PRELIMINARY STATEMENT

The question presented is whether this Court can allow the Defendants' ongoing and unlawful use of publicly funded parkland. The Plaintiffs filed a Complaint that presents the Court with an undisputed and unlawful diversion of dedicated public parkland in violation of the Garden State Preservation Trust Act, implementing Green Acres regulations, and the Environmental Rights Act, which has resulted in the ongoing impairment of a significant area of James J. Braddock Park ("Braddock Park"). The unlawful impairment began in 2001 and continues today. The Plaintiffs respectfully request that this Court now provide a remedy after the Defendants have collectively failed to resolve this long standing environmental violation.

As set forth in the Complaint and the Defendants' motions, it is now undisputed that North Bergen's school district is unlawfully occupying (to the exclusion of the public) a significant portion of Braddock Park. In the face of strong community opposition, led by Plaintiffs Save Braddock Park-Safe Schools and the New Jersey Conservation Foundation ("NJCF"), the Township of North Bergen (hereinafter "North Bergen" or "Township") nonetheless insists on maintaining permanently 17 trailers, a tot lot, and a parking area in the public park for non-recreational use. Defendants raise the doctrines of pre-emption, primary jurisdiction and exhaustion of administrative remedies to prevent Plaintiffs from securing any equitable and just relief from this Court. Essentially, the Defendants admit that they are responsible for the ongoing violation of the law, as alleged in the Complaint, but argue that this Court is deprived of jurisdiction to provide the Plaintiffs with any remedy. The Defendants' instant attempt to elevate dilatory and unresponsive bureaucracy beyond the reach of this Court's equitable powers and the law should be rejected.

Since the Department of Environmental Protection's Green Acres Program ("DEP") first notified North Bergen and Hudson County (the "County") of their violation of Green Acre laws in 2011, the Township and County Defendants have engaged in continued administrative actions designed to delay any corrective action. DEP has actively participated in North Bergen and Hudson County's failure to provide the public with the benefits of the public parkland by failing to set reasonable time limits on its administrative process and, after eleven years, has never issued any final agency decision.

From 2001, all the Defendants had constructive notice of the violation, and since early 2011, North Bergen had actual notice that it was obligated to remove the trailers from Braddock Park. The Defendants' administrative proposals to temporarily or permanently divert the parkland for a different use were always preliminary, never completed, and only intended to delay the removal of the trailers. The preliminary proposals to divert the parkland to a different use (i.e. trailers instead of normal recreational use by the public, a softball field with parking lot) consists of a non-adversarial process between the applicant owner of property and DEP. This is a process in which the public has the opportunity to speak at a "scoping hearing," followed by a second hearing when a final application is filed, but members of the public are not parties in the process, and, for sure, do not have the ability to stop an unlawful diversion from continuing in the publicly funded parkland while the administrative process is pending. The public has little say over the administrative diversion process, and as the facts of this case indicate, Plaintiffs' participation in the process has been futile. Requiring Plaintiffs to exhaust an administrative remedy before an ongoing impairment of parkland can be stopped is neither adequate nor a remedy that is in the interests of justice.

Moreover, for purposes of the ERA, there is no need to remand the matter to DEP to determine the legality of the undisputed factual circumstances because the illegality of North Bergen's diversion has been admitted by all Defendants. Furthermore, DEP has no expertise nor control over North Bergen's decisions on where and how to house its public school children; such long-term facilities planning is in the hands of North Bergen's Board of Education and the New Jersey Department of Education ("DOE"). These two facts empty Defendants' assertion that DEP has primary jurisdiction over Plaintiffs' ERA claim of any meaning or validity. Contrary to Defendants' claims that they have all been "active" and "diligent, and have not "refused to act" but are "fulfill[ing]" their respective missions or obligations to follow the law, DEP has been paralyzed by North Bergen's failure to evacuate and restore the parkland, as one deadline after another has passed. North Bergen's failure to use its long-term facilities planning process to solve the problem posed by the temporary trailers since it commenced its pre-K program in 2001 (though it had been receiving state funding for such program prior to that date), is thus apparent. It poses a problem beyond the expertise of DEP.

It was not until the Chair of Save Braddock Park-Safe Schools notified DEP of a potential vacant county high school in 2016, that North Bergen commenced a process (at DEP's urging) to acquire that property. In October 2018, North Bergen secured approval of an amendment to its Long-Range Facilities Plan, followed by a voter approved bond referendum in December of that year, that set in motion a system-wide reorganization that will enable the placement of all pre-school children in existing elementary schools, while removing the temporary trailers from Braddock Park. This educational planning process is beyond the jurisdiction of DEP, and is under the control of North Bergen, which for twenty-one years has failed its pre-K children and families, at the same time as depriving its residents of a valuable public right --– i.e., access to parkland.

Despite the undisputed existence of North Bergen and the County's ongoing violation of the Green Acres laws, these local government defendants have continually agreed (by empty promises) and then refused (in action) to remove the trailers from Braddock Park and restore the public parkland to its former recreational use. Instead of urgently complying with DEP's orders and the Green Acres laws, North Bergen has let one deadline after another pass; and, on March 3, 2021, it filed a second pre-application with DEP for a permanent diversion, as part of a concerted effort to perpetually delay compliance with the relevant laws. Another year has passed, and the administrative process continues, with DEP failing to impose any meaningful deadlines or framework on the process, no final agency decision in sight and no relief for the Plaintiffs at hand.

Defendant North Bergen and the County's ongoing disregard for the relevant Green Acres statute and regulations must end, as a matter of law and equity. This Court must grant relief under Count I of Plaintiffs Complaint (the ERA) and compel North Bergen to evacuate the parkland by a date certain; and, under Count II, must compel them to comply with Green Acres' regulations with respect to all other issues involved in an after-the-fact diversion process on a reasonable and timely basis, including restoration of the parkland. DEP is a necessary party in this lawsuit. Plaintiffs are not asking this Court to review a final agency decision nor interfere in DEP's exercise of discretion, as DEP asserts. Rather, Plaintiffs are requesting this Court, pursuant to Count III of the Complaint, to craft an equitable and just remedy without unduly infringing on DEP's delegated authority, regulations and process .

In short, there is little doubt that an enforceable and reasonable timeline to cure this significant impairment of public parkland must be ordered by this Court, because the regulatory process is being abused by the local government Defendants and will otherwise result in the continued failure of compliance for another two decades.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Plaintiffs repeat and reassert the factual allegations set forth in Plaintiffs' Statement of Undisputed Material Facts, with exhibits A-V, which has been submitted with this Brief in Support of Summary Judgment and in Opposition to the Defendants' Motions to Dismiss for lack of subject matter jurisdiction and/or failure to state a claim, as if they are fully stated herein.

On. December 22, 2021, Plaintiffs filed a Complaint for Declaratory and Injunctive Relief against Defendants. The Complaint includes three counts: The first is lodged against North Bergen and Hudson County under the ERA. Count II is a mandamus action seeking an order compelling North Bergen and Hudson County to participate in the Green Acres diversion process in a diligent manner and on a timely basis; and the third count, brought against DEP, seeks relief for that agency's failure to enforce reasonable timelines on the process and to issue a final agency decision, for now over ten years.

In response to Plaintiffs' Complaint, Defendant DEP filed a Notice of Motion to Dismiss and Brief on February 9, 2022; and Defendants North Bergen, Hudson County, Mayor Nicholas Sacco and County Executive Thomas DeGise filed a similar motion on March 17, 2022.

Plaintiffs now respond to these Motions to Dismiss all three Counts of their Complaint, and submit a Cross-Motion for Summary Judgment on Counts I and II of their Complaint against the municipal and county defendants. Plaintiffs firmly believe that this Court has jurisdiction to hear their claim against DEP; it should not be transferred to the Appellate Division, if it should be transferred at all, without first developing an administrative record as to why DEP has permitted this diversion of parkland to continue unabated for over twenty-one years.

LEGAL ARGUMENT

I. SUMMARY JUDGMENT IS APPROPRIATE WHEN THERE ARE NO MATERIAL FACTS IN DISPUTE AND THIS MATTER INVOLVES ONLY QUESTIONS OF LAW.

A moving party is entitled to summary judgment as a matter of law if the pleadings, depositions, and answers to the interrogatories and admissions on file show that there is no genuine issue as to any material fact challenged. R. 4:46-2. Blum v. Prudential Insurance Company of America, 125 N.J. Super. 195 (Law Div.), aff'd, 132 N.J. Super. 204 (App. Div. 1975). By its plain language, R. 4:46-2 dictates that a court should "deny a summary judgment motion only where the party opposing the motion has come forward with evidence that creates a 'genuine issue as to any material fact challenged.'" Brill v. Guardian Life Ins. Co., 142 N.J. 520, 529 (1995). Furthermore, the court must consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party. Id. at 540.

Counts I and II are ripe for summary judgment because there is no genuine issue as to any material fact. The only facts in front of the Court are: (1) When the unlawful diversion commenced: 2001 (Ex. R); (2) When DEP notified North Bergen and Hudson County of the illegality of their conduct: March 2011 (Ex. A); (3) When DEP, North Bergen and Hudson County first agreed that the trailers would have to be removed and the parkland restored: April 2011 (Exs. B and C); (4) When the first pre-application to remedy the after-the-fact diversion occurred: January, 2016 (Ex. R) (5); The number of deadlines to remove the trailers and restore the parkland that came and went unenforced: April 22, 2011 (Ex. A); August 2013, February 21, 2014 (Ex. D); and August 31, 2021 (Ex. F); (6) When North Bergen secured financial resources and approval of its plan to realign the schools so that the pre-K program will be housed in district elementary schools, facilitating the

removal of the trailers: October/December 2018 (Exs. O and P); and (6) When the second pre-application to now divert on a permanent basis was submitted: March 5, 2021 (Ex. T). See Statement of Undisputed Material Facts.

Defendants implicitly agree that this case does not involve any factual questions. Accordingly, they have moved to dismiss for lack of subject matter jurisdiction and failure to state a claim pursuant to R. 4:6-2. In deciding such motion, the Court accepts the Plaintiffs' version of the facts as true. Rumbauskas v. Cantor, 138 N.J. 173, 175 (1994). Of course, summary judgment is granted if the filings show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law R. 4:46-2(c). In this way, Defendants' motions to dismiss can be understood as motions for summary judgment, because what they essentially seek is dismissal of the case on the undisputed facts.

Plaintiffs, on the other hand, seek, on the basis of these same undisputed facts, an Order compelling North Bergen and Hudson County to evacuate and restore the parkland by a date certain under the ERA, and an Order requiring the same defendants to complete their after-the-fact diversion application by a date certain or to respond to Green Acres' completeness questions on a timely basis. As a result, this matter is ripe for summary judgment. See e.g. Mack-Cali Realty Corp. v. State, 466 N.J. Super. 402 (App. Div. 2021) (summary judgement appropriate where State filed motion to dismiss and plaintiff cross-moved for summary judgment and there was no factual dispute); D'Anastasio Corp. v. Twp. of Pilesgrove, 387 N.J. Super. 241, 245, (App. Div. 2006) (prerogative writ complaints involving purely legal issues can be decided by summary judgment).

II. THIS COURT HAS JURISDICTION AND PLAINTIFFS HAVE STANDING TO ENFORCE THE ENVIRONMENTAL RIGHTS ACT AGAINST NORTH BERGEN AND THE COUNTY; AND THE COURT SHOULD ISSUE AN ENFORCEBLE TIMETABLE FOR THE

TRAILERS TO BE REMOVED AND THE PARKLAND TO BE RESTORED.

The Township and County Defendants argue that the Plaintiffs' Complaint should be dismissed because "the DEP has primary and pre-emptive jurisdiction over environmental matters such as those presented herein." Twp./Co. Brief at 9. Similarly, the DEP argues that ". . . the authority to consider and determine the adequacy of an application for a diversion of Green Acres encumbered parkland is one requiring extensive agency expertise and discretion." DEP's Brief at 13. In addition, the DEP argues that it "has the discretion to utilize its limited enforcement resources as it sees fit." Id. at 14. For the reasons that follow, these arguments regarding DEP's primary and pre-emptive jurisdiction must be rejected. The Complaint is properly before this Court and justice requires immediate relief.

The DEP generally has primary jurisdiction over applications to divert parkland that is otherwise dedicated by statute to be used solely for open space or recreation. But surely the "primary" and "pre-emptive" phase of the DEP's jurisdiction, in this instance, passed many years ago. Now -- after more than 21 years of what is admittedly an ongoing and unlawful impairment of Braddock Park -- these circumstances must now be addressed by this Court.

It is a bitter irony that the Township and County Defendants assert that the Plaintiffs' instant Complaint must be dismissed because "The Township/County has been active and diligent in its responses to DEP's requests in the ongoing diversion process." Twp./Co. Brief at 9. And, it is the height of bureaucratic failure for the DEP to argue that the Complaint must be dismissed against it because "[t]he applicants are still in process of submitting their pre-application materials." DEP Brief at 14. Any reviewing tribunal must consider that these arguments are being made by entities that have allowed what they concede to be an unlawful impairment of Braddock Park to continue for over 21 years and running! These arguments must be rejected so this Court can now exert its

equitable powers. Given the undisputed factual circumstances, this Court's exercise of its equitable powers in response to the instant Complaint is an absolute necessity.

It has been held that "[p]rimary jurisdiction recognizes that both the administrative agency and the courts have subject matter jurisdiction, but for policy reasons, the agency should exercise its jurisdiction *first*." Borough of Closter v. Abram Demaree Homestead, Inc., 365 N.J. Super. 338, 348-49 (App. Div. 2004). Here, the DEP has already exercised its jurisdiction *first*. The DEP *first* ordered the Township and County Defendants to remove the unlawful trailers in 2011, 10 years after they had been unlawfully placed there, in 2001. Exactly how long do the Plaintiffs have to wait until DEP's *first* chance to exert its "primary" and "pre-emptive" jurisdiction has run its course? Plaintiffs respectfully but vehemently disagree with the Defendants' arguments that this Court is now deprived of subject matter jurisdiction over this continuing environmental violation. The fact that the diverted parkland is not emitting toxic waste does not make the situation less eligible for injunctive relief; though not creating an immediate health hazard, the continuing impairment of parkland has directly harmed the neighboring communities by depriving them of their recreational space, and in many ways, has also harmed the pre-school children who have had their first school experience in dilapidated trailers.

In addition, if this court were to permit this impairment to continue, it is likely to set a statewide precedent, causing enormous indirect and cumulative harm around the state as other municipalities see North Bergen parking public facilities in public parks without first following the requisite Green Acres procedures.

The Plaintiffs thus seek equitable and appropriate relief based on the legislative intent of the Declaratory Judgment Law, N.J.S.A. 2A:16-56, and the Environmental Rights Act (the "ERA" or "Act"), N.J.S.A. 2A:35A-1 et seq. In the ERA, the legislature declared:

> . . . that the integrity of the State's environment is continually threatened by pollution, impairment and destruction, that every person has a substantial interest in minimizing this condition, and that it is therefore in the public interest to enable ready access to the courts for the remedy of such abuses.
>
> [N.J.S.A. 2A:35A-2.]

It has been held that "**The ERA creates a broad cause of action** which allows a party to seek 'declaratory and equitable relief against any other person for the protection of the environment, or the interest of the public therein, from pollution, impairment or destruction.' N.J.S.A. 2A:35A-4(b)." Raritan Baykeeper, Inc. v. NL Indus., 713 F. Supp. 2d 448, 458 (D.N.J. 2010) (emphasis added). In addition, the definition of "person" in the ERA unquestionably includes and envisions that DEP may be named as a defendant under the ERA. N.J.S.A. 2A:35A-3.

Critically, Plaintiffs now rely on the expressed legislative intent to mandate that the ERA "shall be *in addition* to existing administrative and regulatory procedures provided by law." N.J.S.A. 2A:35A-12 (emphasis added). Therefore, contrary to Defendants' arguments regarding DEP's primary jurisdiction under the Green Acres laws, Plaintiffs are relying on the ERA as an "additional" authority to ask this Court to address the ongoing impairment of the public parkland in an equitable manner. In essence, "the statutory remedy is deemed *additional* to other legal remedies." Superior Air Prods. Co. v. NL Indus., 216 N.J. Super. 46, 60 (App. Div. 1987) (emphasis added).

In Superior Air Prods. Co., the Appellate Division held that "even where DEP enforces the Spill Act, a private cause of action may still lie if the effort provided by DEP enforcement proves insufficient." Id. at 61. The same logic applies here. Even though DEP retains its authority to administer the Green Acres laws and rules, the Plaintiff's instant Complaint is still appropriate

before this Court because the efforts provided by the DEP have proven insufficient to correct what is undisputedly an ongoing violation of the Green Acres laws and regulations.

Thus, the instant Complaint is properly based on the Declaratory Judgment Law and the ERA. Contrary to the Defendants' mis-reading of the Complaint, the DEP's continued review of the deficient diversion applications and the DEP's flaccid enforcement efforts have proven entirely *insufficient* and it is now time for this Court to exert its equitable powers over the Defendants. Given the long and tortured procedural history of this ongoing environmental impairment, the Plaintiffs properly seek to avail themselves of their rights under the Declaratory Judgment Law and the ERA to request this Court now employ its equitable powers. Any remedy of this ongoing impairment must include the DEP, as it is a necessary or indispensable party under R. 4:28-1 and N.J.S.A. 2A:16-56. See Metz Family Ltd. P'ship v. Twp. of Freehold, 32 N.J. Tax 69, 78 (2020). The DEP does not deny that it has an interest in the subject matter of the Complaint, that any order will affect its interests, and that for many years it has entertained different iterations of questionable, incomplete, and unsupported diversion applications presented to it by the Township and County Defendants.

It would be an injustice for this Court to dismiss the Complaint and force the Plaintiffs to await an endless administrative process while there now exists what can only be characterized as an undisputed, ongoing, and continuous violation of the Green Acres laws and regulations. The New Jersey Supreme Court has held that "When the legal rights of parties are clear, it is unjust and unfair to burden them with an administrative proceeding to vindicate their rights." Boss v. Rockland Elec. Co., 95 N.J. 33, 40 (1983). This Court has jurisdiction over the Plaintiff's claims, because it would be patently unjust and unfair to dismiss Plaintiff's Complaint at this juncture.

Specifically, for this Court to find that DEP's jurisdiction necessarily preempts that of this Court, the Court must first find that the DEP has a reasonable or practical basis to continue to entertain the currently incomplete diversion application. But the still incomplete diversion application is futile, at least with respect to the question of when North Bergan will evacuate and restore the property to its former recreational use.[1] It is a sham effort designed by the Township to shield itself from the relief sought in this Complaint. The Defendants submitted the current iteration of the incomplete diversion application shortly after the Plaintiffs sent the ERA notice to all the Defendants. See SUMF ¶¶35-36; Steinhagen Cert. at ¶¶12-13. Clearly, the Defendants' strategy all along was to defend against this lawsuit by claiming that an administrative process was underway. The Court should recognize the never-ending administrative process for what it is and reject the Defendants' arguments. It is simply another delay tactic in a decades-long series of unjustified delays.

The pending diversion application is also an unreasonable basis to deny this Court its jurisdiction over the allegations in the Complaint because the issues needed to be resolved by this court pursuant to the ERA do not need further factual development. North Bergen and DEP decided early on in the process that North Bergen would enter into a temporary lease with the County, and would take all steps necessary to place the pre-school program in an alternative building or to distribute among existing elementary schools, while finding replacement property and making lease payments in accordance with Green Acres regulations in order to make "legal"

[1] Plaintiffs are not seeking relief with respect to other aspects of a diversion application that still need factual development and require DEP's expertise and may proceed but with a reasonable timetable imposed by this Court; that is, the issue of quantity and quality of replacement property, the approval of the lease between the County and Township, including the amount to be paid on an annual basis since 2011, if not earlier, whether such payments have been used by the County exclusively for recreational and open space purposes, and the terms of future restoration of the parkland.

what was clearly an unlawful diversion. The complicated issues entailed regarding securing educational funds or bonding to exercise eminent domain, purchase land and/or build a school or expand current elementary schools were never matters within DEP's expertise or jurisdiction, and still are not within their expertise to warrant referring this matter back to DEP.

Nonetheless, as a necessary premise for the utility of the pending diversion application, the DEP relies on the legal test of whether a proposed application for a permanent diversion contains any "reasonable" alternatives, now that North Bergen has stated, after ten years, that it wants to keep the pre-school program in the park --- contrary to public sentiment, the 2018 bond referendum, the stated goals of its long-term facilities plan and its agreement with DEP since 2011. The requisite alternatives analysis that DEP typically follows provides that in order for the diversion application to be granted, the Defendants must demonstrate as follows:

> … through the alternatives analysis required by N.J.A.C. 7:36-26.9(d)2, that there is no feasible, reasonable and available alternative to the disposal or diversion of funded or unfunded parkland. It shall be the Department's presumption that there is a feasible, reasonable and available alternative not involving parkland for the project for which an applicant seeks to divert or dispose of parkland. The applicant must rebut this presumption through the alternatives analysis in order to obtain the approval of the Commissioner and the State House Commission under this subchapter.

[N.J.A.C. 7:36-26.1(d)(2), (emphasis added).]

However, with regard to this instant matter, as noted above, the DEP has already determined that there are reasonable alternatives available to the Township and County Defendants and, therefore, there is no basis for the Township and the County to apply, 10 years into the application, for a major permanent diversion of the parkland. See SUMF, ¶¶24-34. The Township and County Defendants finally in 2018 set in motion a long-term facilities plan, approved by DOE and funded by the residents, that will enable the placement of the entire pre-school program in the district elementary schools. It cannot now just say there is nowhere to place the children or the

trailers by relying on a self-created hardship (based on their actions over the last 21+ years) to reasonably overcome the presumption and previous determination by the DEP that there are reasonable alternatives to the diversion of this piece of Braddock Park.

Moreover, the question of whether North Bergen may rely on a self-created hardship in order to keep the pre-school program in the park is a legal question, and the doctrine of primary jurisdiction is therefore irrelevant. There is no doubt that this court is not bound by DEP's interpretation of a statute or its determination of a strictly legal issue. New Jersey DEP v. Exxon Mobile Corp., 420 N.J. Super. 395, 404 (App. Div. 2011); Pinelands Preservation Alliance v. State DEP, 436 N.J. Super. 510, 524-25 (App. Div. 2014). This is especially the case when "that interpretation is inaccurate or contrary to legislative objectives." G.S. Dep't of Human Servs., Div. of Youth and Family Servs., 157 N.J. 161 (1999). See also In re City of Atlantic City, 445 N.J. Super. 1, 11 (App. Div. 2016) (Court will not "yield" to agency's interpretation if it is "plainly unreasonable, contrary to language of act or subversive of Legislative intent").

Like all matters of law, this court must apply a *de novo* standard of review to an agency's interpretation of a statute, its regulations, or case law. Russo v. Bd. of Trustees, Police, 206 N.J. 14, 27 (2011); Toll Bros., Inc. v. Twp. of W. Windsor, 173 N.J. 502, 549 (2002); Pinelands Preservation Alliance v. State DEP, supra, 436 N.J. Super. at 525. See also Tumpson v. Farina, 218 N.J. 450 (2014) (legal determination of local official subject to *de novo* review). Because this court has *de novo* review of any legal questions that may pertain to this matter, DEP cannot use its regulatory authority to make a legal determination with respect to whether there are alternatives to a permanent diversion to keep Plaintiffs' request under the Declaratory Judgment Law and the ERA beyond the jurisdiction of the court.

Notwithstanding the above, Defendants' amended diversion application is obviously part of its legal strategy to further delay the inevitable removal of the trailers, and has no significant possibility of being granted.

III. THERE IS NO ADEQUATE ADMINISTRATIVE REMEDY FOR PLAINTIFFS TO EXHAUST TO END THE ONGOING IMPAIRMENT OF PARKLAND; AND, THIS COURT SHOULD COMPEL DEFENDANTS TO REMOVE THE TRAILERS FROM BRADDOCK PARK "IN THE INTERESTS OF JUSTICE."

In defense of their dilatory and abusive conduct, North Bergen and Hudson County, without any reference to the actual facts presented in this case, assert that "The Township/County has been active and diligent in its responses to DEP's requests in the ongoing diversion process." (Twp./Co. Brief at 9). They then go on to present the court with case law requiring a plaintiff to exhaust their administrative remedies and argue that the Plaintiffs' requests for relief are not ministerial in nature; again, without doing a factual analysis of the circumstances presented in this matter nor the nature of Plaintiffs' request for relief against the Township, let alone any of the Defendants. (Twp./Co. Brief at 20-27).

In this case, Plaintiffs are requesting this Court to compel North Bergen to remove the trailers and restore the parkland, and to complete their after-the-fact diversion application in a timely manner. Both requests are ministerial in nature insofar as they simply require the Township to abide by a statutory obligation, and are not compelling them to exercise their discretion. Following DEP's directive to remove the trailers by a date certain, though a complicated process, is not a discretionary act; similarly, completing their pre-application may involve lots of decisions, staff resources and consultants, but it too is not discretionary. Furthermore, requiring Plaintiffs to exhaust their alleged administrative remedies, is futile; the DEP diversion process is a regulatory

process between a landowner and DEP, it is not an adequate remedy for members of the public, who are harmed by an impairment of parkland that has now existed for twenty-one years.

Prerogative Writ of Mandamus

In addition to Plaintiffs right to compel North Bergen to remove the trailers under the ERA, as established, supra Point II, Plaintiffs have a constitutional right to institute civil proceedings to "safeguard against official wrong[doing]" and "to compel performance of a public duty." Mullen v. Ippolito Corporation, 428 N.J. Super. 85, 104-106 (App; Div. 2012) (quoting Garrou v. Teaneck Tyron Co., 11 N.J. 294, 302 (1953)).

Article VI, Section V, paragraph 4, of the New Jersey Constitution reads as follows:

> Prerogative writs are superseded and, in lieu thereof, review, hearing and relief shall be afforded in the Superior Court, on terms and in the manner provided by rules of the Supreme Court, as of right, except in criminal causes where such review shall be discretionary.

The full meaning and scope of this provision is not evident from the plain language of the clause,[2] but must be garnered from the substantive nature of the various writs –- the writs of *mandamus, certiorari, prohibition* and *quo warrranto* -- as they developed under common law. These writs constituted a series of remedies "by which officials and bodies in the executive branch of government at local and higher levels were kept within their respective spheres and were held to methods prescribed by law." Ward v. Keenan, 3 N.J. 298, 302 (1949).

[2] On the face of this clause, one can conclude (1) that prerogative writs were superseded in the 1947 Constitution, and (2) that "the review, hearing and relief" associated with such writs "shall be afforded in the Superior Court," but "on terms and in the manner provided by rules of the Supreme Court, as of right." Ibid. Why these writs were superseded is not answered in the clause itself, but case law makes clear that "widespread dissatisfaction" with certain aspects of their implementation was the primary cause; and safeguarding individual rights against public officials and governing bodies, while avoiding such procedural defects, was the goal behind the change. Ward v. Keenan, supra, 3 N.J. at 303, 308.

In particular, throughout the 19th Century, New Jersey courts had taken "in almost every respect a more liberal view of the province of the writ than the courts of other commonwealths." Id. at 305-306 (citation omitted). And, the special significance of the broad scope of such writ, as applied in New Jersey, in protecting an aggrieved citizen from almost every form of improper official action was particularly noted. Id. at 306. As early as 1876, the variety of uses to which the various writs were used in civil matters was summarized by Justice Dixon in, Ferry v. Williams, 41 N.J.L. 332, 338 (Sup. Ct. 1879):

> These cases seem to indicate that with us the exception to the rule is extended so far as to justify this court in acting by mandamus, . . . at the instance of private persons, for the redress or prevention of public wrongs by public bodies and officers, whose official sphere is confined to some political division of the state, whenever the applicant is one of the class of persons to be most directly affected in their enjoyment of public rights, and the public convenience will be subserved by the remedy desired. The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks.

See also Switz v. Middletown, 23 N.J. 580, 625 (1957) (right to be heard to challenge government action is constitutionally assured, Art. VI, Sec. 5, ¶4, yet the nature and scope of the relief depends upon the application of principles which control the granting of the writ, such as a *mandamus).*

Accordingly, this court must be very circumspect when deciding whether to shut the court house doors to citizens, such as Plaintiffs, who are trying vindicate important public rights and hold their local government officials accountable, when they obviously have received no relief elsewhere for so long.[3]

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[3] It is also established that Plaintiff's joinder of their claims for (1) injunctive and declaratory relief under the ERA and (2) relief in lieu of mandamus is proper. N.J. Const. (1947) Article VI, §2, ¶4 states: " Subject to rules of the Supreme Court, the Law Division and the Chancery Division

Exceptions to the Exhaustion Requirement

Today, R. 4:69 governs Actions In Lieu of Prerogative Writs. Consistent with the common law, R. 4:69-5 requires:

> Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted.

In addition, R. 4:69-6(a), provides that "No action in lieu of prerogative writs shall be commenced later than 45 days after the accrual of the right to the review, hearing or relief claimed, except as provided by paragraph (b) of this rule."[4] Accordingly, R. 4:69 (i) implements a person's constitutionally protected right of access to the Superior Court to challenge all government action and secure declaratory and injunctive relief, but (ii) places jurisdictional time limitations on that right, and (iii) conditions it on the exhaustion of administrative remedies.

It is axiomatic, however, that the exhaustion of remedies requirement is neither jurisdictional nor absolute. Matawan v. Monmouth County Bd. of Taxation, 51 N.J. 291 (1968) (legal question of constitutionality not requiring county board's expertise does not require

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shall each exercise the powers and functions of the other division when the ends of justice so require, and legal and equitable relief should be granted in any cause so that all matters in controversy between the parties may be completely determined." See also O'Neill v. Vreeland, 6 N.J. 158, 165 (1951) (the "jurisdiction of the Law and Chancery Divisions being the same"); Garrou v. Teaneck Tyron Co., supra 11 N.J. at 305 ("joinder of such claims, in appropriate circumstances such as those presented in the instant matter . . . will serve the ends of sound judicial administration"); Vineland Shopping Center v. De Marco, 35 N.J. 459 (1961) ("both trial divisions of the Superior Court are required to employ the same principles of justice"); Ward v. Merrimack Mutual Fire Ins. Co., 312 N.J. Super. 162 (App. Div. 1998) (the 1947 Constitution empowers both the Law and Chancery Divisions with co-equal, and often concurrent jurisdiction).

[4] In this matter, given the continuous, ongoing nature of North Bergen's unlawful impairment of parkland, the Defendants do not raise the issue of timeliness; in fact, they take the position that this matter is not ripe for adjudication since DEP has not made a final agency determination. Twp./Co. Brief at 17. But, this notion of ripeness ignores the fact that North Bergen has been unlawfully occupying the parkland continuously now for twenty-one years.

compliance with administrative appeal process). The "interests of justice" qualification confers discretion on the court before which the rule is raised. See e.g., Baldwin Constr. Co. v. Essex, 16 N.J. 329 (1957) (permitting landowners to seek relief directly under Art. VI, Sec. 5, ¶4, from what is asserted to be discrimination in assessments without requiring exhaustion of administrative remedies under R. 4:69-5's language "in the interest of essential justice"); Keane v. Twp. of Monroe, 25 N.J. Tax 479 (Tax Ct. 2010) (exhaustion of administrative remedies not required when taxpayer is seeking prospective relief based on entire assessment list, and not a revision of an assessment already made); and J.H. Becker, Inc. v. Township of Marlboro, 82 N.J. Super. 519, 526-27 (App. Div. 1964) (challenge to assessor's overall procedures, as contrasted with assessment of a particular parcel of real property, does not require exhaustion of administrative remedies).

Rather, R. 4:69-5 "vests discretion in the trial court to determine whether the interests of justice require that the process of administrative appeal be by-passed, and no rigid formula can be prescribed for the exercise of that discretion." Redeb Amusement, Inc. v. Hillside, 191 N.J. Super. 84 (Law Div. 1983) (citing Durgin v. Brown, 37 N.J. 189, 203 (1962)). Case law is clear that when *only questions of law* are at issue, exhaustion of administrative remedies may be viewed as resulting in useless delay. 21st Century v. D'Alessandro, 257 N.J. 320, 322 (App. Div. 1992); see also Levin-Sagner-Orange v. Rent Leveling Board, 142 N.J. Super. 429 (Law Div. 1976) (where only issue was "novel question of whether the HUD regulation, if valid, preempts the application of the Orange rent leveling ordinance to plaintiffs," they were not required to apply for administrative relief before the court could intervene); and, when plaintiffs are challenging an action of the local authorities, such as here, the *futility* of requiring that local administrative remedies be exhausted is apparent. 21st Century v. D'Alessandro, supra, 257 N.J. at 323. In addition, courts have also noted that cases involving "*important public rather than private interests*

which require adjudication or clarification" have satisfied the "interests of justice" standard in R. 4:69-5. See Mullen v. Ippolito Corp., supra, 428 N.J. Super. at 85 (where plaintiffs complained to relevant municipal officers for over 13 years and violations of the zoning and public safety laws remained unabated).

In this case, all three exceptions apply: First, Plaintiffs' claims involve an important public right: the right of access to dedicated recreational parkland that cannot be eliminated simply because local officials deem it convenient to do so, have the ostensible authority to do so, and have the political power to prevent federal or state enforcement. Plaintiffs, their members and the residents of North Bergen and Hudson County have for twenty-two years lost the use of a ballfield and public parking that may seem insignificant to government officials, but represents a major loss for those living in a dense, urban environment such as North Bergen.

Second, there is no factual dispute posed in this mandamus action against North Bergen and Hudson County. All parties agree that (1) the occupation of the parkland by North Bergen constitutes an unlawful diversion of dedicated parkland. and (2) North Bergen is currently in the process of implementing a long-term educational facilities plan, approved by the NJ DOE in October 2018, that is designed to solve the problem of physical space for the pre-K program. To the extent any legal issue exists, it is whether defendants, who willfully have not used their authority or resources to provide permanent facilities for the pre-K program to date, should be estopped from changing their commitment to remove the trailers from Braddock Park simply because it is, perhaps, more convenient for them to maintain the status quo. This is an after-the-fact diversion, and after-the-fact does not necessarily mean permanent, especially in this case, where local officials have maintained since 2001 (until August 2020) that the diversion is intended to be temporary. See e.g., Hirsch v. Amper Fin. Servs., LLC, 215 N.J. 174, 189 (2013) (Estoppel

"is designed to prevent a party's disavowal of previous conduct if such repudiation would not be responsive to the demands of justice and good conscience") (quoting Heuer v. Heuer, 152 N.J. 226, 237 (1998)); In re Johnson, 215 N.J. 366, 379-80 (2013) ("Equitable estoppel is designed to prevent disavowal of prior conduct if a change of course would be unjust"); W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 562 (1989) ("We have similarly insisted that government adhere to strict standards in its contractual dealings . . . [prohibiting] conduct that seems inconsistent with the notion that government must act fairly and 'with compunction and integrity'"); and Vogt v. Belmar, 14 N.J. 195, 205 (1954) (While not applied as freely against the public as in the case of private individuals, the doctrine of estoppel may be invoked against a municipality to prevent manifest wrong and injustice). Accordingly, North Bergen, Mayor Sacco, Hudson County, and County Executive DeGise should be estopped, as a matter of law and equity, from converting this temporary diversion into a permanent diversion and should not be permitted to assert that it is impossible to relocate the pre-K program out of the park, when any such hardship, if any, has been self-imposed.

Finally, there is also no local administrative remedy available through which Plaintiffs are able to challenge the Township's and County's actions; and the DEP administrative process that all Defendants propound must be exhausted is neither a remedy through which the public is able to force the cessation of the unlawful diversion, nor an adequate one. The administrative diversion process, which was not initiated by North Bergen until 2016 --16 years after the diversion commenced and 5 years after DEP notified Defendants of the violation – is designed primarily to address compliance issues arising from an after-the-fact diversion, such as the extent and nature of replacement property and lease payments made by North Bergen to Hudson County, which are required to be used solely for recreational purposes. It is a non-adversarial process between the

applicant owner of property and DEP; a process in which the public has the opportunity to speak at a "scoping hearing" and a second hearing when a final application is filed, but members of the public are not parties and have no ability to control the proceedings. This procedure is a forum for the landowner and DEP to resolve matters, and Plaintiffs do not have the ability through this proceeding to stop an unlawful diversion from continuing. The public has little say over the administrative diversion process, and as the facts of this case indicate, Plaintiffs' participation in this process has been futile. DEP's directives to evacuate the parkland go unenforced, and North Bergen has effectively prevented DEP from reaching a final agency decision, which would have to be approved by the DEP Commissioner and the State House Commission, before Plaintiffs would have recourse to the courts. Requiring Plaintiffs to exhaust an administrative remedy that, under the circumstances, is neither adequate nor a remedy is not "in the interests of justice." R. 4:69-5.

In short, North Bergen and Hudson County have violated the Green Acres statute first by failing to apply for a diversion in 2001 and then failing to notify DEP about its illegal diversion; and once caught in 2011, have abused the administrative process for the past ten years. (E.g., by 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 further delaying the diversion process by starting it anew in August, 2020). Defendants North Bergen, Hudson County, Mr. Sacco, and Mr. DeGise have thus failed to properly serve their constituents in accordance with state law; an outrageous fact that this Court must remedy by ordering them to remove the trailers

from the parkland by a date certain and to participate in the DEP regulatory process in a reasonable and diligent manner.

IV. THIS COURT CAN RETAIN JURISDICTION TO DEVELOP A RECORD ON WHICH THE SUPERIOR COURT CAN COMPEL DEP TO COMPLETE THE DIVERSION PROCESS ON A TIMELY BASIS AND ISSUE A FINAL AGENCY DECISION.

In early June 2020, DEP's Green Acres program was properly notified under the ERA that Plaintiffs had waited long enough, and wanted the then 19-year unlawful diversion in Braddock Park to end. From 2001, North Bergen officials had stated that the location of the 17 trailers was temporary, but residents saw only one delay of that commitment after another. SUMF, ¶¶35, 41, Exs. R, & T. Instead of asserting its regulatory authority to ensure the end of the parkland impairment, DEP permitted the municipal and county Defendants to start the administrative process over, this time, authorizing them to apply for a permanent diversion. SUMF, ¶¶31, Ex. S.

And now, after DEP has failed to take any action that would expedite the completion of the administrative process, it wants to be dismissed from this case, because DEP allegedly cannot be held accountable for inaction in the Law Division, and Plaintiffs are seeking an order compelling DEP to deny a "yet to be submitted" diversion application. (DEP Brief at 10-14). Defendant DEP not only misconstrues Plaintiffs' request for relief under Count III,[5] but also forgets about the one exception to Appellate Court jurisdiction over state agencies, which pertains here: lack of an administrative record amenable to appellate review. Montclair v. Hughey, 222 N.J. Super. 441, 446 (App. Div. 1987).

[5] Count III states a mandamus claim against DEP for failure to satisfy its ministerial duty to process the diversion application in a timely manner; Plaintiffs are "compel[ling] the exercise of discretion, not interfer[ing] with that discretion" nor seeking review of a final agency decision. Colon v. Tedesco, 125 N.J. Super. 446 (Law Div. 1973).

As Plaintiffs' Statement of Facts indicates, there is a chronology establishing the prolonged administrative process to date, but there is no record as to why DEP has permitted the process to go beyond the typical "one-year" diversion process. SUMF, ¶20. DEP issued a Notice of Violation dated March 16, 2011. SUMF, ¶5, Ex. A. Since that time, DEP has yet to issue a final agency decision, let alone North Bergen to submit a diversion application or even complete a pre-application. Because there is no record amenable to review, this Court should retain jurisdiction over Count III to enable proper fact-finding to occur prior to issuing a mandamus to ensure the timely completion of the process.

As noted *supra* Point III, the 1947 Constitution superseded the prerogative writs "and, in lieu thereof" afforded "review, hearing and relief . . . in the Superior Court, on terms and in the manner provided by rules of the Supreme Court as of right." N.J. Const., art. VI § 5, ¶4. Accordingly, "[in] New Jersey, judicial review of administrative agency determinations has the support of a special constitutional provision." In re Senior Appeals Exam'rs, 60 N.J. 356, 363. (1972). Pursuant to this constitutional grant, the Supreme Court adopted R. 2:2-3(a)(2), which contemplates that "every proceeding to review the action or inaction[6] of a state administrative agency would be by appeal to the Appellate Division." Pascucci v. Vaggott, 71 N.J. 40, 52 (1976). This Supreme Court rule mandates the "exclusive allocation" to the Appellate Division of review of final decisions and actions of any state administrative agency, and is, thus, "not jurisdictional

[6] Plaintiffs agree that, typically, if a state administrative agency, such as DEP, fails to complete its proceedings in a timely manner, a person adversely affected by such inaction may apply to the Appellate Division for an order to compel the agency to act. See e.g., Sod Farm Assocs. v. Township of Springfield, 366 N.J. Super. 116, 131-34 (App. Div. 2004); In re Failure by Dep't of Banking & Ins., 336 N.J. Super. 253, 261 (App. Div. 2001); and Johnson v. New Jersey State Parole Bd., 131 N.J. Super. 513, 519 (App. Div. 1974), certif. denied, 67 N.J. 94 (1975). Such application for relief does not seek to compel a specific form of agency action; it only seeks a remedy for arbitrary inaction. See Switz v. Township of Middletown, supra, 23 N.J. at 587-588.

in the strict subject-matter sense." Vas v. Roberts, 418 N.J. Super. 509, 521-522 (App. Div. 2011) (holding that "because the allocation to the Appellate Division is not jurisdictional," the Division, "may, in the public interest, opt to address the merits of a dispute improvidently brought before [the Appellate Court])." Because the Law Division, Chancery Division and Appellate Division are all part of the Superior Court, courts in each of these divisions have acknowledged an exception to the exclusive allocation to the Appellate Division of review of state agency action or inaction that is applicable here: no agency record amenable to appellate review.

In Montclair v. Hughey, supra, 222 N.J. Super, at 441 (App. Div. 1987), the DEP sought review of a decision of the Chancery Court in Essex County denying its motion to transfer to the Appellate Division a proceeding brought by Township and County officials to enjoin the DEP from implementing its administrative order to remove barrels of contaminated soil. The Appellate Court affirmed the decision denying DEP's motion to transfer, holding that the matters in controversy were properly instituted in the Chancery Division because this was a case "brought to halt an alleged threatened breach of public and private rights, not to review an administrative proceeding." Id. at 447-8.[7] This holding has been followed in several cases since. See e.g., State Farm Mut. Auto. Ins. Co. v. State, 227 N.J. Super. 99 (App. Div. 1988) (holding that where there are factual issues raised concerning the assessment for Rate Counsel's representation of the public interest, the Appellate Division is not a convenient forum to make a determination as to the reasonableness of the assessments charged in the absence of the creation of a record which is

[7] It should be noted that at, one time, there was a second exception to mandatory allocation to the Appellate Division known as the "single locality" rule. Other than still requiring condemnation actions to be brought in the Law Division, the New Jersey Supreme Court "jettison[ed] the single locality exception to the broad rule that lodges appellate jurisdiction from the actions of state agencies in the Appellate Division" while reaffirming the lack of fact-finding and agency record exception set forth in Montclair v. Hughey. Infinity Broadcasting Corp. v. New Jersey Meadowlands Comm'n, 187 N.J. 212 (2006).

amenable to appellate review); Cohen v. Bd. of Trustees of University of Medicine and Dentistry of New Jersey, 240 N.J. Super. 188) (Ch. Div. 1989) (transferring litigation seeking to force the Trustees of the UMDNJ to calculate and pay salaries in a certain fashion to the Law Division, not the Appellate Division, in part because internal decisions failed to be open to formal or informal challenges prior to adoption and there was no record amenable to appellate review); and Enertron Industries, Inc. v. Mack, 242 N.J. Super. 83 (App. Div. 1990) (where Law Division erred in dismissing the complaint because plaintiffs were "in the wrong place." Prerogative writ action to compel agency action may be filed in the Law Division, but once a "final agency" decision was issued, litigation should be transferred to Appellate Division).

Similarly, other courts acknowledge the propriety of the Appellate Division remanding a matter to the Law Division or the agency for factfinding, when such action has been initiated in the "proper" Superior Court division, but there is no record amenable to review (including two cases cited by DEP). See Strategic Envtl. Partners, LLC.v. New Jersey Dep't of Envtl. Prot., 438 N.J. Super. 125 (App. Div. 2014) (acknowledging jurisdiction to review DEP emergency order, but remanding to the Law Division to develop agency record on which to conduct meaningful review); Twp. of Neptune v. NJDEP, 425 N.J. Super. 433 (App. Div. 2012) (where DEP was the sole defendant, Appellate Division temporarily remanded the matter to DEP to create a factual record regarding Township's claim of failure to dredge State navigational channels in the Bay); and Hospital Center at Orange v. Guhl, 331 N.J. Super. 322 (App. Div. 2000) (noting ability to remand to trial court to develop record, but in this case, allowing supplementation of the record, and since agency issued decisions, remaining issues were ripe for adjudication); Cf. Jersey City v. State Dept. of Envtl. Prot., 227 N.J. Super. 5 (App. Div. 1988) (lease of a portion of the Park

constitutes *a final agency decision* and no need to remand for factual hearing, since record is sufficient because of multiple public hearings on the issue).

In this matter, Plaintiffs joined DEP as a necessary party; it was required to give notice to DEP under the ERA, though as argued in Point II, supra, DEP's failure to force North Bergen to end the impairment of parkland does not involve any factual questions on which this court should defer to DEP's expertise. Once Plaintiffs decided to name DEP, the entire controversy doctrine required Plaintiffs to bring their claim for DEP's "arbitrary inaction," together with its claims against the municipal and county defendants, in one court.

The regulatory process involves the applicant, the Township and County, and DEP. They are all invited to the dance, while the public is effectively excluded, except for the opportunity to be heard at the scoping hearing (in the beginning of the process) and at the end, when DEP is ready to make a final agency decision. Accordingly, the flip side of asking this Court to compel North Bergen and Hudson County to comply with DEP's directives and regulations in a timely and diligent manner is to ask this Court to compel DEP to conduct and complete the diversion process, also on a timely basis. Insofar as all Defendants are responsible for the pace, or lack thereof, they both must be ordered to complete the administrative process by a date certain; the regulatory diversion process has dragged on now for over ten years since DEP first gave notice to Hudson County of a gross statutory violation of the Garden State Preservation Trust Act, N.J.S.A. 13:8C-32(a) & (b)(1), and several Green Acres regulations, and Plaintiffs demand a remedy.

Contrary to DEP's assertions, this is a mandamus action seeking to compel DEP to satisfy its ministerial duty to end unlawful diversions promptly and to process applications to divert after-the-fact in a timely manner; Count III does not state a claim based on the pre-1947 Constitution writ of *certiorari*. That is, Plaintiffs are not requesting the Superior Court to review a final agency

decision or a discrete agency action.[8] Although Plaintiffs believe that DEP's decision to permit North Bergen and Hudson County to change the nature of its pre-application diversion application ten years after the violation was first noticed (and North Bergen stated to DEP and the public that the placement of the trailers in the park was temporary) was arbitrary, [9] Plaintiffs do not challenge that action specifically. Plaintiffs claim that such decision was just one more affirmative decision that together with other decisions constitutes a failure of DEP to control its administrative process and bring it to closure. That is, affirmative decisions that together result in "arbitrary inaction" that must be remedied.

The looming question at this time is why DEP has abdicated its statutory duty to process diversion applications on a timely basis. Plaintiffs do not know why it took three inspections of Braddock Park, before DEP decided to issue a Notice of Violation to Hudson County; Plaintiffs do not know why DEP did not impose deadlines by which North Bergen had to respond to DEP's completeness questions; Plaintiffs do not know why DEP allowed one date after another to lapse, giving North Bergen the impression that there was no urgency in removing the trailers from the

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[8] Many of the cases cited by DEP are simply inapposite since they involve review of a final agency decision, which is not the case here. E.g., Williams v. N.J. Dept. of Corrections, 423 N.J. Super. 176 (App. Div. 2011) (involving denial of inmates' administrative action challenging the authority of the DOC to transfer himself and other inmates from the general prison population to the Adult Diagnostic Treatment Center); Mutschler v. NJDEP, 337 N.J. Super. 1 (App Div. 2001) (involves review of an affirmative action by DEP—an issuance of a permit); Dolan v. City of East Orange, 287 N.J. Super. 136 (App. Div. 1996) (involves challenge to the discipline and termination of a municipal employee); Equitable Life Mort. V. N.J Div. of Taxation, 151 N.J. Super. 232 (App. Div.), certif. denied, 75 N.J. 535 (1977) (challenge to corporate tax assessment on ground that the manner in which the assessment was made violated rule-making requirements of the APA did not belong in Chancery Division; even if viewed as nonaction rather than agency action, it does not involve a ministerial duty so belongs in Appellate Division).

[9] It appears DEP required North Bergen and Hudson County to add a second, after-the fact diversion to its initial diversion application; and the two defendants used the opportunity to renege on their commitment to the public to place the pre-K program in district elementary schools as part of the school re-alignment approved by NJ DOE in October 2018. See Estoppel argument, supra Point III).

Park. Further information is required in order for a court to compel DEP to reach a final agency decision within a reasonable time period. See Colon v. Tedesco, supra, 125 N.J. Super at 446 (in a case brought by a migrant worker, among others, who claimed that he was harmed by Dept. of Labor's failure to enforce a statute, plaintiffs were entitled to discovery before a hearing because there might be agency "abuses which [otherwise] may never be discovered").

At this juncture, there is no administrative record on which a court can decide why DEP has violated its statutory duties. Further fact-finding and discovery are required. Plaintiffs thus request this court to retain jurisdiction over Count III, rather than transfer it to the Appellate Division, which may just turn around and remand it back to this court to develop a record. As the court stated in State Farm Mut. Auto. Ins. Co. v. State, retaining jurisdiction of Count III "will also produce a speedier disposition in a matter affecting the public interest than would be achieved by transferring the matter to the Appellate Division."" Id., supra, 227 N.J. Super. at 132.

What is certain is that, contrary to DEP's assertion, there is authority to compel DEP to complete its administrative process within a reasonable time period. See Petition of Howell Twp. v. Monmouth, 371 N.J. Super. 167, 187-188 (App. Div.), certif. denied, 182 N.J. 144 (2004) (ordering an administrative agency to take action by a date certain was required when "[m]ore than three years have elapsed since our remand to COAH," during which, "the only action COAH has taken to complete the remand is to prepare a pre-mediation report and schedule mediation"). Like the Appellate Court in Petition of Howell Twp., this Court should be moved by the "disturbing lack of appreciation [by DEP] of the agency's obligation to discharge its statutory responsibilities in an expeditious manner" and, after further fact-finding, this Court should set forth "a schedule for completion" of the agency's process. Id. at 188.

CONCLUSION

For all the foregoing reasons, this Court should grant summary judgment on Counts I and II against the Township and County Defendants, deny DEP's motion to dismiss, and hold a pre-trial scheduling conference with respect to Count III against DEP so a discovery schedule can be devised.

Respectfully submitted,

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