is as follows:

N.J.A.C. 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.**

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N.J.A.C. 7:36-25.1 discusses the maintenance requirements for funded parkland, as well as compliance inspections. Petitioner would amend the current regulations to impose a two-year time period for Green Acres to resolve a compliance issue, measured from the date of the inspection report reporting the issue. Petitioner would also add that the Department must initiate suit for injunctive relief and any other remedies against the local government or nonprofit property owner. Petitioner states that this would avoid a situation where compliance issues remain unresolved, and would require the Department to file suit against a property owner with unresolved compliance issues. The language that Petitioner suggests is as follows:

N.J.A.C. 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.

N.J.A.C. 7:36-25.3 contains the procedure for a local government unit to amend a ROSI. Petitioner would amend that regulation to state that amendments to a ROSI made without Department approval would be void and of no effect. This would avoid a situation where a local government unit removes a parcel from its ROSI without Department approval and later argues

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that the diversion of that parcel is not actually a diversion due to its absence from the ROSI.

The language that Petitioner suggests is as follows:

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

This notice and the full text of the petition filed in this matter are available on the Department's website at <http://www.nj.gov/dep/rules/petition.html>.

In accordance with N.J.A.C. 1:30-4.2, the Department will subsequently mail to the petitioner and file with the Office of Administrative Law a notice of action on the petition.

DATE

Gary J. Brower, Director
Office of Legal Affairs