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ENVIRONMENTAL PROTECTION

NATURAL AND HISTORIC RESOURCES

Green Acres Program Rules

Readoption: N.J.A.C. 7:36

Proposed: February 7, 2011 at 43 N.J.R. 252(a).

Adopted: February 6, 2012 by Bob Martin, Commissioner, Department of Environmental Protection.

Filed: February 7, 2012 as R.2012 d.053, **without change**.

Authority: N.J.S.A. 13:8A-1 et seq., 13:8A-19 et seq., 13:8A-35 et seq., 13:8C-1 et seq., and P.L. 1961, c. 46; P.L. 1971, c. 165; P.L. 1974, c. 102; P.L. 1978, c. 118; P.L. 1983, c. 354; P.L. 1987, c. 265; P.L. 1989, c. 183; P.L. 1992, c. 88; P.L. 1995, c. 204; P.L. 1999, c. 152; P.L. 2007, c. 119; and P.L. 2009, c. 117.

DEP Docket Number: 01-11-01.

Effective Date: February 7, 2012.

Expiration Date: February 7, 2019.

The Department of Environmental Protection (Department) hereby readopts without amendment the Green Acres Program rules, N.J.A.C. 7:36. The Green Acres Program rules implement the purposes and objectives of the Green Acres laws in order to help ensure that there is access to and an adequate supply of lands for public outdoor recreation or conservation of natural resources. The rules provide the criteria under which, and procedures by which, Green Acres will award funding to counties, municipalities, and nonprofit organizations for funding for the acquisition and

development of land for outdoor recreation and conservation purposes. The rules establish the procedures by which the Department will ensure that lands acquired or developed with Green Acres funding, and all other lands held by a local government unit for recreation and conservation purposes at the time the local government unit received Green Acres funding, permanently remain in use for recreation and conservation purposes. Finally, the rules establish the procedures and standards for the limited circumstances under which a local government unit or a nonprofit may obtain the prior approval of the Commissioner and the State House Commission to use, for other than outdoor recreation and conservation purposes, those lands it holds that are subject to Green Acres restrictions, and the compensation requirements for such approvals.

This adoption document may also be viewed or downloaded from the Department's website at <http://www.nj.gov/dep/rules/adoptions.html>.

Summary of Public Comments and Agency Responses:

During the 60-day public comment period, which closed on April 8, 2011, the Department received one written comment on the proposed readoption from the New Jersey Chapter of the Sierra Club. The comment letter was co-signed by Ken Johanson, Chair, New Jersey Chapter, Sierra Club; Bob Moss, Green Acres Issues Coordinator, New Jersey Chapter, Sierra Club; and Laura Lynch, Conservation Chair, New Jersey Chapter, Sierra Club. The comments received and the Department's responses are summarized below.

1. COMMENT: The Green Acres rules allow diversions in cases of “compelling public need,” but the term is loosely defined. The regulations should specify that there must be a compelling public need to build exactly on the targeted parcel of protected land. Moreover, the absence of available vacant land should not be considered a dispositive factor in determining compelling public need. If a lack of available land creates a compelling need, then eventually every project will qualify for approval as a diversion of parkland.

RESPONSE: Although the Department proposed to readopt N.J.A.C. 7:36 without amendment in order to prevent a lapse in the rules, before the end of the calendar year it does plan to begin the process of soliciting stakeholder input and drafting rule amendments in order to better conform the rules to its current policy objectives. As part of this effort, it will review the rule markup submitted by the commenters (which includes the suggested changes summarized in these comments) as part of its comment letter and solicit input from the commenters about whether “compelling public need” should be defined in more detail in the rules. On the issue of whether applicants should be required to demonstrate that a specific parkland site is necessary for a proposed diversion/disposal, the Department notes that the current rules at N.J.A.C. 7:36-26.1(d)2 do require applicants to demonstrate that there is no “feasible, reasonable and available” non-parkland alternative site for a project that requires the diversion or disposal of Green Acres encumbered parkland. As noted in this subsection, the rules presume that there are non-parkland sites for projects that would constitute a diversion or disposal of parkland, and place the burden on the applicant of proving otherwise.

On the issue of whether lack of available land could be construed to create a compelling need for the diversion or disposal of parkland, the Department notes that under the current rules at N.J.A.C. 7:36-26.4(e)3 and 26.9(e)3 an applicant may only determine that an alternative site is “not available” if the alternative relies on use of land that is not owned by the applicant **and**:

- i. The owner is unwilling to sell or transfer the land to the applicant or to allow the applicant to lease or otherwise obtain, utilize, expand or manage the land for the purposes of the project; and
- ii. Condemnation of the land is not available to the applicant or is not reasonable under one or more of the factors at (e)2 above.

The factors referenced in N.J.A.C. 7:36-26.4(e)2 and 26.9(e)2 include “additional construction costs of an extraordinary magnitude,” “extraordinary operation or safety problems,” and “adverse social, economic or environmental impacts of extraordinary magnitude.”

2. COMMENT: References to “significant public benefit” and “competing interests” should be removed. The rules currently provide that a “significant public benefit” can be “improved delivery of essential services,” and the provision of inclusionary housing. Given the dearth and cost of replacement land, merely “improving” the delivery of essential services is not grounds for diverting protected open space.

RESPONSE: As noted in the Response to Comment 1 above, the Department plans in the near future to begin the process of soliciting stakeholder input and drafting rule amendments in order to better conform this chapter to its current policy objectives. As part of this effort, it will review the rule markup submitted by the commenters as part of the comment letter and solicit additional input from the commenters on the issues raised in this comment. However, the Department notes that some of the language highlighted in the comment (particularly, “significant public benefit” which is discussed at N.J.A.C. 7:36-26.1(d)1 and the concept of improving the delivery of essential services discussed at N.J.A.C. 7:36-26.1(d)1ii) has been in the rules since they were first adopted in 1998, and reflects longstanding policy determinations about the appropriate thresholds for the diversion/disposal application process. As part of the upcoming rulemaking process, these thresholds will be re-evaluated to determine if appropriate amendments are necessary.

3. COMMENT: When applying for approval of a major diversion of parkland, municipalities or counties must prove that there is “no feasible alternative” to using Green Acres-encumbered land. Instead of requiring several feasible alternatives to be presented, the rules should state that if there is a feasible alternative, it must be chosen. In addition, if a potential alternative site requires demolition of an existing structure or the use of eminent domain, this should not disqualify the site from the list of feasible alternatives. As New Jersey approaches buildout, it is necessary that brownfields and

disused structures be considered as viable alternatives to the diversion of Green Acres property.

The lack of feasible alternatives must be clearly and convincingly demonstrated. When alternatives are presented, all potentially feasible sites must be considered, whether or not there is a cost to acquisition and demolition of existing structures, and whether or not the best alternative might require the use of eminent domain.

“Available” in the context of real estate has always meant “available for sale,” without the need for eminent domain. In the context of Green Acres, “available” has also meant “not already built on.” Requiring that an alternative parcel be on the market and vacant would lead to the elimination of “available” alternatives and the eventual elimination of open space to diversions.

RESPONSE: The current rules, particularly N.J.A.C. 7:36-26.1(d)2, already state that the Department cannot approve a diversion application unless it finds that “the applicant has demonstrated to the Department’s satisfaction “...that there is **no** feasible, reasonable and available alternative ... not involving parkland for the project for which an applicant seeks to divert or dispose of parkland.” (emphasis supplied) Therefore, the Department believes that the current rules already incorporate the commenters’ suggestion about requiring feasible alternative sites to be used instead of parkland. However, the Department recognizes that the question of whether an alternative site is “feasible, reasonable and available” is often a matter of dispute between the proponents of projects on parkland sites and those opposed to the use of parkland for non-parkland purposes. As part of the upcoming stakeholder process and the ultimate rulemaking

process, the Department welcomes the input of the commenters on how to better evaluate these factors in the alternatives analysis process and whether amendments to the alternatives analysis requirements of N.J.A.C. 7:36-26 are appropriate. The Department notes that the current rules do not preclude or prohibit the use of demolition or eminent domain to create alternative non-parkland sites and avoid diversion or disposal of parkland. To the contrary, the current rules require applicants to evaluate the use of private lands as alternative sites (N.J.A.C. 7:36-26.4(d)2i and 26.9(d)2i), estimate the cost of leasing or acquiring alternative sites (N.J.A.C. 7:36-26.4(d)2ii(6) and 26.9(d)2ii(6)), identify obstacles/constraints to acquiring or using those alternative sites (N.J.A.C. 7:36-26.4(d)2ii(7) and 26.9(d)2ii(7)), document efforts to remove such obstacles/constraints (N.J.A.C. 7:36-26.4(d)2ii(6) and 26.9(d)2ii(6)) and explain why each alternative site was rejected (N.J.A.C. 7:36-26.4(d)2iv and 26.9(d)2iv).

While the need for demolition or eminent domain might be among the obstacles/constraints identified by the applicant, the rules do not automatically disqualify alternative sites on either of these bases. In fact, the current rules at N.J.A.C. 7:36-26.4(e)2ii and 26.9(e)2ii state that in rejecting an alternative, an applicant may only determine that it is “not reasonable” if it:

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; [Emphasis supplied.]

Likewise, under N.J.A.C. 7:36-26.4(e)3 and 26.9(e)3, an applicant may only determine that an alternative site is “not available” if the alternative relies on use of land that is not owned by the applicant and:

- iii. The owner is unwilling to sell or transfer the land to the applicant or to allow the applicant to lease or otherwise obtain, utilize, expand or manage the land for the purposes of the project; and
- iv. Condemnation of the land is not available to the applicant or is not reasonable under one or more of the factors at (e)2 above.

In evaluating the cost of an alternative site requiring demolition or eminent domain against the use of a parkland site, the rules seek to force an “apples to apples” comparison by requiring the applicant to take into account the costs associated with the diversion application process, including the cost of acquiring replacement land and providing other forms of compensation required by the rules (such as recreational facility replacement and tree replacement). (N.J.A.C. 7:36-26.4(e)2ii(1) and 26.9(e)2ii(1)). Therefore, although the Department is willing to consider alternate methods to more explicitly reference demolition of structures in these sections of the rules as part of the upcoming stakeholder process, it believes the current rules already largely address the commenters’ concerns.

4. COMMENT: When a diversion involves a fee simple conveyance, monetary compensation should not be offered as an alternative to replacement land.

Monetary compensation, replacement land, or a combination of the two, should be allowed for easements. Only replacement land should be allowed for fee simple conveyances.

RESPONSE: The current rules allow monetary compensation to be offered in exchange for the conveyance of a fee simple interest in parkland in two limited circumstances: (1) for minor diversions of parkland under 0.5 acre (see N.J.A.C. 7:36-26.5(a)4) and (2) for major diversions of parkland involving less than five acres of land (and comprising less than five percent of a park), at higher compensation ratios than would be required if replacement land is offered (see N.J.A.C. 7:36-16.10(j)2i and the table at N.J.A.C. 7:36-26.10(g)). In the second scenario, if the project triggering the need for a diversion or disposal of parkland has been classified as “private,” then the monetary compensation must be used for land acquisition (and not park improvements). The general policy objective of classifying certain diversions of parkland as “minor” was explained in the July 5, 2005 proposal for the rules being readopted at this time (37 N.J.R. 2364(a), 2386), as follows:

In developing the five categories of minor disposals or diversions of parkland at proposed N.J.A.C. 7:36-26.2(b), the Department attempted to identify activities with a clear public purpose and minimal parkland impact for which the process of obtaining the approval of the Commissioner and the State House Commission could be simplified. This approach is intended to both afford applicants more flexibility in accommodating competing public needs and allow the Department to focus its limited staff time and resources on processing and analyzing applications

for major disposals or diversions of parkland. In addition, as will be discussed below, the Department has attempted to make the compensation for minor disposals or diversions of parkland simpler, more equitable and more predictable.

The specific rationale for allowing monetary compensation instead of replacement land for minor diversions/disposals of parkland under N.J.A.C. 7:36-26.5(a)4 was set forth in the same proposal as follows:

Proposed N.J.A.C. 7:36-26.5 outlines compensation requirements for minor disposals or diversions of parkland. In general, the Department has sought to simplify the compensation process for minor disposals or diversions of parkland by allowing applicants to remit monetary compensation where appropriate. Often, it has been difficult for applicants to come up with replacement land as compensation for small-scale disposals or diversions of parkland such as road widenings or bridge replacements. It has also been the Department's experience that it is difficult for appraisers to attach a value to the highest and best use or intended use of small areas of parkland. In addition, in cases where monetary compensation has been approved in the past, the Department has not always had the resources to follow up with or audit applicants to verify that the compensation has been applied in the manner approved by the Commissioner and the State House Commission. Based on these concerns, the Department proposes to allow monetary compensation for most categories of minor disposals or diversions of parkland, but to require the compensation to be remitted to the Department for deposit in the GSPT Fund prior to formal release of the Green Acres

encumbrances on the parkland approved for disposal or diversion. However, in order to allow some flexibility to applicants, proposed N.J.A.C. 7:36-26.5(b) would allow the Department to approve the use of the compensation by the applicant for a parkland acquisition or parkland development project scheduled to be completed within six months of the approval of the minor disposal or diversion of parkland. In such cases, the Department will not execute a release of the Green Acres restrictions from the parcel approved for disposal or diversion until completion of the acquisition or development project. (See 37 N.J.R. 2387.)

The Department recognizes that allowing monetary compensation for minor diversions and disposals of parkland will result in small losses of protected parkland in the particular location(s) affected by the diversion/disposal application. However, the Department believes that, on balance, (1) the use of monetary compensation deposited in the Garden State Preservation Trust Fund for future land acquisition and (2) the requirement that applicants for major diversions and disposals of parkland provide at least 2 to 1 replacement land, will still result in a net gain of parkland when the diversion application process is evaluated on a long-term, Statewide basis.

5. COMMENT: For purposes of conservation and/or outdoor recreation, replacement land must be substantially equivalent in habitat, ecological, and recreational value to the land proposed to be diverted. When measuring equivalence, parameters should include, but not be limited to, size, topography, habitat type, flora, fauna, and accessibility. Environmental assessment reports should be thorough enough to ensure that replacement land is substantially equivalent to the land being diverted.

RESPONSE: For diversions/disposals of parkland that require the applicant to provide replacement land, the rules at N.J.A.C. 7:36.26-10(d)6 already require that:

The proposed replacement land shall be of **reasonably equivalent or superior quality** to the parkland proposed for disposal or diversion, **including, but not limited to, location, accessibility, usefulness for recreation purposes, and value for ecological, natural resource and conservation purposes.** In evaluating the usefulness of the proposed replacement land, the Department shall pay particular attention to ensuring that parks that provide services to significant populations are replaced with recreation areas that serve the same, if not broader population; [Emphasis supplied.]

The Department believes the above language covers all the parameters suggested by the commenters except the size of the replacement land. However, the size of the replacement land is addressed elsewhere in N.J.A.C. 7:36-26.10 through various requirements pertaining to minimum replacement land ratios. In particular, N.J.A.C. 7:36-26.10(d)3 states:

In no case shall the acreage of the replacement land be less than the acreage of the parkland to be disposed of or diverted. For example, if an applicant proposes to provide compensation through a combination of replacement land and monetary compensation, the ratio of the replacement land to the parkland proposed to be disposed of or diverted shall be at least 1:1;

Based on the above, the Department does not believe it is necessary to amend these rules in the future to address the commenters' concerns about equivalency.

On the issue of whether environmental assessment reports submitted to the Department as part of the diversion/disposal application process are thorough enough to make a determination about equivalency, the Department welcomes the commenters' suggestions about how to improve these reports in the future.

6. COMMENT: Replacement land must not be already protected under any law, easement, or other method of protection. Mitigation for the diversion must not consist of restoration projects on public land.

RESPONSE: The issue of accepting "protected lands" as replacement land for a diversion/disposal of parkland was raised by several commenters as part of 2005-2006 rulemaking for this chapter (see 38 N.J.R. 155(a), 219), and was addressed by the Department as follows:

409. COMMENT: Under proposed N.J.A.C. 7:36-26.10, an alternative site should not include lands that are left over from a subdivision or site plan, because the planning board's intent was for those lands to be used as open space and should be included on the ROSI. Lands that have conservation easements, or lands that are leased and used as parkland, lands that are regulated or protected by State regulations from development such as those that are under a watershed moratorium, or are solely within the buffer of a stream or wetland should not be used as compensation. (75, 111)

RESPONSE: Since Comment 409 appeared under the heading of N.J.A.C. 7:36-26.10 in the comment letter, the Department assumes that the first part of the comment was intended to refer to the use of subdivision open space as compensation, not as an alternative site. In the case of subdivision open space, conservation easements, leased lands and lands protected by the watershed moratorium, the Department agrees that there are many instances in which proposed replacement lands falling within these categories will be either ineligible as replacement or of minimal market value. However, this determination requires a case by case evaluation based on the particulars of the zoning ordinance, easement, lease or the characteristics of the property itself and cannot be made categorically through these rules.

In addition, the Department does not consider it appropriate to categorically exclude as replacement land properties entirely within stream or wetlands buffers. While such properties may have minimal market value as replacement lands, in many situations encumbering the properties with Green Acres restrictions will add another layer of protection to ecologically important properties. See the Responses to Comments 372 and 387.

Based on the above, the Department has not adopted the commenter's suggestions.

The Department continues to believe that a case-by-case evaluation of whether these types of property should potentially be accepted with an assigned market value reflective of the limitations applicable to the particular parcel is appropriate.

On the issue of “restoration projects on public land” qualifying as replacement land, the Department is not entirely sure of the commenters’ concern, but notes that (1) the Freshwater Wetlands Protection Act prohibits the creation of wetlands on public property as mitigation for a freshwater wetlands permit (see N.J.S.A. 13:9B-13c and N.J.A.C. 7:7A-1.4) and (2) the current rules do not allow the substitution of park improvements (such as restoration projects) for replacement land except for major diversions of parkland involving less than five acres of land (and comprising less than five percent of a park) for which monetary compensation is tendered at higher compensation ratios than would be required if replacement land is offered (see N.J.A.C. 7:36-16.10(j)2i and the table at N.J.A.C. 7:36-26.10(g)). The Department invites the commenters to clarify their particular concern on this subject as part of its future stakeholder outreach and rule amendment process for this chapter.

7. COMMENT: The construction of any permanent structure on protected open space must be considered a major diversion, whether the protected open space parcel is leased or otherwise made available to the applicant. The structures that should be considered major diversions should include all linear and utility infrastructure projects such as communications towers and pipelines. As major diversions, these projects must be subject to the rules of leases 25 years or longer and further should be subject to the

public notification and comment period, as well as the hearing requirements under the Ogden-Rooney Statute.

RESPONSE: As discussed in the Response to Comment 4 above, the Department decided in the 2006 rulemaking to classify certain diversions/disposals of parkland as minor based on their small size and obvious public purpose. The minor classification and the underlying rationale apply to these projects regardless of whether they involve structures. However, the Department notes that in many cases linear and utility infrastructure projects, including pipelines and communication towers, are classified as major diversions because they are considered private, not public, projects under these rules.

On the issue of subjecting diversion/disposal applications to the “Ogden-Rooney” requirements, the Department notes that the Ogden-Rooney statute, N.J.S.A. 13:1D-51 et seq., only applies to conveyances of State land, not the local/nonprofit parkland regulated under these rules. However, the Department also notes that all Green Acres diversion/disposal applications are subject to public notice and hearing requirements. In particular, “major” diversion/disposal applications require two public hearings under N.J.A.C. 7:36-26.9 and 26.11.

Federal Standards Statement

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. (as amended by P.L. 1995, c.65) require State agencies that adopt, readopt, or amend State regulations

that exceed any Federal standards or requirements to include in the rulemaking document a Federal standards analysis. N.J.A.C. 7:36 is not promulgated under the authority of, or in order to implement, comply with, or participate in any program established under Federal law or under a State statute that incorporates or refers to Federal law, standards, or requirements. Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. do not call for a Federal standards analysis for these rules readopted without amendment.

Full text of the readopted rules can be found in the New Jersey Administrative Code at N.J.A.C. 7:36.