SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-56-23

SAVE BARNEGAT BAY, INC., A NON-PROFIT CORPORATION OF THE STATE OF NEW JERSEY Plaintiff-Appellant v. DONALD F. BURKE, SR., DONALD F. BURKE JR., PATRICIA BURKE, 80 MANTOLOKING, LLC, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, JOE DOES 1-10 AND XYZ CORPORATIONS 1-10 (FICTITIOUS NAMES, TRUE NAMES BEING UNKNOWN TO PLAINTIFF AT THIS TIME) Defendants- Respondent	**Civil Action** On Appeal From: Superior Court of New Jersey Ocean County, Law Division Docket No.: OCN-L-1171-22 Sat Below: Hon. Craig L. Wellerson, P.J. Cv.

BRIEF OF PLAINTIFF-APPELLANT SAVE BARNEGAT BAY, INC.

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Dated: November 20, 2023

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2. Order Granting Defendant Donald F. Burke, Jr. Motion to Dismiss entered on July 25, 2023. (Pa383-Pa384; 1T64-14 to 1T70-5).

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PRELIMINARY STATEMENT

In this matter, Plaintiff seeks to enforce the Freshwater Wetlands Protection Act, the Freshwater Wetland Protection Act Rules, the Wetlands Act of 1970, and the Coastal Zone Management Rules. Defendants filed a motion to dismiss, however the legal arguments raised and the submissions provided were more akin to a summary judgment motion. As discovery in the matter has not yet even begun, a motion for summary judgment is inappropriate at this juncture.

A review of the complaint shows sufficient facts that satisfies the pleading standard set forth in New Jersey Superior Court. Plaintiff's pre-action notices complied with the clear and unambiguous requirements of the Environmental Rights Act, and Plaintiff's claims are not "collateral attacks" on previously issued NJDEP permits. The enforcement of environmental statutes, regulations, and ordinances and the violation of permits is not the same thing as challenging the issuance of a permit.

Finally, Plaintiff clearly has standing to bring an Environmental Rights Act action. Plaintiff's claims are not automatically preempted by any NJDEP action that has taken place to date, and the case law is clear that a person may use the ERA to supplement any action by the NJDEP. At a minimum, this is a fact specific inquiry that is inappropriate to be decided on a motion to dismiss.

For the reasons set forth herein, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

PROCEDURAL HISTORY

On June 6, 2022, Plaintiff Save Barnegat Bay, Inc., a non-profit corporation of the State of New Jersey ("Plaintiff") filed the complaint. (Pa1). On June 30, 2022, Defendants Donald F. Burke, Jr., Donald F. Burke, Sr., Patricia Burke, and 80 Mantoloking LLC (collectively, "Defendants[1]"), filed a Notice of Removal to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. §1331. (Pa46).

On July 6, 2022, Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). On July 8, 2022, Defendants filed a Supplemental Notice of Removal to note that New Jersey Department of Environmental Protection ("NJDEP") had not consented to the removal. On March 10, 2023, The District Court of New Jersey granted Plaintiff's Motion to Remand and Denied as moot Defendants' Motion to Dismiss.

On May 5, 2023, the Trial Court held a case management conference, directing answers to be filed by June 9, 2023. On June 7, 2023, the NJDEP filed a Motion to Dismiss in Lieu of Answer. On June 9, 2023, Defendants filed

[1] Donald F. Burke, Esq., represents Defendant Donald F. Burke, Jr., relating to 174 Twilight Road, Bay Head, New Jersey. Donald F. Burke, Jr., Esq., represents Defendants Donald F. Burke, Patricia Burke, and 80 Mantoloking LLC. As separate entities with separate counsel, Defendants have filed two separate motions, but the issue on appeal generally involve the same legal analysis, therefore Plaintiff will address their arguments together for conciseness.

Motions to Dismiss the Complaint. (Pa51; Pa369). On July 25, 2023, the Trial Court held oral argument on the pending motions. (1T). On July 25, 2023, the Court entered three orders, dismissing Defendants with prejudice and dismissing NJDEP with prejudice. (1T; Pa383-Pa386).

STATEMENT OF FACTS[2]

Plaintiff is a non-profit corporation in the State of New Jersey, whose mission is to protect and continue the restoration of Barnegat Bay and its ecosystem. (Pa2, ¶1). Defendants Donald F. Burke, Sr. and Patricia Burke are the owners of 70 Mantoloking Road, Brick Township, New Jersey and 45 Gale Road, Brick Township, New Jersey. (Pa2, ¶3). Defendant 80 Mantoloking Road, LLC is the owner of 80 Mantoloking Road, Brick, New Jersey. (Pa11). Defendant Donald F. Burke, Jr., is the owner of 174 Twilight Road, Bay Head, New Jersey. (Pa24, ¶128).

On or around April 30, 2014, Defendants Donald F. Burke, Sr. and Patrica Burke purchased 70 Mantoloking Road, Brick, New Jersey. (Pa5, ¶18). The property located at 70 Mantoloking Road contains freshwater wetlands and freshwater wetlands transition area, as well as coastal wetlands. (Pa5, ¶19). Starting in 2016, Defendants began to intermittently import and deposit fill in

[2] For the purpose of a Motion to Dismiss, all facts plead in the complaint are taken as true. Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989).

the wetlands and wetlands transition areas, removed vegetation, constructed a bridge and otherwise conducted regulated activities within the regulated areas. (Pa5, ¶20). The fill was not certified clean fill as required by NJDEP regulations. (Pa5, ¶20). This work was done without any of the necessary NJDEP permits. (Pa5, ¶21). The NJDEP issued a notice of violation for Defendants 2016 actions, but did not take further action. (Pa6, ¶24).

In 2021, neighbors observed additional fill being brought to the 70 Mantoloking Road property. (Pa6, ¶25). NJDEP requested access to inspect the property, but Defendants refused access. (Pa6, ¶25). NJDEP has not taken any further action. (Pa6, ¶25). Defendants also extended an access road across the rear of the property to 80 Mantoloking Road without the necessary NJDEP permits and approvals. (Pa6, ¶28).

On or about July 9, 2014, Defendant Donald F. Burke, Jr. purchased 80 Mantoloking Road, Brick, New Jersey. (Pa11, ¶51). On or about May 29, 2015, title to the property was transferred to 80 Mantoloking Road, LLC for $1.00. (Pa11, ¶52). Upon information and belief, the members of 80 Mantoloking Road, LLC are Defendants Donald F. Burke, Sr., Patrica Burke, and/or Donald F. Burke, Jr. (Pa11, ¶53).

The property located at 80 Mantoloking Road also includes freshwater wetlands and freshwater wetlands transition areas, coastal wetlands, and other

sensitive environmental features. (Pa11, ¶56). Starting in 2016, Defendants began to intermittently import and deposit fill in the freshwater wetlands, disturbing vegetation, soil sand, gravel, and conducted other regulated activities within the regulated areas. (Pa12, ¶57). This work was done without any of the necessary NJDEP permits. (Pa12, ¶61). The fill was not certified clean fill as required by NJDEP regulations. (Pa12, ¶57). Around 2016, the NJDEP attempted to investigate the violations, but Defendants denied access. (Pa12, ¶58). The NJDEP issued an incident report noting that the Defendants' actions in 2016 constituted violations of environmental regulations but did not take further action. (Pa12, ¶59). In 2021, Defendants brought in additional fill onto the property. (Pa12, ¶60). When the NJDEP attempted to gain access to inspect the property, Defendants denied access, and NJDEP has not taken further action. (Pa12, ¶60).

On or about October 12, 1984, Donald F. Burke, Sr. and Patricia F. Burke acquired 45 Gale Road, Brick, New Jersey. (Pa17, ¶86). The property located at 45 Gale Road contains freshwater wetlands, freshwater wetlands transition areas, coastal tidal wetlands, and a tidal stream. (Pa17, ¶88). In 1994, a footings and foundation permit, which is not a construction permit, was issued by the Township of Brick that allowed for only the construction of pilings at the Gale Road Property. (Pa17. ¶89). In 2000, a modular home was installed and permits

were issued by the Township of Brick for building, plumbing, and electrical at the Gale Road Property. (Pa17, ¶91). However, Defendant did not obtain a stream encroachment permit, wetlands permits, or CAFRA permits. (Pa18, ¶97).

The building permits issued for the home on 45 Gale Road were dated after the adoption and effective date of the CAFRA regulations. (Pa18, ¶95). Therefore, the home was not exempt from the regulations and required NJDEP permits and approvals which were not obtained. (Pa18, ¶95). Furthermore, construction lapsed for more than one year. (Pa18, ¶97). As such, the residence and accessory structures were built on protected tidal and freshwater wetlands in violation of New Jersey environmental statutes and regulations. (Pa19, ¶98).

After the construction of the home and over the years since 2000, Defendants have imported fill and otherwise conducted regulated activities in or about the property without the necessary permits. (Pa19, ¶99). The fill was not certified clean fill as required by NJDEP regulations. (Pa19, ¶99). Defendant also filled in a tidally influenced stream that was located on the property without permits or approvals. (Pa19, ¶100). The activities caused flooding and damage to neighboring properties. (Pa19, ¶102). A bulkhead was further constructed in the rear of the property without permits or approvals. (Pa19, ¶102).

Township of Brick officials attempted to access the property but Defendants refused access. (Pa19, ¶103). In October 2021, NJDEP requested

access to conduct an inspection. (Pa20, ¶108). Defendants again refused access, and NJDEP has not taken further action. (Pa20, ¶108).

The 174 Twilight Road property is located within the FEMA mapped special Flood Hazard Area, also known as the 100-year floodplain. (Pa24, ¶123). The property also contains freshwater wetlands and transition areas. (Pa 24, ¶122). On December 19, 2014, the owner of the property obtained a Freshwater Wetlands Individual Permit, which authorized the clearing or filling of approximately 5,000 square feet (0.115 acres) of wetlands on the western side of the site. (Pa24, ¶124).

In December 2015, a Freshwater Wetlands Individual Permit was issued to allow the construction of a single-family residence, on the condition that it required the preservation of wooded areas. (Pa24 ¶125). At the time of the individual permit, the property was predominantly covered by native vegetation and wetlands and associated transition areas. (Pa24, ¶125).

On or about May 27, 2016, Defendants acquired the property from Vorhees, the prior owner. (Pa24, ¶126). Between December 2016 and February 2018, Defendant Donald F. Burke, Jr. removed trees and vegetation from the property and imported fill to fill-in wetlands and transition areas. (Pa24, ¶128). The removed trees and vegetation as well as fill importation exceed the 5,000 square feet permitted under the issued Freshwater Wetlands Individual Permit.

(Pa24-Pa25, ¶129). The fill was not certified clean fill as required by NJDEP regulations. (Pa25, ¶129). Defendants planted a lawn, eliminating any visual evidence of the wetlands that were filled in. (Pa25, ¶131). Subsequent wetlands delineations did not include the areas previously designated as wetlands in 2014 due to Defendant's clearing and filling of the property. (Pa25, ¶133).

In 2018, Defendants obtained a modification of the existing Freshwater Wetlands Individual Permit to allow greater disturbance of wetlands and transition areas. (Pa25, ¶134). The NJDEP granted the modification in reliance of the erroneous re-delineation of the wetlands, based on representations by Defendants that the previously wooded area was a lawn. (Pa25, ¶135). In 2019, neighbors began to suffer from flooding that did not occur prior to the filling of the property. (Pa25, ¶136). Defendants cleared additional wetlands in early 2020. (Pa26, ¶139).

LEGAL ARGUMENT

A motion to dismiss for failure to state a claim pursuant to R. 4:6-2(e) should be approached with great caution and should only be granted in the rarest of instances. Banco Popular N. Am. v. Gandi, 184 N.J. 161, 165 (2005) (citing Lieberman v. Port Auth. of N.Y. & N.J., 132 N.J. 76, 79 (1993)). In reviewing a motion to dismiss for failure to state a claim, the court should (1) accept as true all factual assertions in the complaint, (2) provide the nonmoving party

every reasonable inference from those facts, and (3) examine the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim." Malik v. Ruttenberg, 398 N.J. Super. 489, 494 (App. Div. 2008) (citing Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989)). A court's "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint." Printing Mart-Morristown, 116 N.J. at 746 (1989).

"The plaintiff's obligation on a motion to dismiss is 'not to prove the case but only to make allegations, which, if proven, would constitute a valid cause of action.'" Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005) (quoting Leon v. Rite Aid Corp., 340 N.J. Super. 462, 472 (App. Div. 2001)). As such, the allegations in a complaint should be viewed with "great liberality and without concern for the Plaintiff's ability to prove the facts alleged in the complaint." Ibid. (citing Printing Mart-Morristown, 116 N.J. at 746). As a general principle of law, procedural dismissals are not favored. Yancsek v. Hull Corp., 204 N.J. Super. 429, 433 (App. Div. 1985).

On appeal, the Appellate Court reviews a grant of a motion to dismiss for failure to state a claim *de novo*, and applies the same standard as the trial court in reviewing a motion to dismiss for failure to state a claim. Wreden v. Township

of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014); Malik, 398 N.J. Super. at 494 (citing Donato v. Moldow, 374 N.J. Super. 475, 483 (App. Div. 2005)).

I. PLAINTIFF'S COMPLAINT PLEADS SUFFICIENT FACTS THAT IF ACCEPTED AS TRUE, SUPPORTS VALID CLAIMS AGAINST DEFENDANTS UNDER THE ENVIRONMENTAL RIGHTS ACT. (Pa377-Pa378).

A. The Complaint Pleads Sufficient Fact that if Accepted As True, Supports a Cause of Action under the ERA. (Pa377-Pa378).

As previously set forth, it is well-settled law that New Jersey is a notice-pleading state requiring only a general statement of the claim. Printing Mart-Morristown, 116 N.J. at 746. Pursuant to R. 4:5-7, "each allegation of a pleading shall be simple, concise and direct, and no technical forms of pleading are required. All pleadings shall be liberally construed in the interest of justice."

The Environmental Rights Act ("ERA") provides that "any person may commence a civil action in a court of competent jurisdiction against any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment." N.J.S.A. 2A:35A-4(a). Such an action may commence upon "an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future." N.J.S.A. 2A:35A-4(a).

"Pollution, impairment or destruction of the environment" includes any "actual pollution, impairment or destruction to any of the natural resources of the State or parts thereof." N.J.S.A. 2A:35A-3(b). Natural resources includes in relevant part, but is not limited to, water pollution, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds, or other water resources, and destruction of wetlands, open spaces, and natural areas. N.J.S.A. 2A:35A-3(b). Importantly, the ERA shall be construed liberally to effectuate the purpose and intent thereof. N.J.S.A. 2A:35A-13.

Pursuant to the New Jersey Freshwater Wetlands Protection Act ("FWPA"), N.J.S.A. 13:9B-1 to -30, the following activities are regulated activities when they occur in freshwater wetlands:

1. The removal, excavation, disturbance or dredging of soil, sand, gravel, or aggregate material of any kind;
2. The drainage or disturbance of the water level or water table so as to alter the existing elevation of groundwater or surface water, regardless of the duration of such alteration, by:
    i. Adding or impounding a sufficient quantity of stormwater or other water to modify the existing vegetation, values or functions of the wetland; or
    ii. Draining, ditching or otherwise causing the depletion of the existing groundwater or surface water so as to modify the existing vegetation, values or functions of the wetland;
3. The dumping, discharging or filling with any materials;
4. The driving of pilings;
5. The placing of obstructions, including depositing, constructing, installing or otherwise situating any

obstacle which will affect the values or functions of a freshwater wetland; and

6. The destruction of plant life which would alter the character of a freshwater wetland, including killing vegetation by applying herbicides or by other means, the physical removal of wetland vegetation, and/or the cutting of trees.

N.J.A.C. 7:7A-2.2. Similarly, the following activities are regulated activities when they occur in transition areas:

1. Removal, excavation, or disturbance of soil;
2. Dumping or filling with any materials;
3. Erection of structures;
4. Placement of pavements; and
5. Destruction of plant life which would alter the existing pattern of vegetation.

N.J.S.A. 13:9B-17; N.J.A.C. 7:7A-2.3(a). Absent the issuance of a FWPA permit, or unless otherwise permitted under the FWPA, any regulated activity on or affecting freshwater wetlands and transition areas is strictly prohibited. New Jersey Dep't. of Envir. Prot. v. Huber, 213 N.J. 338, 346 (2013). Each violation of the Freshwater Wetlands Protection Act shall constitute an additional, separate, and distinct violation. N.J.A.C. 7:7A-22.7(b); N.J.A.C. 7:7-29.5(b). Each day the violation continues or remains in place without the required permit shall constitute an additional, separate, and distinct offense. N.J.A.C. 7:7A-22.7(c); N.J.A.C. 7:7-29.5(c).

As an initial matter, the Trial Court erred in finding that the ERA required a plaintiff to have suffered specific damages from the alleged violation. (1T69-

15 to 1T69-18). The ERA is not a common law claim such as nuisance or trespass that requires specific harm or monetary damage to be suffered by a plaintiff.

The purpose of the ERA is to allow private citizens to enforce environmental statutes, regulations, and ordinances. N.J.S.A. 2A:35A-2. The statute expressly states that "any person may commence a civil action… against any person alleged to be in violation of any statute, regulation, or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment." N.J.S.A. 2A:35A-4(a). "The action may be for injunctive or other equitable relief to compel compliance… or assess civil penalties as provided by law." N.J.S.A. 2A:35A-4(a). As such, the plain language of the statute only requires a showing that the defendants is in violation of a statute, regulation, or ordinance designed to prevent or minimize pollution, impairment or destruction of the environment.

The Trial Court also erred in holding that the Plaintiff was unable to identify any environmental hazard that would be a detriment to the environment. (1T68-15 to 1T68-25). "Pollution, impairment or destruction of the environment" is defined as "any actual pollution, impairment or destruction to any natural resources of the State or parts thereof." N.J.S.A. 2A:35A-3(b). Natural resources shall include, but not limited to, air pollution, water pollution,

improper sewage disposal, pesticide pollution, excessive noise, improper disposal of refuse, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds or other water resources, destruction of seashores, dunes, wetlands, open spaces, natural areas, parks or historic areas. N.J.S.A. 2A:35A-3(b).

A review of Plaintiff's complaint shows allegations that when taken as true, supports the claims asserted against Defendants.

70 Mantoloking Road contains freshwater wetlands and freshwater wetlands transition areas. (Pa5, ¶19). The property also contains mapped coastal wetlands (Pa5, ¶19). The property is contiguous to holdings of the United States Fish and Wildlife Service ("USFWS") and may contain other environmentally sensitive features and flood hazard areas. (Pa5, ¶19).

Starting in 2016, Defendants intermittently imported and deposited fill in the wetlands and wetlands transition areas located at 70 Mantoloking Road. (Pa5, ¶20). Defendants also removed vegetation, constructed a bridge to connect to land owned by the USFWS, and conducted other regulated activities within wetlands and transition areas. (Pa5, ¶20). The fill brought into the property was not certified clean fill as required by NJDEP regulations. (Pa5, ¶20).

Defendants did not have a permit to conduct regulated activities on 70 Mantoloking Road as required by the Freshwater Wetlands Protection Act,

Wetlands Protection Act of 1970, the Freshwater Wetlands Protection Act Rules, and the Coastal Zone Management Rules. (Pa5 ¶21). These activities included but are not limited to the dumping, discharging or filling the 70 Mantoloking Road property, the removal and disturbance of wetlands vegetation, and the disturbance of soil, sand, gravel, and the filling with soil and other materials, violating the Freshwater Wetlands Protection Act, the Freshwater Wetlands Protection Act Rules, and Coastal Zone Management Rules (Pa5-Pa6, ¶22). The filling and other regulated activities are in violation of the Freshwater Wetlands Protection Act, the Freshwater Wetlands Protection Act Rules, and Coastal Zone Management Rules. (Pa6, ¶23).

In 2021, neighbors observed additional fill being brought to the 70 Mantoloking Road property. (Pa6, ¶25). The NJDEP sought to inspect the property, but Defendants refused access. (Pa6, ¶25). No further enforcement or investigation actions were taken by the NJDEP. (Pa6, ¶25). The filling and other regulated activities have negatively affected adjoining properties by impeding the natural drainage. (Pa6, ¶26). The change in drainage patterns constitutes hydrological trespass on adjoining properties and is also a violation of the Freshwater Wetlands Protection Act, the Freshwater Wetlands Protection Act Rules, and the Coastal Zone Management Rules. (Pa6, ¶27).

Defendants also illegally extended the access road starting from Mantoloking Road across 70 Mantoloking Road property, towards the back of the property, and connecting it to the rear of 80 Mantoloking Road. (Pa6 ¶28-29). The creation of the access road on 70 Mantoloking Road constitutes a violation of the Freshwater Wetlands Protection Act, the Freshwater Wetlands Protection Act Rules, and Coastal Zone Management Rules. (Pa7, ¶30). Defendants' actions also constitute violations of Brick Township Code 168-1 and 383-3. (Pa7, ¶35). Defendants have violated the applicable requirements of the cited environmental statutes and regulations and have been in a state of non-compliance for years. (Pa7, ¶36).

80 Mantoloking Road contains freshwater wetlands and freshwater wetlands transition areas. (Pa11, ¶56). Starting in 2016, Defendants intermittently imported and deposited fill in the freshwater wetlands and transition areas. (Pa12, ¶57). In 2016, municipal inspectors and representatives of NJDEP attempted to investigate violations at the property. (Pa12, ¶58). Defendants denied access to government officials. (Pa12, ¶58). The NJDEP issued an incident report noting that Defendants' 2016 actions constituted violations of the environmental regulations, but failed to take further action to enforce the law. (Pa12, ¶59).

Defendants did not have a permit to conduct regulated activities at 80 Mantoloking Road. (Pa12, ¶60). These activities included but are not limited to the dumping, discharging, or filling of the 80 Mantoloking Road property, the disturbance of vegetation, soil, sand, gravel, and the filling with soil and other materials, in violation of the Freshwater Wetlands Protection Act, Freshwater Wetlands Protection Act Rules, Wetlands Act of 1970, and the Coastal Zone Management Rules. (Pa13, ¶62). The filling and other regulated activities have negatively affected adjoining properties by impeding the natural drainage. (Pa13, ¶63). The change in drainage patterns constitutes a hydrological trespass on adjoining properties and also a violation of the Freshwater Wetlands Protection Act, Freshwater Wetlands Protection Act Rules, Wetlands Act of 1970, and the Coastal Zone Management Rules. (Pa13, ¶65).

Defendants created and connected an access road on 80 Mantoloking Road to an access road illegally created on the 70 Mantoloking Road property. (Pa13, ¶66). The creation of the access road on 80 Mantoloking Road constitutes a violation of the environmental statutes and regulations. (Pa13, ¶68). Defendants' actions also constitute violations of Brick Township Code 168-1 and 383-3. (Pa13, ¶70). Defendants have violated the applicable requirements of the cited environmental statutes and regulations and have been in a state of non-compliance for years. (Pa13, ¶71).

45 Gale Road contains freshwater wetlands, freshwater wetlands transition areas, coastal tidal wetlands, and a tidal stream. (Pa17, ¶88). In 1994, a footings and foundation permit, which is not a construction permit, was issued by the Township of Brick for the construction of pilings. (Pa17, ¶89). In 1997, the foundation pilings were driven at 45 Gale Road. (Pa17, ¶90). In 2000, a modular home was installed and permits were issued by the Township of Brick for building, plumbing, and electrical. (Pa17, ¶91).

The CAFRA amendments to the original statutes regulates all construction within 150ft landward of the mean high-water line of any tidal waters. (Pa17-Pa18, ¶92). The grandfathering clause exempted developments that had a construction full building permit prior to July 19, 1994. (Pa17-Pa18, ¶92). The regulations required construction to begin by July 19, 1997, and continue to completion without any lapses of more than one year. (Pa18, ¶93). Therefore, when the foundation and footings permit was issued, a permit under the CAFRA regulations was required but not obtained. (Pa18, ¶94). The construction activity did not comply with the regulations to entitle the activities on the property to be grandfathered. (Pa18, ¶94). Furthermore, the home was constructed well after the CAFRA regulations were in effect. (Pa18, ¶95). Therefore, the home was built in violation of the Wetlands Act of 1970, the Coastal Zone Management

Rules, the Freshwater Wetlands Protection Act, and the Freshwater Wetlands Protection Act Rules. (Pa18, ¶95).

Defendants never obtained stream encroachment, wetlands, or CAFRA permits as required. (Pa18, ¶97). Over the years since 2000, Defendants have imported fill and otherwise conducted regulated activities on 45 Gale Road without permits. (Pa19, ¶99). The activities caused flooding and damage to the neighboring properties and area. (Pa19, ¶102). A bulkhead was also constructed in the rear of the property without permits or approvals. (Pa19, ¶102).

174 Twilight Road contains wetlands and transition areas. (Pa23, ¶122). The property is also located within FEMA mapped Special Flood Hazard Area, also known as the 100-year floodplain. (Pa24, ¶123). On December 19, 2014, the NJDEP issued a Freshwater Wetlands Individual Permit to allow for the construction of a single-family residence. (Pa24, ¶124). The 2014 permit authorized the clearing or filling of approximately 5,000 square feet of wetlands on the property. (Pa24, ¶124). Between December 2016 and February 2018, Defendants removed trees and vegetation from 174 Twilight Road in violation of the Freshwater Wetlands Protection Act, the Freshwater Wetlands Protection Act Rules, the Wetlands Act of 1970, and the Coastal Zone Management Rules. (Pa24, ¶128).

During the same time, Defendants filled in wetlands and transition areas in violation of the prior issued Freshwater Wetlands Individual Permit, as it exceeded the 5,000 square feet that was permitted. (Pa24-Pa25, ¶129). The fill was not certified clean fill as required by NJDEP regulations. (Pa24-Pa25, ¶129). In 2019, Defendants brought in additional fill and regarded the property without the necessary approvals or any effort to protect adjacent properties from disturbances caused by Defendants' activities. (Pa26, ¶138). Additional clearing of wetlands occurred in early 2020 outside areas allowed by the Freshwater Wetlands Individual Permits that were issued. (Pa26, ¶139).

Despite being notified of the violations, Defendants have not come into compliance and the NJDEP has not taken affirmative actions to enforce the law. (Pa1-Pa28, ¶¶37, 72, 107, 143). Because of the NJDEP's inability or unwillingness to pursue enforcement, Defendants' violations are likely to continue, thereby presenting an ongoing hazard to human health, safety, and the environment. (Pa1-Pa28, ¶¶38, 73, 109, 144). There is a likelihood that Defendants' violations of the environmental statutes and regulations and Brick Township ordinances will continue in the future. (Pa1-Pa28, ¶¶39, 74, 110, 145).

Plaintiff has sufficiently described Defendants' violations of environmental statutes, regulations, and ordinances that are designed to prevent or minimize pollution, impairment, or destruction of the environment. Each day

the violation continues or remains in place without the required permit shall constitute an additional, separate, and distinct offense. N.J.A.C. 7:7A-22.7(c); N.J.A.C. 7:7-29.5(c). Therefore, Plaintiff has shown that Defendants continuous and intermittent violation, and the likelihood that the violation will recur in the future. Plaintiff has sufficiently plead claims under the ERA. N.J.S.A. 2A:35A-4(a).

Furthermore, the ERA permits any person to commence a civil action against any person for the protection of the environment, or the interest of the public therein, from pollution, impairment, or destruction even when a specific statute, regulation, or ordinance does not exist. N.J.S.A. 2A:35A-4(b). Here, Plaintiff has also plead facts that would support a claim under the ERA by pleading how Defendants' actions have impaired the environment so that they alter the local drainage patterns and worsen local flooding events. Plaintiff also has plead sufficient facts to allege that Defendants have violated the freshwater wetlands permit that was issued.

The Trial Court erred in finding that Plaintiff is required to plead with specificity every single violation to support a claim. (1T69-15 to 1T70-5). No technical forms of pleadings are required, and pleadings are to be liberally construed in the interest of justice. R. 4:5-7. In contrast, the court rules only

require the particulars of the wrongs in claims involving misrepresentation, fraud, mistake, breach of trust, willful default, or undue influence. R. 4:5-8.

For these reasons, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

B. Defendants' Motion to Dismiss for Failure to State a Claim Relied Upon Evidence Outside the Pleadings, Therefore Must be treated as a Motion for Summary Judgment and Must be Denied. (Pa379-Pa381).

On a motion to dismiss under R. 4:6-2(e), the court is not permitted to look outside the parties' pleadings. Wreden, 436 N.J. Super. at 128. "If a judge relies matters outside the pleadings, a Rule 4:6-2(e) motion is automatically converted to a Rule 4:46 summary judgment motion." Ibid. Summary judgment is only granted if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, 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).

Here, Plaintiff's complaint only attached the notice of intention to commence suit under the ERA. (Pa1-Pa45). However, Defendants' Motion to Dismiss included numerous exhibits that were not a part of the pleadings. (Pa51-Pa375). Therefore, Defendants' motions should be treated as motions for summary judgment, which should not have been granted as Plaintiff has not had the opportunity to conduct discovery.

In Wreden, the trial court granted a motion to dismiss for failure to state a claim. Wreden, 436 N.J. Super. at 120. In doing so, the trial court relied upon a certification of a township committee member in finding that the township was entitled to a tort claims defense of plan or design immunity. Id. at 128. The Appellate Division reversed because the trial court improperly relied upon matters outside the pleadings in concluding that the Township was entitled to plan or design immunity at this stage of the proceedings, where no discovery had been conducted yet. Ibid.

Similarly, the Trial Court here erred in granting Defendants' Motions to Dismiss for Failure to State a Claim on the conclusion that the NJDEP had investigated the properties and decided not to proceed. (1T69-18 to 1T69-20). This conclusion was based on the outside documents submitted by Defendants that were outside the pleadings. Plaintiff has not had the opportunity to conduct discovery on the violations or the scope of the NJDEP investigations, and therefore Defendants' motion was inappropriate to be granted at this juncture. Furthermore, the ERA identifies that such matters should be set forth as an affirmative defense. N.J.S.A. 2A:35A-5. The burden of proof is on Defendants to establish an affirmative defense; therefore, such a decision should not have been made on a motion to dismiss for failure to state a claim, but on a summary judgment motion or at trial.

For these reasons, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

II. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF DOES NOT HAVE STANDING UNDER THE ENVIRONMENTAL RIGHTS ACT. (1T68-15 to 1T70-5).

A. The Environmental Rights Act Provides Private Parties with Standing to Enforce the Environmental Statutes, Rules, and Ordinances. (Pa377-Pa378).

In adopting the ERA, the Legislature determined 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. As such, the ERA provided that "any person may commence a civil action in a court of competent jurisdiction against any other person alleged to be in violation of any statute, regulation or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment." N.J.S.A. 2A:35A-4(a). Such an action may commence upon "an allegation that a person is in violation, either continuously or intermittently, of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future." N.J.S.A. 2A:35A-4(a).

The ERA defines "Person" as including corporations, companies, associations, societies, firms, partnerships and joint stock companies, individuals, the State, any political subdivision of the State, and any agency or instrumentality of the State or of any political subdivision of the state. N.J.S.A. 2A:35A-3(a). "Pollution, impairment or destruction of the environment" includes any "actual pollution, impairment or destruction to any of the natural resources of the State or parts thereof." N.J.S.A. 2A:35A-3(b). Natural resources includes in relevant part, but is not limited to, water pollution, impairment and eutrophication of rivers, streams, flood plains, lakes, ponds, or other water resources, and destruction of wetlands, open spaces, and natural areas. N.J.S.A. 2A:35A-3(b). Importantly, the ERA shall be construed liberally to effectuate the purpose and intent thereof. N.J.S.A. 2A:35A-13.

In determining if a claim is properly characterized as being brought under the ERA, it is necessary to consider not only the pleadings, but the conduct of the litigation and its resolution. Girandola v. Allentown, 208 N.J. Super. 437, 441 (App. Div. 1986). "Only by a careful evaluation of the contentions actually pursued, the 'design' of the 'statute, regulation or ordinance' allegedly violated and the relief obtained can a determination be made whether the action was brought 'under' the [Environmental Rights Act] within the meaning of N.J.S.A. 2A:35A-10." Ibid.

Here, Plaintiff and Defendants clearly fall under the definition of a "persons" under the ERA. As previously set forth in detail, Plaintiff's complaint alleges that Defendants are in violation of the Freshwater Wetlands Protection Act, N.J.S.A. 13:9B-4, 13:9B-17, Freshwater Wetlands Protection Act Rules, N.J.A.C. 7:7A-2.2 and -2.3, the Wetlands Act, N.J.S.A. 13:9A-4, N.J.A.C. 7:7-9.27 and -9.28, and the Coastal Zone Management Rules. (Pa1-Pa29). Specifically, Defendants had removed vegetation, imported fill, planted a lawn after the removal of wetlands, and otherwise conducted regulated activities within wetlands and transition areas without permits or approvals. (Pa1-Pa29).

As such, Plaintiff has alleged that Defendants are in violation, continuously and intermittently, and that the violation will recur in the future. (Pa1-Pa29). Each violation shall constitute an additional, separate, and distinct violation. N.J.A.C. 7:7A-22.7(b); N.J.A.C. 7:7-29.5(b). Each day the violation continues or remains in place without the required permit shall constitute an additional, separate, and distinct offense. N.J.A.C. 7:7A-22.7(c); N.J.A.C. 7:7-29.5(c). Therefore, Plaintiff clearly has standing under the ERA to bring the current action.

Furthermore, Plaintiff also set forth facts to support a claim under N.J.S.A. 2A:35A-4(b). N.J.S.A. 2A:35A-4(b) permits any person to commence a civil action for 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. Plaintiff's complaint alleges that neighbors have regularly suffered flooding and that the activities are damaging wetland resources and degrading water quality. (Pa1-Pa29). These are also violations of standard permit requirements for freshwater wetlands individual permits. N.J.A.C. 7:7A-10.2.

For these reasons, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

B. The NJDEP's Actions to Date on the Matter Do Not Preempt Plaintiff's Ability to File the Current Action. (1T40-1 to 1T47-9).

With regards to the ERA, New Jersey Courts are charged with deciding whether the agency in a given case has properly exercised its right to preemptive jurisdiction "when [the agency] failed in its mission, neglected to take action essential to fulfill an obvious legislative purpose, or where it has not given adequate and fair consideration to local or individual interests." Howell v. Waste Disposal, 207 N.J. Super. 80, 96 (App. Div. 1986). Even when an agency does take action, "but seeks less than full relief under relevant legislation," there is a "clear right" under the ERA for other "persons" to seek further relief. Ibid. In other words, the ERA may be used "to supplement actions the government has taken." Morris County Transfer Station, Inc. v. Frank's Sanitation Service, Inc., 260 N.J. Super. 570, 577 (App. Div. 1992). The ERA allows for any "person"

to bring an action "where the state agency has failed or neglected to act in the best interest of the citizenry or has arbitrarily, capriciously or unreasonably acted." Howell, 207 N.J. Super. at 96.

Although the NJDEP has the primary and supervisory enforcement powers, in the instances where the government is unable or unwilling to take necessary action, any person was to be provided an alternative course of action. Howell, 207 N.J. Super. at 95 (quoting Sponsor's Statement to Assembly Bill 1245, enacted as the ERA). The Court in Howell expressly found that "there is no *per se* rule" in determining if NJDEP action may preempt a private action under the ERA. Ibid. A private action should still proceed when the NJDEP fails to act to correct a particular problem, does not take proper and necessary action, or where the NJDEP seeks less than full relief available. Id. at 96. The NJDEP may have primary jurisdiction, but it does not have exclusive jurisdiction. Rockaway v. Klockner & Klockner, 911 F. Supp. 1039, 1054 (D.N.J. 1993).

The case law is clear that simply because the NJDEP has acted does not serve as an automatic bar to a separate ERA action. An ERA action can proceed even if the NJDEP may have taken investigatory steps for a period of years. Rockaway, 911 F. Supp. at 1054. Here, although the NJDEP may have done some investigation into the complaints, there were also instances where the NJDEP was denied access and then decided not to investigate further. (Pa1-

Pa29). The NJDEP clearly has decided to not proceed further with the violations identified in the complaint.

Based on the allegations in the complaint, which at this stage, must be taken as true, Defendants have engaged in regulated activities within protected wetlands and wetlands transition areas. The NJDEP has not fully investigated the issues as access was refused at each property. In fact, during oral argument, the Deputy Attorney General stated that the NJDEP decided not to pursue this further, that "they have other priorities. They don't have the resources, or the inclination at this point in time, [to proceed further in the enforcement.]" (1T11-11 to 1T11-23). A private action should proceed when the NJDEP fails to act to correct a particular problem, does not take proper and necessary action, or where the NJDEP seeks less than the full relief. Howell, 207 N.J. Super. at 96.

The NJDEP's actions here, or lack of actions, do not automatically preempt Plaintiff's ability to proceed with an ERA action. At a minimum, Plaintiff is entitled to discovery to determine the sufficiency of the NJDEP's actions and contest Defendants' affirmative defense. See N.J.S.A. 2A:35A-5.

For these reasons, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

C. Plaintiff's Pre-Action Notice Complied with the Requirements of N.J.S.A. 2A:35A-11. (Pa377-Pa378).

N.J.S.A. 2A:35A-11 provides that,

> No action may be commenced pursuant to this act unless the person seeking to commence such suit shall, at least 30 days prior to the commencement thereof, direct a written notice of such intention by certified mail, to the Attorney General, the Department of Environmental Protection, the governing body of the municipality… and to the intended defendant.

The purpose of the notice requirement is to allow the NJDEP to exercise its judgment and determine if it wants to take further action, such as if it wants to join the litigation, if its expertise would assist the court, or if the NJDEP will take further actions that may render the litigation subject to collateral estoppel or res judicata principles. Howell, 207 N.J. Super. at 95. "If the [NJDEP] expresses no interest and elects not to join that action… the action may proceed in accordance with the rights accorded in the Environmental Rights Act." Ibid.

Prior to filing the Complaint, Plaintiff served the pre-action notices to Defendants as required by N.J.S.A. 2A:35A-11. On January 20, 2022, Plaintiff served the notice of intention to commence suit under the ERA. (Pa34-Pa46). As required, the notices were sent via regular and certified mail, to the Attorney General, the NJDEP, the governing body of the municipality in which the alleged conduct occurred, and the intended defendant. (Pa34-Pa46). The notices clearly identified Plaintiff, and that the violation concerned "disturbance of wetlands, filling of wetlands, work in regulated areas without appropriate permits, and other conduct causing impairment and destruction of the

environment.[3]" (Pa34-Pa46). The pre-action notices were fully compliant with the express requirements of N.J.S.A. 2A:35A-11.

Nowhere in the statute does it require the notice of intention to specifically plead with specificity each and every little detail of the violations. The purpose of the notices is to provide the NJDEP an opportunity to determine how it wants to proceed in connection with the proposed private action. If the NJDEP decided to take action, that would potentially preempt the private action. However, if the NJDEP "expresses no interest and elects not to join that action… the action may proceed in accordance with the rights accorded in the Environmental Rights Act." Howell, 207 N.J. Super. at 95.

A review of other similar notice requirements support the proposition that the ERA notices do not need to set forth every single detail as to the violations complained of. It is well-settled law that New Jersey is a notice-pleading state requiring only a general statement of the claim. Printing Mart-Morristown, 116 N.J. at 746. Pursuant to R. 4:5-7, "each allegation of a pleading shall be simple, concise and direct, and no technical forms of pleading are required. All pleadings shall be liberally construed in the interest of justice."

The New Jersey Torts Claim Act ("TCA") requires that notice be given to the public entity within 90 days of the accrual of the claim, and that an action

[3] The Notice of Intention relating to 45 Gale Road also identified the tidal stream violations.

cannot be brought until six months after the notice of claim is received. N.J.S.A. 59:8-8. In contrast to the ERA, the TCA specifically requires the notices to include the name and post office address of the claimant; the post-office address to which the person presenting the claim desires notices to be sent; the date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted; a general description of the injury, damage or loss incurred so far as it may be known at the time of presentation of the claim; the name or names of the public entity, employee or employees causing the injury, damage or loss, if known; and the amount claimed as of the date of presentation of the claim, including the estimated amount of any prospective injury, damage, or loss. N.J.S.A. 59:8-4.

The New Jersey Contractual Liability Act similar requires a notice of claim for breach of contract to be sent to the contracting agency, within 90 days after the accrual of such claim, and requires the claimant to wait 90 days before being able to file a complaint. N.J.S.A. 59:13-5. Again, in contrast to the ERA, the statute requires the notice to include the name of the claimant, the nature of the claim, specific reasons for making the claim, and the total dollar amount of the claim if known. N.J.S.A. 59:13-5.

The New Jersey Revised Uniform Limited Liability Company Act requires that prior to a member filing a derivative action to enforce a right of a

limited liability company, the member must first make a demand on the other members or the manager, requesting that they cause the company to bring an action to enforce the right. N.J.S.A. 42:2C-68.

The Fair Foreclosure Act requires a mortgage debtor to send a notice of intention to foreclose at least 30 days in advance of such action. N.J.S.A. 2A:50-56(a). Such notices shall include the particular obligation or real estate security interest; the nature of default; the right of the debtor to cure the default; what performance is required to cure the default; the deadline for the debtor to cure the default which shall not be less than 30 days from the date of the notice; and many other details. N.J.S.A. 2A:50-56(c).

It is well established law that the overriding goal in interpreting a statute is to determine the Legislature's intent. Sanchez v. Fitness Factory Edgewater, LLC, 242 N.J. 252, 260 (2020) (quoting Young v. Schering Corp., 141 N.J. 16, 25 (1995)). When "a statute is clear and unambiguous on its face and admits of only one interpretation, a court must infer the Legislature's intent from the statute's plain meaning." Id. at 621 (quoting O'Connell v. State, 171 N.J. 484, 488 (2002)). A court shall not "rewrite a plainly written enactment of the Legislature nor presume that the Legislature intended something other than that expressed by way of the plain language." Ibid. "Courts read every word in a statute as if it was deliberately chosen and presume that omitted words were

excluded purposefully." State v. Scott, 429 N.J. Super. 1, 6-7 (App. Div. 2012) (quoting A Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 72:3 at 802 (7th ed. 2010)).

If the Legislature wanted to require a notice of intention to commence an ERA action to provide more specific details of the claim, the Legislature would have required it in the statute as the Legislature had done in several other instances. As evidenced by other statutes that require notices prior to filing the action, the Legislature clearly knew that it could have required more specific details in the ERA notice. However, the exclusion of such language in the ERA shows that the "omitted words" were excluded purposefully.

Plaintiff's pre-action notices fully complied with the clear and unambiguous requirements of N.J.S.A. 2A:35A-11. For these reasons, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

III. THE TRIAL COURT ERRED IN FINDING THAT PLAINTIFF WAS CHALLENGING A PRIOR ISSUED PERMIT AND THAT VIOLATIONS OF THE FRESHWATER WETLAND PROTECTION ACT IS COVERED BY AN APPEAL OF A VARIANCE GRANT. (Pa377-Pa378; 1T64-14 to 1T65-8; 1T64-21 to 1T65-11).

A. Plaintiff's Complaint is Not a Challenge on the Prior Issued Permit, Plaintiff's Complaint Seeks to Enforce the Violations of the Wetlands Act and the Conditions of the Issued Permits. (Pa377-Pa378).

The Trial Court erred in dismissing the Complaint as to 174 Twilight Road, Bay Head New Jersey on the basis that it was a collateral attack on the

Freshwater Wetlands Individual Permits issued in 2014. (1T64-14 to 1T65-8). The complaint brought by Plaintiff was not a challenge to the issuance of the permits. The complaint was that Defendants removed wetlands vegetation and imported fill within regulated areas beyond what was authorized by the permits. (Pa24-Pa25, ¶129, Pa26, ¶139). Plaintiff alleged that Defendants filled in wetlands beyond the activity authorized by the 2005 and 2014 permits, as it exceeded the authorized 5,000 square feet. (Pa24-Pa25, ¶129). Plaintiff alleged that in early 2020, Defendants cleared additional wetlands outside the areas permitted by the 2014 and 2015 Freshwater Wetlands Individual Permits. (Pa26, ¶139). In other words, Plaintiff's complaint was that Defendants had violated the issued freshwater wetlands individual permits.

Enforcing the conditions of a permit and asserting a violation of the permit is not the same as challenging the issuance of the permits. Therefore, the Trial Court erred in finding that Plaintiff's Complaint against 174 Twilight Road was preempted by the issuance of the permit. For these reasons, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

B. An ERA Claim is Not Preempted by A Separate Prerogative Writ Action Challenging a Planning Board Decision relating to 174 Twilight Road. (Pa382; 1T64-21 to 1T65-11).

The Trial Court erred in determining that Plaintiff's complaint alleging violations of the Freshwater Wetlands Protection Act and other environmental

statutes is subject to res judicata or jurisdictional issue due to a pending appeal of the Bay Head Planning Board decision. (1T64-21 to 1T68-14). The ERA authorizes any person to enforce the environmental statutes, regulations, and ordinances designed to protect the prevent or minimize pollution, impairment or destruction of the environment. N.J.S.A. 2A:35A-4(a). The pending prerogative writ matter referenced by Defendants and relied upon by the Trial Court is an appeal of the Bay Head Planning Board's approval and variance relief for the construction of a single-family house, pool, and accessory structure. Paul G. Brennan, Esther Koai, et al. v. Bay Head Planning Board and Kaitlyn Tooker Burke and Donald F. Burke Jr., Docket No. OCN-L-340-21. Plaintiff Save Barnegat Bay, Inc. is not a party to that prerogative writ action.

There is no res judicata or jurisdictional issue. In a prerogative writ action, the plaintiffs were challenging the granting of local land use approvals, relating to variances that were granted and procedural challenges relating to the resolution. Generally, in such a prerogative writ action, a court's analysis focuses on the validity of the board's action and if the board's decision was adequately supported by the evidence. Lang v. Zoning Bd. of Adjustment of N. Caldwell, 160 N.J. 41, 58 (1999).

Here, Plaintiff's complaint seeks to enforce the Freshwater Wetlands Protection Act and regulations, and other environmental statutes through the

ERA. Enforcement of state environmental statutes is not the basis of the prerogative writ action, which generally relates to the validity of the Planning Board's decision. The relief sought in a prerogative writ action relates to reversing the Planning Board's decision. The relief sought in the ERA complaint seeks injunctive relief to bring the properties into compliance with the referenced environmental statutes and regulations.

Although a planning board may consider the subject matter of wetlands in its decision to approve or deny an application, a planning board is generally not charged with enforcing the environmental statutes and related regulations such as the Freshwater Wetlands Protection Act. An exception is stormwater management, as that authority is in part delegated to the municipalities.

These litigations are separate litigations with different plaintiffs, different scopes of review, and different relief sought. Therefore, the Trial Court erred in finding that it did not have jurisdiction over the claims against 174 Twilight Road due to the pending prerogative writ action. For these reasons, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

CONCLUSION

In conclusion, for the reasons set forth herein, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

Respectfully submitted,

LIEBERMAN BLECHER & SINKEVICH, P.C.
Attorneys for Plaintiff

Dated: November 20, 2023 /s/Stuart J. Lieberman
Stuart J. Lieberman, Esq.

Superior Court of New Jersey
Appellate Division
Docket No.: A-56-23

SAVE BARNEGAT BAY, INC.,

Plaintiff-Appellant,

v.

DONALD F. BURKE, SR.; DONALD F. BURKE, JR.; PATRICIA BURKE; 80 MANTOLOKING, LLC; NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION; JOHN DOES 1-10 AND XYZ CORPORATIONS 1-10,

Defendants-Respondents.

Civil Action

On Appeal From:
Superior Court of New Jersey
Ocean County, Law Division

Docket No. Below:
OCN-L-1171-22

Sat Below:
Hon. Craig L. Wellerson, P.J.Cv.

JOINT BRIEF OF DEFENDANTS-RESPONDENTS DONALD F. BURKE, JR., DONALD F. BURKE, SR., PATRICIA BURKE AND 80 MANTOLOKING, LLC

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PRELIMINARY STATEMENT

Not once in its 38-page brief does Plaintiff/Appellant Save Barnegat Bay cite to, quote or analyze the provision of the Environmental Rights Act that the Motion Judge applied to dismiss its Complaint. Instead of confronting head-on the provision of the Environmental Rights Act that directs a trial court to summarily dismiss, even on its own motion, an Environmental Rights Act lawsuit that is "patently frivolous, harassing or wholly lacking in merit," N.J.S.A. 2A:35A-4(c), Save Barnegat Bay seeks refuge in the generally applicable and "generous and hospitable" standard of Rule 4:6-2(e). In enacting the Environmental Rights Act, however, the Legislature recognized the very real threat of abuse by allowing "[a]ny person " to enforce the environmental laws of this state "against any other person" N.J.S.A. 2A:35A-4(c) and encouraged courts to summarily dismiss an action which "on its face appears" is meritless, frivolous or harassing. N.J.S.A. 2A:35A-4(c). Thus, the generally applicable "generous and hospitable" standard of Rule 4:6-2(e) must be read in the context of the Environmental Rights Act which establishes the right of action with stated limitations – that an action deemed "patently frivolous, harassing or wholly lacking in merit" must be summarily dismissed. N.J.S.A. 2A:35A-4(c).

In this case, Judge Wellerson correctly dismissed Save Barnegat Bay's complaint for three reasons. First, Save Barnegat Bay's lawsuit lacks merit because the NJDEP investigated complaints about the Burkes' properties brought by Save

Barnegat Bay's General Counsel, and took action it deemed appropriate. In the words of NJDEP's counsel, "But the whole point of the [Environmental Rights Act] is to allow a private party to enforce where the government has not. Here the government has taken enforcement action, it has determined not to do anything further, and that's its decision." (T11:19-23). Judge Wellerson asked NJDEP's counsel whether Save Barnegat Bay should be precluded from proceeding with its lawsuit counsel for the NJDEP responded, "I would say they are precluded" (T13:5) stating that the NJDEP has "taken action" it considered "sufficient under the circumstances." (T13:9-18). Indeed, as to Donald F. Burke Jr.'s property at 174 Twilight Road, Bay Head, the NJDEP issued a letter to Save Barnegat Bay's General Counsel Michele Donato in direct response to Save Barnegat Bay's complaints stating, "Based on the Department's review of the submitted information, as well as multiple site investigations, there are no violations at the property as of July 21, 2020." (Pa076).

Second, Judge Wellerson found the action to be harassing because it focuses exclusively on property owned or controlled by one family – the Burkes – one being a residential property that was built over 25 years ago and has been the family's residence. During oral argument, Judge Wellerson gave Save Barnegat Bay an opportunity to address the issue of harassment as barring Save Barnegat Bay's lawsuit pursuant to N.J.S.A. 2A:35A-4(c) that had been squarely raised by the

defendants in their motions to dismiss. Judge Wellerson asked whether Save Barnegat Bay has ever filed "other lawsuits . . . against any other property owners" (T27:3-5) and Save Barnegat Bay's Counsel responded, "I wouldn't have that information today, Your Honor." (T27:6-7). Making his concern clear, Judge Wellerson again asked counsel for Save Barnegat Bay "are any other prosecutions currently pending other than the Burkes?" (T27:11 -13). Save Barnegat Bay's counsel stated, "Again, Your Honor, I wouldn't know one way or the other." (T27:14-15). Counsel stated, "So, I don't have any firsthand knowledge into why this lawsuit was started, or why these properties were selected." (T27:20-22). Later in the argument, Judge Wellerson asked, "The statute also talks about harassment. Why is this not to be viewed through that?" (T47:10-110) and counsel responded, "Well, I don't know -- I don't know." (T47:12-13). Judge Wellerson gave Save Barnegat Bay a fourth opportunity to address the issue asking, "And where does the issue of harassment get distilled out in that analysis?" (T51:13-14) and Save Barnegat Bay's counsel's response was, "Well, Judge, again I'm hard pressed to answer that on behalf of my client. So I --as to when they make determinations about when and where to initiate litigation. I don't have that information." (T51:15-16).

Finally, even under the Rule 4:6-2 standard, Save Barnegat Bay's complaint failed to assert facts sufficient to establish environmental harm, an essential element of a cause of action under the Environmental Rights Act.

PROCEDURAL HISTORY

Plaintiff Save Barnegat Bay, Inc., filed the instant complaint on June 6, 2022. (Pa1). On June 30, 2022, Defendants Donald F. Burke, Jr., Donald F. Burke, Sr., Patricia Burke, and 80 Mantoloking LLC, filed a Notice of Removal to the United States District Court for the District of New Jersey pursuant to 28 U.S.C. § 1331 (Pa46) and a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on July 6, 2022. On March 10, 2023, the District Court of New Jersey granted plaintiff's motion to remand and denied as moot defendants' motion to dismiss.

On May 5, 2023, the Trial Court held a case management conference, and, thereafter, on June 7, 2023, the NJDEP filed a motion to dismiss the Complaint and the Burke defendants filed a motion to dismiss on June 9, 2023. (Pa51; Pa369).[1]

On July 25, 2023, the Trial Court held oral argument on the pending motions (1T) and on July 25, 2023, the Court entered three orders, dismissing defendants with prejudice, and dismissing NJDEP with prejudice. (1T; Pa383-Pa386). Save Barnegat Bay's Notice of Appeal followed. (Pa387).

STATEMENT OF FACTS

Donald F. Burke Jr. – 174 Twilight Road, Bay Head, NJ

[1] Save Barnegat Bay filed one brief as to the Burke defendants – Donald F. Burke Jr., Donald F. Burke, Patricia F. Burke and 80 Mantoloking Road, LLC – even though they are separate entities with separate counsel – and the Burke defendants have jointly filed this brief in opposition.

Save Barnegat Bay alleges Donald F. Burke Jr. illegally cleared and filled property he owns at 174 Twilight Road in Bay Head, New Jersey (Complaint, paragraphs 3, 7 and Fourth Count, Pa002, Pa003, Pa023) notwithstanding the fact that the NJDEP issued permits allowing the property to be developed. The NJDEP issued a Freshwater Wetlands Individual Permit in 2014, prior to Donald F. Burke Jr.'s purchase of the property, to "Clear and/or fill approximately 5,000 square feet (0.115 acres) of forested wetlands" for construction of a home. (Verified Complaint, paragraph 124, Pa024). The NJDEP permit was modified in 2018 after Donald F. Burke Jr. purchased the property. (Complaint, paragraphs 124, 125 and 138, Pa024).

After receiving NJDEP approval, Donald F. Burke Jr. sought a variance from the Bay Head Planning Board. Save Barnegat Bay vehemently opposed development of Donald F. Burke Jr.'s property at 174 Twilight Road and while the Bay Head Planning Board application was pending, Save Barnegat Bay complained in writing to the NJDEP, making the same allegations it makes in this lawsuit – that Donald F. Burke Jr. illegally filled the property at 174 Twilight Road, Bay Head. The Verified Complaint alleges that a 2005 subdivision approval "required preservation of wooded areas on Lot 13" and 174 Twilight "merged with adjoining lots pursuant to local zoning approvals." (Verified Complaint, paragraph 122, Pa023). These were arguments raised by Save Barnegat Bay before the Planning Board and rejected. Honorable Marlene Lynch Ford, A.J.S.C upheld the Planning Board's rejection of

the objector's arguments, and these issues are currently before the Appellate Division.

Notwithstanding the fact that Donald F. Burke Jr. has all required permits to construct a single-family home at 174 Twilight Road,[2] Save Barnegat Bay filed this lawsuit using the Environmental Rights Act against Donald F. Burke Jr. Save Barnegat Bay has a playbook it uses titled "Secrets of Being A Successful Objector." This playbook encourages its member to "Wage a separate and ongoing PR war against the applicant" and to "play dirty" and advises objectors that "Nuclear options are available" and encourages the use of "skullduggery" (*see* "Secrets of Being A Successful Objector," Pa057-Pa059). Notwithstanding the Freshwater Wetlands Individual Permits issued by the NJDEP in 2014 and modified in 2018 allowing clearing and filling, Michele Donato, Esq., "the former counsel for Save Barnegat Bay" sent in "two, if not three, letters [to NJDEP]" and the NJDEP received "various anonymous complaints called into the [NJDEP's] hotline." (T14:5-9). In response, the NJDEP thoroughly investigated Save Barnegat Bay's Complaints and concluded, **"Based on the Department's review of the submitted information, as**

[2] The Verified Complaint alleges that a 2005 subdivision approval "required preservation of wooded areas" on Donald F. Burke Jr.'s property and his property "merged with adjoining lots pursuant to local zoning approvals." (Verified Complaint, paragraph 122, Pa023). Save Barnegat Bay unsuccessfully raised these arguments before the Bay Head Planning Board, and in the Prerogative Writ action challenging the Planning Board's action in favor of Donald F. Burke Jr. and the issues are currently before the Appellate Division.

well as multiple site investigations, there are no violations at the property as of July 21, 2020." (Pa073-Pa076). (emphasis added).

Judge Wellerson correctly recognized that Save Barnegat Bay's lawsuit was not only harassing but a prohibited and meritless collateral attack on NJDEP permits and actions, stating, "Well somebody reviewed the project and said that we're going to allow you to do it." (T33:16-18). Counsel for Save Barnegat Bay responded by conceding that Save Barnegat Bay was using the Environment Rights Act to collaterally attack NJDEP action, stating, "Our quarrel is that what's happened in the past was not accurately represented or investigated by DEP as to that Twilight property." (T33:21-23). Save Barnegat Bay's counsel then agreed that NJDEP inspectors "were on the Twilight property more than once" (T33:24-34:1) and the Motion Judge asked, "Isn't it inconceivable to suggest that the DEP didn't see what was on the property?" (T34:2-3).

The NJDEP also recognized Save Barnegat Bay's position as a prohibited collateral attack on NJDEP decision making, stating:

> How DEP chooses to enforce its environmental statutes, what resources it has, what enforcement priorities it has, those are all things that are discretionary determinations made by the Department. This Court cannot compel DEP to take particular discretionary action, or to exercise that discretion in a particular way that would violate the separation of powers found in the New Jersey Constitution, Article 3.
>
> [(T10:25-11:7).]

Accepting the prohibited collateral attack on NJDEP decision making argument advanced by the NJDEP, the Court stated,

> What the Court doesn't have the authority to do is to second guess the discretionary nature of the DEP's decisions and indicate to the Department that the Court believes that they would -- that the people of New Jersey would be better served if they took an alternate course.
>
> [(T36:11-36).]

Donald F. Burke, Patricia Burke – 45 Gale Road, Brick, NJ and 70 Mantoloking Road, Brick, NJ and 80 Mantoloking, LLC – 80 Mantoloking Road, Brick, NJ

With regard to Save Barnegat Bay's claims against defendants Donald F. Burke, Patricia Burke and 80 Mantoloking, LLC, it alleges in broad and conclusory language that defendants "conducted regulated activities within the regulated areas." (Pa005, ¶20). Save Barnegat Bay's Complaint misleadingly alleges that the "NJDEP has not taken any further action" (Pa006, ¶25) when it knows that the anonymous complaints and those of its General Counsel, Michle Donato, Esq., were investigated by the NJDEP which conducted an investigation, gathered available evidence and sought an administrative search warrant to conduct an on-site evaluation of these properties. (Pa073-Pa076). In fact, Save Barnegat Bay's unsupported allegation that the NJDEP did nothing was a focus of oral argument when Judge Wellerson stated that the NJDEP "investigated before they came and sought the search warrant." Judge Wellerson described "a stack of papers that were produced and presented by the DEP" including "affidavits" and "satellite photographs" and stated, "t]he Court,

in its discretion, denied the search warrant application. But it's not that they just appeared with the search warrant, they did an investigation as well." (T40:11-20).

The NJDEP contends it took appropriate enforcement action in response to Save Barnegat Bay's complaints by conducting an investigation and seeking an administrative search warrant, which the Court denied, and, as a result, Save Barnegat Bay is precluded from proceeding with its Environmental Rights Act claims, stating: "Here the government has taken enforcement action, it has determined not to do anything further, and that's its decision. It doesn't want to be -- and doesn't -- you know, I don't think it can be compelled to take additional enforcement action at this time." (T11:21-12:1). NJDEP's counsel emphasized, "How DEP chooses to enforce its environmental statutes, what resources it has, what enforcement priorities it has, those are all things that are discretionary determinations made by the Department. This Court cannot compel DEP to take particular discretionary action, or to exercise that discretion in a particular way that would violate the separation of powers found in the New Jersey Constitution, Article 3." (T10:25-12:7).

At Oral Argument before Judge Wellerson, counsel for Save Barnegat Bay[3] agreed with the proposition that DEP has "primary enforcement authority over the

[3] Counsel for Save Barnegat Bay below has been replaced by Michele Donato, Esq.'s law firm, Lieberman, Blecher & Sinkevich, https://www.liebermanblecher.com/2021/08/19/long-standing-land-use-attorney-

environment laws" stating: "When they exercise that authority, when they take the reins and then seek to enforce those laws then everyone else's boxed out [but] [w]hen they don't the statute provides that private attorney general can come in and enforce those laws." (T43:14-20).

For the following reasons, Judge Wellerson properly exercised his discretion to dismiss Save Barnegat Bay's Complain pursuant to N.J.S.A. 2A:35A-4(c) because it is "patently frivolous, harassing or wholly lacking in merit" (Point I), does not set forth facts supporting a cause of action under the Environmental Rights Act (Point II), and its pre-action notice failed to comply with the statute (Point III). Additionally, Save Barnegat Bay's failed to appeal the Order of Dismissal as to the NJDEP, which it claims is an indispensable party, precluding Save Barnegat Bay's claims because without the NJDEP, complete relief cannot be accorded. (Point IV).

LEGAL ARGUMENT

Point I

THE TRIAL COURT CORRECTLY APPLIED THE STATUTORY LIMITATION TO SUIT SET FORTH IN N.J.S.A. 2A:35A-4(c) BY DISMISSING THIS ACTION WHICH "ON ITS FACE APPEARS TO BE PATENTLY FRIVOLOUS, HARASSING OR WHOLLY LACKING IN MERIT"

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michele-donato-joins-princetons-lieberman-blecher-sinkevich-as-of-counsel/?gad_source=1.

Save Barnegat Bay focuses on the provision of the NJERA allowing "any person" to "commence a civil action . . . against any person alleged to be in violation of any statute, regulation, or ordinance which is designed to prevent or minimize pollution, impairment or destruction of the environment," N.J.S.A. 2A:35A-4(a), but has not once addressed N.J.S.A. 2A:35A-4(c) in its brief which Judge Wellerson relied upon to dismiss Save Barnegat Bay's Complaint. The Sponsor's Statement accompanying the bill identifies the concern that the Environmental Rights Act could be weaponized and used for improper purposes:

> The bill also contains several provisions or safeguards which will deter commencement of spurious lawsuits. These include a requirement to give 30 days prior notice to the responsible agency and alleged polluter, the posting of a security where appropriate **and the express authorization to the court to dismiss, on its own motion, frivolous suits.**
>
> [(See Legislative History, Sponsor's Statement, page 5 (emphasis added)).]

For the following reasons, Judge Wellerson properly exercised his discretion to dismiss Save Barnegat Bay's Complaint because it is frivolous, harassing and/or lacking in merit.

A. Judge Wellerson's application of the statutory limitations to suit under the Environmental Rights Act mandating dismissal of frivolous, harassing, and meritless actions is subject to an abuse of discretion standard.

The Environmental Rights Act sets forth a statutory limitation to suit in N.J.S.A. 2A:35A-4(c) which provides, "The court may, on the motion of any party,

or on its own motion, dismiss any action brought pursuant to this act which on its face appears to be patently frivolous, harassing or wholly lacking in merit." This is a mandatory part of the statute. "[A] statute granting a new right usually is mandatory, and the viability of such a right is contingent upon strict compliance with the law and all its conditions." Shambie Singer, 3 Sutherland Statutory Construction § 57:16 (8th ed. 2020). "A limitation contained in a statute creating a new right [is] generally considered a condition precedent to the existence of the right itself . . .." Kaczmarek v. N.J. Tpk. Auth., 77 N.J. 329, 339 (1978); see also People ex rel. Dunbar v. First Nat. Bank of Colorado Springs, 356 P.2d 967, 970 (Colo. 1960) ("It is a fundamental rule that, where statutes confer a new right . . . and prescribe a mode for the acquisition, preservation, enforcement, or enjoyment, such are mandatory, and must be strictly complied with, and . . . if not complied with, no right exists." (quoting Schaut v. Joint Sch. Dist. No. 6, Towns of Lena & Little River, 210 N.W. 270, 272 (Wis. 1926)).

Pursuant to the Court's obligation to "dismiss any action brought pursuant to this act which on its face appears to be patently frivolous, harassing or wholly lacking in merit," N.J.S.A. 2A:35A-4(c), Judge Wellerson engaged in an exacting, in-depth and thoughtful analysis of the facts and law and his decision to dismiss Save Barnegat Bay's lawsuit is entitled to deference. "A court abuses its discretion when its 'decision is made without a rational explanation, inexplicably departed from

established policies, or rested on an impermissible basis.'" State v. Chavies, 247 N.J. 245, 257 (2021) (quoting State v. R.Y., 242 N.J. 48, 65 (2020)). "[A] functional approach to abuse of discretion examines whether there are good reasons for an appellate court to defer to the particular decision at issue." State v. R.Y., 242 N.J. 48, 65 (2020) (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). "When examining a trial court's exercise of discretionary authority, we reverse only when the exercise of discretion was 'manifestly unjust' under the circumstances." Newark Morning Ledger Co. v. N.J. Sports & Exposition Auth., 423 N.J. Super. 140, 174 (App. Div. 2011) (quoting Union Cnty. Improvement Auth. v. Artaki, LLC, 392 N.J. Super. 141, 149 App. Div. 2007)).

B. The Trial Court Correctly Dismissed the Complaint Because it Lacks Merit.

1. The Trial Court correctly determined that the NJDEP has not failed or neglected to act but rather took action as to each property and exercised its discretion in a way that precludes Save Barnegat Bay's action as a private attorney general.

A bedrock principle of the Environmental Rights Act is that citizen suits under the ERA are preempted unless the NJDEP "has failed or neglected to act in the best interest of the citizenry or has arbitrarily, capriciously or unreasonably acted." Twp. of Howell v. Waste Disposal, Inc., 207 N.J. Super. 80, 96 (App. Div. 1986). Save Barnegat Bay cannot seriously dispute this legal proposition. Indeed, counsel for Save Barnegat Bay agreed at Oral Argument:

> MR. KAFAFIAN: So if you distill all the case law down to what it says, right, DEP has primary enforcement authority over the environment laws. When they exercise that authority, when they take the reins and then seek to enforce those laws then everyone else's boxed out. When they don't the statute provides that private attorney general can come in and enforce those laws.
> [(T43:13-20).]

On this point, counsel for the NJDEP stated:

> But the whole point of the ERA is to allow a private party to enforce where the government has not. Here the government has taken enforcement action, it has determined not to do anything further, and that's its decision.
>
> [(T11:19-23).]

The Appellate Division in Twp. of Howell noted that the statutory authority and legislative history of the Environmental Rights Act "make it clear" that the NJDEP "must normally be free to determine what solution will best resolve a problem on a state or regional basis given its expertise and ability to view those problems and solutions broadly" and established a high bar for a private actor to bring an Environmental Rights Act case. Id. at 95-96. An entity claiming a right to act as a private attorney general under the statute must make a threshold showing that the NJDEP "has failed in its mission, neglected to take action essential to fulfill an obvious legislative purpose, or where it has not given adequate and fair consideration to local or individual interests." Id. at 96. Emphasizing the high standard a private actor must establish the right to act as a private attorney general, the Court limited the right to act as a private attorney general to those who establish

the NJDEP "has failed or neglected to act in the best interest of the citizenry or has arbitrarily, capriciously or unreasonably acted." Ibid.

Judge Wellerson confirmed with counsel for the NJDEP that the complaints were anonymous and that "Michele Donato, who was the former counsel for Save Barnegat Bay" sent in "two, if not three, letters." (T14:3-8). Focusing on whether the threshold standard for acting as a private attorney general was met here by Save Barnegat Bay, Judge Wellerson asked counsel for the NJDEP whether Save Barnegat Bay was precluded from proceeding pursuant to the Environmental Rights Act against the Burkes because the NJDEP has taken the action it considers appropriate and counsel for the NJDEP responded:

> [Save Barnegat Bay is] precluded because [the NJDEP] did take enforcement action. . . And it was -- so, yes. How we enforce -- and the Court did seek to enforce certain statutes, including the Freshwater Wetlands Protection Act. But as I said, when this Court denied the search warrant application, DEP determined it would not pursue it any further. So it has taken -- there has been enforcement action. I think the ERA is really designed to allow plaintiffs to pursue an alleged violator where the State just hasn't taken any action whatsoever. Here [the NJDEP has] taken action. We think what we did was sufficient under the circumstances, so I would say yes that would be the State's position."
>
> [(T13:2-18).]

Judge Wellerson also asked Save Barnegat Bay's counsel to address whether the threshold standard for action as a private attorney general was met if the NJDEP investigated "the private complaints" and determined there was "no need for us to

take any further action." Save Barnegat Bay's counsel acknowledged that the NJDEP's position was, quoting from the NJDEP's brief, that "[a]fter further review of the existing evidence available to it, the Department has for now determined not to pursue any further action regarding the four properties that are the subject of the ERA complaint" (T45:24-46:3) and requested a dismissal without prejudice. (T47:10-12). Judge Wellerson responded, "It's [Save Barnegat Bay's] obligation under a 4:6-2 to determine, or to show the Court that you have a viable claim under the law. That's your obligation. If I take all of your allegations at face value, that you at the end of the day will be able to sustain a cause of action." (T47:15-20).

Judge Wellerson correctly dismissed Save Barnegat Bay's Complaint because Save Barnegat Bay did not establish that the NJDEP "failed in its mission" or "failed or neglected to act in the best interest of the citizenry or has arbitrarily, capriciously or unreasonably acted." Ibid. Driving home this point, Judge Wellerson stated,

> What the Court doesn't have the authority to do is to second guess the discretionary nature of the DEP's decisions and indicate to the Department that the Court believes that they would -- that the people of New Jersey would be better served if they took an alternate course. That's what I don't have the authority to do. That is a constitutional prohibition on this Court's authority. It's a separation of powers argument and the Court is reluctant to take any opportunity to violate it.
>
> [(T36:11-20).]

Judge Wellerson's reasoning that the NJDEP has not failed or neglected to act but rather took action as to each property and exercised its discretion in a way that

precludes Save Barnegat Bay's action as a private attorney general is unassailable and entitled to deference.

2. The Trial Court correctly determined that Save Barnegat Bay failed to establish a "violation, either continuously or intermittently, of a statute, regulation or ordinance" or a "likelihood that the violation will recur in the future."

The Environmental Rights Act permits relief only against parties "that are 'in violation, either continuously or intermittently, of a statute, regulation or ordinance,' and only when 'there is a likelihood that the violation will recur in the future.' N.J.S.A. 2A:35A-4(a)." In re Flintkote Co., 655 F. App'x 931, 5-6 (3d Cir. 2016). As set forth above, Save Barnegat Bay's Complaint repeats allegations that were investigated and rejected by the NJDEP and Save Barnegat Bay has not established requisite environmental harm and the need for injunctive relief.

On this point, Judge Wellerson asked counsel for Save Barnegat Bay to identify "the environmental danger" asking, "I mean you keep talking about flooding. Is that the environmental danger, that there's flooding?" and counsel for Save Barnegat Bay asserted that the alleged environmental harm was flooding and Judge Wellerson stated, "Well, the DEP has already investigated that" and that the issue presented by Save Barnegat Bay's Complaint was in actuality "a nuisance issue because the harm is flooding to neighboring property owners" to which Save Barnegat Bay's counsel agreed, noting that "there could be a nuisance claim, Judge, but that's a different remedy." (T49:14-50:3).

As to the Gale Road and the Mantoloking Road properties, Judge Wellerson ruled:

> In regards to the Gale Road and the Mantoloking Road properties, the plaintiff has not been able to identify to this Court any environmental hazard, any issue that would act as a detriment to the environment and be of concern to the people of the State of New Jersey, other than to state that somewhere along this property frontage there's flooding, and the flooding is because of some fill that may or may not have been placed on the property at any point in time subsequent to the ownership and development of the Burkes.
>
> [(T68:15-25).]

Judge Wellerson correctly determined that Save Barnegat Bay failed to establish a "violation, either continuously or intermittently, of a statute, regulation or ordinance" or a "likelihood that the violation will recur in the future" that would sustain a cause of action under the Environmental Rights Act.

3. The Trial Court correctly declined to decide issues raised by Save Barnegat Bay's Complaint regarding 174 Twilight that are pending before the Appellate Division.

The Complaint repeats and reiterates allegations made in a land use matter opposed by Save Barnegat Bay which was dismissed by the New Jersey Superior Court (Pa317-Pa337) and is the subject of a pending appeal in which Michele Donato, Esq., Save Barnegat Bay's General Counsel, represents the appellant-objectors.

Save Barnegat Bay's Complaint alleges that 174 Twilight Road "was included in a subdivision application in 2005 by a prior owner [and that the] approval for that

application required preservation of wooded areas on Lot 13." (Pa023). Michele Donato, Esq. raised the same issues before the Bay Head Planning Board, before Judge Ford in the appeal of the Planning Board's grant of a variance to Donald F. Burke Jr. to build a single-family home at 174 Twilight Road (Pa317-Pa337) and before the Appellate Division in a matter currently pending: "the 2005 subdivision application included the entire tract or parcel known as the 'Voorhees Estate'" and the "limit of the wooded areas required to be preserved by the Subdivision Resolution, which primarily encompassed Lot 13" and that Donald F. Burke Jr. violated "the tree preservation condition of the Subdivision Resolution." (Pa225-Pa276).

Judge Wellerson correctly ruled that "[o]n the Twilight property alone, the Court finds that the involvement of issues that are intertwined with the application and the complaint here, are squarely before the planning -- before the Appellate Division" and "[t]he Court is not going to tread on the same areas of law that the Appellate Division is now considering. It is inappropriate and certainly outside the jurisdiction of this Court." (T38:16-39:2). Judge Wellerson recognized this was an attempt by Save Barnegat Bay to obtain in this case relief that was rejected by Judge Ford in the Prerogative Writ Action involving the same property in which Michele Donato, Esq. represents the objectors that is now pending before the Appellate Division, stating:

> [T]he property in question was the subject of significant scrutiny by the Planning Board. They had expert testimony at the time, they had lay testimony at the time, they had the benefit of their own engineer to provide them with the review and analysis of the engineering firm. The Planning Board, in their discretion, determined it was an appropriate location for development and granted the relief. That determination was appealed to the Superior Court. Judge Ford reviewed the application and found that the Planning Board had acted within its jurisdiction and authority and sustained the determination of the Planning Board. That issue is now on appeal before the Appellate Division.
>
> The complainant here is asking this Court to become involved in making a determination on issues which are squarely before the Appellate Division as to whether or not the development permit, which will require review to be essentially interfered with by the Law Division in a separate action. The Appellate Division will make its determination and may be subject to further appeal if Save Barnegat Bay finds themselves an interested party in that.
>
> [(T66:18-67:16).]

Judge Wellerson recognized Save Barnegat Bay's lawsuit to be impermissible forum shopping and he correctly refrained from becoming involved in issues regarding 174 Twilight that were rejected by the NJDEP, by the Bay Head Planning Board, and by Judge Ford, and that now are "squarely before the Appellate Division." (Ibid.)

C. The Trial Court Correctly Dismissed the Complaint Because it is Harassing.

Save Barnegat Bay filed this action after opposing a variance application for a single family home at 174 Twilight Road, Bay Head, NJ sought by Donald F. Burke Jr. Save Barnegat Bay has a rule book for those who oppose development

urging them to wage "a separate and ongoing PR war against the applicant" and to "play dirty" and advises objectors that "Nuclear options are available" and encourages "skullduggery" (see "Secrets of Being A Successful Objector," Pa057-Pa059).

Counsel for Save Barnegat Bay was not able to provide any responses to Judge Wellerson's questions regarding harassment and appellate counsel does not address this point at all.

- Judge Wellerson asked whether Save Barnegat Bay ever filed "other lawsuits . . . against any other property owners" (T27:3-5) and Save Barnegat Bay's counsel responded, "I wouldn't have that information today, Your Honor." (T27:6-7).
- Judge Wellerson again asked "are any other prosecutions currently pending other than the Burkes?" (T27:11-13). Save Barnegat Bay's counsel stated, "Again, Your Honor, I wouldn't know one way or the other." (T27:14 -15).
- Judge Wellerson asked, "Do you know how it is that out of 45 miles of bay, and there's 80 miles of shoreline at least, because it's both sides of the bay, why we picked these three properties?" (T27:16-19). Again, counsel stated, "So, I don't have any firsthand knowledge into why this lawsuit was started, or why these properties were selected." (T27:20-22).
- Judge Wellerson asked later in the argument, "The statute also talks about harassment. Why is this not to be viewed through that?" (T47:10-11) and Save Barnegat Bay's counsel responded, "Well, I don't know -- I don't know." (T47:12-13).
- Judge Wellerson again asked "And where does the issue of harassment get distilled out in that analysis?" (T51:13-14); Save Barnegat Bay's counsel's response was, "Well, Judge, again I'm hard pressed to answer that on behalf of my client. So I --as to when they make determinations about when and where to initiate litigation. I don't have that information." (T51:15-16).

The legislative mandate to dismiss harassing Environmental Rights Act lawsuits is to protect citizens from environmental vigilantism that would weaponize the statute for illegitimate reasons. Here, Save Barnegat Bay has made its goal clear – it is using litigation to try to force the Burkes to "donate these properties to -- for environmental use to a nonprofit, like Save Barnegat Bay." (T25:17-26:1).

The Legislative History reflects a healthy concern about the dangers of allowing the Environmental Rights Act to be weaponized. Without controlling meritless and harassing lawsuits, private individuals and organizations, including disgruntled neighbors and misguided environmental activists, could usurp the role of the designated State, County and local authorities, including the NJDEP, that are charged with reviewing and approving development projects.

Judge Wellerson recognized Save Barnegat Bay's singular focus on the Burke family and the answer to his inquiries left unanswered by counsel for Save Barnegat Bay is clear – Save Barnegat Bay is using the Environmental Rights Act to harass the Burkes and Judge Wellerson correctly dismissed this matter pursuant to N.J.S.A. 2A:35A-4(c).

Point II

THE TRIAL COURT CORRECTLY DISMISSED SAVE BARNEGAT BAY'S COMPLAINT BECAUSE ALLEGATIONS SET FORTH IN THE COMPLAINT DID NOT ESTABLISH A CAUSE OF ACTION UNDER THE ENVIRONMENTAL RIGHTS ACT

A complaint must contain "a statement of the facts on which the claim is based, showing that the pleader is entitled to relief, and a demand for judgment for the relief to which the pleader claims entitlement." R. 4:5-2. "[A] pleading must allege sufficient facts as give rise to a cause of action; mere conclusions and an intention to rely on discovery are inadequate. Glass v. Suburban Restoration Co., 317 N.J. Super. 574, 582 (App. Div. 1998). "[A] formulaic recitation of the elements of a cause of action" is insufficient. Ibid. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). A review of Save Barnegat Bay's Complaint reveals nothing more than formulaic recitations that properties owned by the Burkes are protected wetlands that have been filled without alleging sufficient facts to sustain a cause of action of a violation of the Environmental Rights Act.

The conclusory nature of the allegations of the Complaint is particularly problematic for Save Barnegat Bay when Judge Wellerson denied the NJDEP's request for an administrative search warrant to enter the Burkes' properties to perform testing. Judge Wellerson reviewed the affidavits submitted in support of the NJDEP's search warrant application that included maps, satellite and aerial photography and other evidence. Judge Wellerson concluded that the facts presented did not establish probable cause to believe a statutory or regulatory violation on the subject properties had occurred. "[t]he Court, in its discretion, denied the search

warrant application. But it's not that they just appeared with the search warrant, they did an investigation as well." (T40:17-20).

Judge Wellerson applied the Rule 4:6-2 standard imposing on a plaintiff an obligation to plead sufficient facts to establish a cause of action. (T47:15-46:20) and determined the facts alleged were insufficient to establish a cause of action under the Environmental Rights Act, especially because Save Barnegat Bay presented nothing beyond what was presented by the NJDEP which he had already considered and concluded did not establish probable cause that statutory and/or regulatory violations had occurred on the properties.

With regard to the requirement to plead environmental harm, Judge Wellerson asked counsel for Save Barnegat Bay "isn't it your obligation to state with some specificity the damages that occur [as a result of alleged violations by the defendants]" and "Don't you have to indicate with specificity the damage that is being suffered by the property owners you allege?" And, Save Barnegat Bay's counsel responded "No, Judge." (T56:7-24).

Accordingly, even if the Court focuses solely on Rule 4:6-2 and not the statutory prerequisites to suit that Judge Wellerson found compelled a summary dismissal of Save Barnegat Bay's lawsuit (see Point I above), the conclusory factual recitation set forth in Save Barnegat Bay's Complaint fell short of identifying

sufficient facts as give rise to a cause of action of a violation of the Environmental Rights Act.

Point III

SAVE BARNEGAT BAY'S PRE-ACTION NOTICE FAILED TO COMPLY WITH THE NOTICE PROVISION OF THE STATUTE

The Environmental Rights Act provides that notice is a prerequisite to suit. N.J.S.A. 2A:35A-11. This is intended to allow a defendant an opportunity to address any issues that may be harming the environment. Here, Save Barnegat Bay provided four (4) identical letters that failed to provide actual notice of any activity that could give rise to an Environmental Rights Act complaint. Much like the Save Barnegat Bay's Complaint, the so-called notices merely recite formulaic language without providing any factual detail whatsoever. The letters conclusorily state, "The suit generally will concern illegal disturbance of wetlands, filling of wetlands, work in regulated areas without appropriate permits, and other conduct causing impairment and destruction of the environment." (Pa036, Pa039, Pa042, Pa045).

As with the Complaint, the "notices" fail to explain (1) what specific conduct Save Barnegat Bay alleges Donald F. Burke Jr., Donald F. Burke, Patricia Burke and 80 Mantoloking, LLC are engaging in that is causing "actual" harm to the environment on an "ongoing or intermittent" basis; (2) how Save Barnegat Bay knows about any such alleged conduct, (3) when that specific conduct occurred, and (4) why it waited until 2022 to file its Complaint.

Most crucially, the "notices" do not state with any specificity what activity Donald F. Burke Jr., Donald F. Burke, Patricia Burke and/or 80 Mantoloking, LLC should stop engaging in.[4] Accordingly, Save Barnegat Bay's "notice" – if deemed valid – would effectively render meaningless the notice provision of the Environmental Rights Act, which is a prerequisite to suit. For that reason, the Complaint should be dismissed.

Point IV

SAVE BARNEGAT BAY'S FAILURE TO APPEAL THE ORDER DISMISSING THE NJDEP AS A PARTY MUST RESULT IN A DISMISSAL BECAUSE THE NJDEP IS, ACCORDING TO SAVE BARNEGAT BAY, AN INDISPENSABLE PARTY BECAUSE IF THE NJDEP IS ABSENT, COMPLETE RELIEF CANNOT BE ACCORDED

Rule 4:28-1 provides, in relevant part, that a person is an indispensable party if:

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest in the subject of the action and is so situated that the disposition of the action in the person's absence may either (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or other inconsistent obligations by reason of the claimed interest.

[4] Save Barnegat Bay is attempting to use the Environmental Rights Act to coerce and intimidate the Burkes in its attempt to confiscate private property by agreeing to "refrain from filing an [Environmental Rights Act] action" if the Burkes sell their "properties for fair market value." (Pal60). Use of the Environmental Rights Act to coerce property owners to sell property is an abuse of the statute and Judge Wellerson properly dismissed Save Barnegat Bay's lawsuit.

Save Barnegat Bay's Complaint named the NJDEP as a "party needed for a just adjudication under R. 4:28-1" (Pa029) alleging, "[c]omplete relief cannot be accorded among the parties to the action without DEP's presence as party; there is a substantial risk of inconsistent obligations between any remedy the Court may fashion and existing DEP regulations and procedures." (Pa029). Save Barnegat Bay argued that the NJDEP's joinder as a party defendant was mandatory because the Environmental Rights Act vests in private litigants the right to compel enforcement of environmental laws by the NJDEP. Certainly, Save Barnegat Bay's position that the NJDEP is an indispensable party is correct and the failure to appeal the Order Dismissing the NJDEP as a party is fatal to its remaining cause of action under the Environmental Rights Act.

As Save Barnegat Bay urged the court below, the NJDEP is a "party needed for a just adjudication under R. 4:28-1." Save Barnegat Bay, however, failed to appeal the Order Dismissing Save Barnegat Bay's action against the NJDEP. Accordingly, this must result in a dismissal of the entire complaint because, without the NJDEP as a party, there are no means to effectuate relief sought by Save Barnegat Bay.

This situation is akin to Kessler v. Tarrats, 191 N.J. Super. 273 (Ch. Div. 1983), aff'd, 194 N.J. Super. 136 (App. Div. 1984) where the Court required the Administrator of Spill Compensation Fund to join all persons who will be affected

by his claim of priority in order to effectuate subordination of prior liens. In Ross v. Ross, 308 N.J. Super. 132, 143 (App. Div. 1998), the Appellate Division held that a surviving wife is an indispensable party to former wife's action to enforce QDRO distributing the deceased husband's pensions and annuities governed by ERISA. In Fox v. Township of West Milford, 357 N.J. Super. 123, 130-131 (App. Div.), certif. denied, 176 N.J. 279 (2003), the Court held that the existence of property owner's access easement over State-owned lands, which would defeat an inverse condemnation action against a municipality, cannot be adjudicated unless the State is a party. See also Stokes v. Twp. of Lawrence, 111 N.J. Super. 134 (App. Div. 1970) (the successful applicant for a variance must be joined as a party-defendant in the action in lieu of prerogative writs brought by objectors to the grant); D'Angelo v. D'Angelo, 208 N.J. Super. 729 (Ch. Div. 1986) (estate of deceased former spouse is indispensable party in action for enforcement of equitable distribution order).

Save Barnegat Bay is precluded by the concept of judicial estoppel from denying that the NJDEP is an indispensable party. Judicial estoppel "bars a party to a legal proceeding from arguing a position inconsistent with one previously asserted." Dep't of Law& Pub. Safety v. Gonzalez, 142 N.J. 618, 632 (1995) (internal quotation marks omitted). The doctrine prevents litigants from "playing fast and loose" with, or otherwise manipulating, the judicial process. Id. "'Judicial estoppel is applied with caution to avoid impinging on the truth-seeking function of

the court,'" Commercial Ins. Co. of Newark v. Steiger, 395 N.J. Super. 109, 115 (App. Div. 2007) (quoting Teledyne Indus., Inc. v. NLRB, 911 F.2d 1214, 1218 (6th Cir. 1990)), "because the doctrine precludes a contradictory position without examining the truth of either statement." Teledyne, 911 F.2d at 1218; see Ali v. Rutgers, 166 N.J. 280, 288 (2000). A court may invoke judicial estoppel where necessary to "protect[] the integrity of . . . the judicial process." Dep't of Law & Pub. Safety v. Gonzalez, 142 N.J. 618, 632 (1995)).

Judicial estoppel is applicable here because Save Barnegat Bay averred in paragraph 158 of its Complaint: "Complete relief cannot be accorded among the parties to the action without DEP's presence as party; there is a substantial risk of inconsistent obligations between any remedy the Court may fashion and existing DEP regulations and procedures." (Pa029). Save Barnegat Bay also argued to the Court below that the NJDEP, as the enforcing agency, is an indispensable party in whose absence relief cannot be accorded.

In light of the above, the failure to appeal Judge Wellerson's Order dismissing Save Barnegat Bay's Complaint the NJDEP must result in a dismissal of the entire action because the NJDEP is an indispensable party in whose absence complete relief cannot be accorded.

Point V

SAVE BARNEGAT BAY'S FAILURE TO ADDRESS IMPORTANT ISSUES IN ITS APPELLATE BRIEF PRECLUDES IT FROM ASSERTING ARGUMENTS ON THESE ISSUES IN ITS REPLY BRIEF

Save Barnegat Bay has strategically failed to address important issues in its Appellate Brief such as the appropriate standard of review and the Legislative History demonstrating a concern that the Environmental Rights Act might be misused and establishing appropriate safeguards to control such misuse, including directing courts to dismiss Environmental Rights Act cases that are "patently frivolous, harassing or wholly lacking in merit" be summarily dismissed. N.J.S.A. 2A:35A-4(c). Here, these issues were raised below and reasonably should have been addressed by Save Barnegat Bay in its merits brief.

An issue addressed for the first time in a reply brief and not presented in claimants' merits brief, is deemed waived. See Gormley v. Wood-El, 218 N.J. 72, 95 n.8 (2014); Drinker Biddle & Reath LLP v. N.J. Dept. of Law & Public Safety, 421 N.J. Super. 489, 496 n.5 (App. Div. 2011) (claims not addressed in merits brief deemed abandoned and could not properly be raised in a reply brief); State v. Amboy Nat. Bank, 447 N.J. Super. 142, 148 n. 1 (App. Div.), certif. denied, 228 N.J. 249 (2016) (issue addressed for first time in reply brief deemed waived); Fuhrman v. Mailander, 466 N.J. Super. 572, 599 (App. Div. 2021) (same); N.J. Citizens Underwriting Reciprocal Exch. v. Collins, 399 N.J. Super. 40, 50, 942

(App. Div. 2008) (declining to address an argument raised for the first time in reply brief). The principle is one of fairness to the court and opposing counsel and it should be applied here because Save Barnegat Bay's strategic failure to brief important issues in its merits brief and waiting to address important issues in its Reply Brief defeats a core principle of our adversary system that requires an appellant to raise all issues that are important so that the respondent has a full and fair opportunity to address them.

CONCLUSION

For the foregoing reasons, Donald F. Burke Jr., Donald F. Burke, Patricia Burke and 80 Mantoloking, LLC respectfully request the Court to affirm the dismissal of Save Barnegat Bay's Complaint.

Respectfully submitted,

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And

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By: s/ *Donald F. Burke*
Donald F. Burke, Esq.

Dated: December 28, 2023

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-56-23

SAVE BARNEGAT BAY, INC., A NON-PROFIT CORPORATION OF THE STATE OF NEW JERSEY Plaintiff-Appellant v. DONALD F. BURKE, SR., DONALD F. BURKE JR., PATRICIA BURKE, 80 MANTOLOKING, LLC, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, JOE DOES 1-10 AND XYZ CORPORATIONS 1-10 (FICTITIOUS NAMES, TRUE NAMES BEING UNKNOWN TO PLAINTIFF AT THIS TIME) Defendants- Respondent	**Civil Action** On Appeal From: Superior Court of New Jersey Ocean County, Law Division Docket No.: OCN-L-1171-22 Sat Below: Hon. Craig L. Wellerson, P.J. Cv.

REPLY BRIEF OF PLAINTIFF-APPELLANT SAVE BARNEGAT BAY, INC.

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Dated: January 11, 2024

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TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

1. Order Granting Defendants Donald F. Burke, Patricia Burke, and 80 Mantoloking, LLC Motion to Dismiss entered on July 25, 2023. (Pa385-Pa386; 1T64-14 to 1T70-5).

2. Order Granting Defendant Donald F. Burke, Jr. Motion to Dismiss entered on July 25, 2023. (Pa383-Pa384; 1T64-14 to 1T70-5).

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

In response to Plaintiff's brief, Defendants do not directly address the arguments raised by Plaintiff, but simply continue to pound the table that there are no violations. However, Plaintiff has alleged sufficient facts that when taken as true, as they must at this stage, support a violation of environmental statutes and regulations. Plaintiff is entitled to discovery prior to a summary judgment being filed and granted. The fact that the NJDEP may have taken some investigation into the matter is not an automatic preemption to Plaintiff's claims. In fact, the decision by the NJDEP not to take further action because it did not have the resources or inclination to pursue the matter further shows that Plaintiff's action is not preempted.

The motion filed was a motion to dismiss for failure to state a claim. It is not a motion for summary judgment, which should have been denied. It is not a motion to dismiss under N.J.S.A. 2A:35A-4(c), which was not referenced in the statement of reasons as the basis for the granting of the motion. The only analysis to be undertaken is if the complaint pleads sufficient facts to satisfy the notice pleading standard in New Jersey. As set forth in Plaintiff's initial brief, Plaintiff has met that burden.

For the reasons set forth herein and in Plaintiff's initial brief, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

PROCEDURAL HISTORY

Plaintiff refers to and incorporates the Procedural History set forth in Plaintiff's appellate brief.

STATEMENT OF FACTS

Plaintiff refers to and incorporates the Statement of Facts set forth in Plaintiff's appellate brief.

LEGAL ARGUMENT

I. DEFENDANTS FILED AND THE COURT GRANTED A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM PURSUANT TO R. 4:6-2(e).

In Defendants' opposition, Defendants argue that the Court relied upon N.J.S.A. 2A:35A-4(c) in dismissing the complaint. (Db11-Db22). However, this is not supported by the record or the transcript. In fact, Defendants in the same brief agreed that "[the Court] applied the Rule 4:6-2 standard." (Db24). Defendants filed a Motion to Dismiss for Failure to State a Claim pursuant to R. 4:6-2(e). (1T47-10 to 1T47-20). The Court in its statement of reasons, held that "the Court makes this determination that it is inconsistent and certainly within the purview of a R. 4:6-2 application to dismiss the complaint for failure to state a claim." Nowhere in the statement of reasons did the Court refer to N.J.S.A. 2A:35A-4(c).

There was no strategic decision not to raise arguments relating to N.J.S.A. 2A:35A-4(c) in Plaintiff's initial brief. It was not addressed in Plaintiff's initial brief

because it did not serve as the reason for the Court's decision. As a motion to dismiss for failure to state a claim, the proper review on appeal is *de novo*, and the Appellate Court applies the same standard as the trial court in reviewing the motion. Wreden v. Township of Lafayette, 436 N.J. Super. 117, 124 (App. Div. 2014).

Defendants next argue that Plaintiff lacks standing because the New Jersey Department of Environmental Protection ("NJDEP") has already acted. (Db13-Db17). This position ignores the actual test under the caselaw. Even when an agency does act, but seeks less than full relief, there is a clear right under the ERA for other "persons" to seek further relief. Howell v. Waste Disposal, 207 N.J. Super. 80, 96 (App. Div. 1986). The Appellate Division has held that the ERA may be used "to supplement actions the government has taken." Morris County Transfer Station, Inc. v. Frank's Sanitation Service, Inc., 260 N.J. Super. 570, 577 (App. Div. 1992). This was extensively briefed in Plaintiff's initial brief, and Defendants have no response to the caselaw.

While this issue should not be decided on a motion to dismiss for failure to state a claim stage as it requires fact-specific discovery and analysis into whether the NJDEP's actions were sufficient, the NJDEP has already stated that it decided not to take further action because "they have other priorities. They don't have the resources, or the inclination at this point in time, [to proceed further in the enforcement.]" (1T11-11 to 1T11-23). This clearly falls into the category of where

individual "persons" can seek further relief. Howell, 207 N.J. Super. at 96. Plaintiff has standing to pursue these claims and has not been preempted by the NJDEP's actions to date.

For the reasons set forth in Plaintiff's initial brief, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

II. THE VARIOUS LAWSUITS CITED BY DEFENDANTS RELATE TO DIFFERENT ISSUES.

Next, Defendants argue that Plaintiff is targeting and harassing Defendants with numerous lawsuits. (Db20). These are separate issues that have different procedural requirements. A party certainly has a right to oppose a land use application and if applicable, file an action in lieu of prerogative writ pursuant to R. 4:69. A party also has a right to provide comments on a NJDEP permitting application, and if applicable file an appeal of the issuance of a NJDEP permit. These are separate types of cases, with different standards of reviews, that do not implicate or infringe on an action pursuant to the Environmental Rights Act. In addition, as Plaintiff briefed in the initial brief and acknowledged by Defendants during oral argument, Plaintiff is not a party in the other lawsuit.

The validity and merit of an ERA claim does not depend on how many other lawsuits have been filed by Plaintiff, what other applications Plaintiff has previously opposed, or the reasons why Plaintiff might choose to proceed with litigation on one matter and not another matter. In fact, to request such information may implicate

attorney-client privileged communications. Defendants apparently take the position that this action is harassing because this lawsuit only focuses on properties controlled by the Burkes. (Db2). But it would not make sense to include other unrelated parties and properties in the same action.

The fact that Plaintiff made a global settlement offer relating to the properties does not mean that this lawsuit is allegedly only to strong-arm Defendants into selling the property. Plaintiff has alleged violations of environmental statutes that the ERA provides standing to a private entity to pursue. It is not Plaintiff's actions that caused Defendants to violate the Freshwater Wetlands Protection Act and rules.

For these reasons and the reasons set forth in Plaintiff's initial brief, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

III. PLAINTIFF IS NOT REQUIRED TO SHOW "DAMAGES" TO BRING AN ENVIRONMENTAL RIGHTS ACT CLAIM.

In relation to the arguments relating to a failure to state a claim, Defendants argue that Plaintiff failed to show damages that occurred because of the alleged violations and therefore failed to state a claim. (Db24). However, as extensively briefed in Plaintiff's initial brief, the ERA does not require a showing of "damages" as might be necessary for tort claims. The harm to be adjudicated by the courts with regards to an ERA claim is the violation of statutes, regulations, or ordinances that were designed to protect the environment.

The purpose of the ERA is to provide a private citizen standing to enforce environmental statutes, regulations, or ordinances. N.J.S.A. 2A:35A-4(a). Such an action requires only "an allegation that a person is in violation…of a statute, regulation or ordinance, and that there is a likelihood that the violation will recur in the future." N.J.S.A. 2A:35A-4(a). There is no requirement to show damages or personal harm to a plaintiff; an action pursuant to the ERA is for injunctive or other equitable relief to compel compliance with the environmental statutes, regulations, or ordinances. N.J.S.A. 2A:35A-4(a).

Furthermore, the denial of an application for a search warrant in an entirely different lawsuit, to which Plaintiff was not a party to, does not mean that this Complaint must be denied for failure to state a claim. Instead, this further supports Plaintiff's argument that this was improperly dismissed at the motion to dismiss stage and Plaintiff should have had the opportunity for discovery. In fact, the NJDEP stated that when the Court denied the application for the search warrant, "[the Court] opined that DEP could pursue further actions to obtain additional evidence to … bolster its application [for a search warrant]." (1T45-15 to 1T45-24). The NJDEP chose not to do so. Plaintiff, under the ERA, is choosing to do so and should have the opportunity to obtain and present the additional evidence.

For the reasons set forth in Plaintiff's initial brief, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

IV. THE PRE-ACTION NOTICES WERE SUFFICIENT AS THE NJDEP ATTEMPTED TO INVESTIGATE THE ALLEGED CLAIMS.

Defendants continue to argue that the notices are not sufficient and assert various requirements that are not required by the statute. (Db25). Defendants did not provide any citations to support their position, because there are none. As extensively briefed in Plaintiff's initial brief, the notice was adequate as the purpose is to allow the NJDEP to exercise its judgment and determine if it wants to take action. Howell, 207 N.J. Super. at 95.

On January 22, 2022, Plaintiff served the notice of intention to commence suit under the ERA. (Pa34-Pa46). The NJDEP had been investigating the matter, and as stated during the hearing, the NJDEP decided not to pursue it further because "they have other priorities. They don't have the resources, or the inclination at this point in time, [to proceed further in the enforcement]." (1T11-11 to 1T11-23). Therefore, as the NJDEP has made the affirmative decision to not take further action, Plaintiff's ERA action is not preempted and may proceed. Howell, 207 N.J. Super. at 96.

In a footnote, Defendants also allege that Plaintiff is only filing this lawsuit to strong-arm Defendants into selling the property. (Db26). Simply because Plaintiff made a global settlement offer to try to resolve the many different issues associated with the properties and proposed development, does not mean that this is a frivolous lawsuit.

For these reasons and the reasons set forth in Plaintiff's initial brief, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

V. DEFENDANTS DID NOT CROSS-APPEAL THE DISMISSAL OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, THEREFORE AN ARGUMENT THAT THE NJDEP IS AN INDISPENSABLE PARTY IS NOT PROPERLY RAISED.

Defendants argue that Plaintiff's claims against Defendants must be dismissed as Plaintiffs failed to appeal the order dismissing the New Jersey Department of Environmental Protection ("NJDEP"). (Db26-Db27). Defendants are in effect arguing that the NJDEP is an indispensable party. (Db29). However, in dismissing the NJDEP, the Court held that the NJDEP is not an indispensable party, holding that "[t]here's no need to have the DEP remain in the lawsuit at this time." (1T38-7 to 1T38-8). Defendants did not cross-appeal this ruling and cannot raise this argument on appeal. As the Court has held the NJDEP is not an indispensable party, Plaintiff is proceeding with its claims against Defendants.

The concept of judicial estoppel is not implicated because Plaintiff is not arguing a contrary argument, Plaintiff is simply accepting the Court's ruling on this discrete issue, which is that the NJDEP is not an indispensable party to this action.

CONCLUSION

In conclusion, for the reasons set forth herein and in the initial brief, this Court should reverse the Trial Court's orders and deny Defendants' Motion to Dismiss.

Respectfully submitted,

LIEBERMAN BLECHER & SINKEVICH, P.C.
Attorneys for Plaintiff

Dated: January 11, 2024

/s/Stuart J. Lieberman
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