IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-003032-23

ON APPEAL FROM ORDER AND FINAL DECISION SIGNED AND SERVED TO PARTIES ON MAY 7, 2024 IN DOCKET NO. CPM-L-415-22 SUPERIOR COURT OF NEW JERSEY, CAPE MAY COUNTY, LAW DIVISION

SAT BELOW:
THE HONORABLE DEAN R. MARCOLONGO, J.S.C.

NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, FISH & WILDLIFE,

PLAINTIFF-RESPONDENT,

V.

SUNSET BEACH SPORTSMEN'S CLUB, INC.,

DEFENDANT-APPELLANT.

BRIEF OF DEFENDANT-APPELLANT, SUNSET BEACH SPORTSMEN'S CLUB, INC.

SUBMITTED AUGUST 28, 2024

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I. PRELIMINARY STATEMENT

This is a dispute between a State agency (NJDEP) and the Sunset Beach Sportsmen's Club, Inc., (the Club) a non-profit organization, arising from the NJDEP's purchase of over 148.351 acres (or 6,462,169.56 SF) of uniquely situated waterfront property in Lower Township, New Jersey commonly known as the area of Sunset Beach and Higbee's Beach (the property), which occurred in 1999 and included the Club remaining in possession of

approximately 0.57 acres as part of the NJDEP's acquisition. The Club owns the building that is situated on the land.

The Club predated the NJDEP by almost half a century. In the late 1950s, the Club came to possess approximately half an acre of land on the property and established a non-profit club. The property was once owned by Harbison-Walker and operated as a Magnesite Plant. Since the 1970s, the Club has also had a club liquor license and since that time has occupied and used the property in the same manner to the present day as a place for social gathering, fostering various community oriented and charitable initiatives, and providing limited service of alcohol to its members and their guests only pursuant to a lawfully issued club liquor license. The Club has no history of violations. With the exception of the NJDEP, the Club has operated without any government interference since its inception.

In 1999, after years of preparation and due diligence, the NJDEP purchased the property not only with notice of the Club, but with the NJDEP requesting in writing that the Club be incorporated as part of its acquisition of the property and with the express recognition of their many years in existence and a representation that the Club would be able to retain possession. The NJDEP communicated its intent in writing to the previous owner and the Club. Both reasonably relied on the NJDEP's representations, including the preservation

of the Club and the promise of their continued possession and facilitated the sale. Almost two decades later, the NJDEP has completely reversed their position and now cites the service of alcohol as categorically incompatible with the mission of the NJDEP.

The Trial Court erred in granting summary judgment to the NJDEP and failed to view the competent evidential materials in the light most favorable to the Club as the non-moving party and afford them all "legitimate inferences".

II. PROCEDURAL HISTORY.

On June 15, 2022, NJDEP filed their complaint for summary dispossession against the Club in Special Civil Part, Landlord Tenant under Docket No. CPM-LT-346-22. Da8.

On July 29, 2022, the Club filed a Motion to Transfer to Law Division pursuant to R. 6:4-1(g). Da526. On October 26, 2022, the Court entered an Order granting the Motion to Transfer to Law Division and the case was reassigned Law Division Docket No. CPM-L-415-22. Da526.

On November 4, 2022, the Club filed their Answer with Affirmative Defenses and Counterclaims against the NJDEP. On December 9, 2022, the NJDEP filed an Answer to the Club's Counterclaims. Da95.

Discovery concluded on December 15, 2023. Da527. That same day, NJDEP filed a Motion for Summary Judgment which was opposed by the

Club. Da527. On May 7, 2024, the Trial Court issued a Final Order and Opinion granting the NJDEP's motion for summary judgment and entering a judgment in the NJDEP's favor but requiring that a Warrant of Removal shall not be executed prior to November 11, 2024. Da527. This appeal followed. Da545.

III. STATEMENT OF FACTS

The Sunset Beach Sportsmen's Club, Inc. (the Club) is a non-profit organization with a diverse membership that provides a gathering place for those sharing a common purpose to support the regard for fish and wildlife sporting resources, including but not limited to Sunset Beach and Higbee Beach, as well as veteran & active military organizations, schools, police & fire department fundraisers, local charities, and other benevolent organizations. Da232; Da432.

The Club is located at Sunset Beach in Lower Township in the vicinity of lands formerly owned by Harbison-Walker Magnesite Facility and surrounded by a parking lot, gift shop and miniature golf course. Da445.

The Club was founded by a group of fishermen in the 1940s and was originally located in Cape May Point. Da232; Da432. In 1957, the club moved to its current location in the area of Sunset Beach, where it remains to this day.

Id. At the time of the Club's relocation in 1957, Harbison-Walker Refractories Company operated a large magnesite plant in the area of Sunset Beach. Id.

In the 1970s, the Club obtained a Club Liquor License pursuant to the provisions of Title 33. Da440. Since then, the Club has continued in possession of the Club, renewed its license on an annual basis through the State of New Jersey and the Township of Lower, and operates in conformance with the law. Da488.

In 1982, Harbison-Walker executed a Lease with the Club. Da23. That lease provides that the Club retains ownership of the structure itself and that the Club will pay real estate taxes, which the Club has paid every quarter. Paragraph 37 of the Lease provides the Club with the option to renew for an unlimited number of one (1) year periods. Id.

On May 6, 1993, the prior owner wrote to the Club advising of a corporate reorganization and requesting all future notices and checks be directed to a new address and that the Club indicate its "desire to continue this lease another year". Da444.

By 1993, the factory operations had shuttered and the factory buildings had been demolished and thereafter NJDEP developed an interest in acquiring the property. Da282. On August 30, 1994, the NJDEP submitted an application for federal aid for "153 acres" of land in Lower Township. Id.

Through the process of applying for Federal funding, the property was appraised and the existence of the Club and its activities on the property was disclosed, and the Federal Government knew about the Club as early as 1995. Da300. Ultimately, the NJDEP received federal funding for the project. However, the Federal Government only funded a fraction of the purchase price. Da203.

The NJDEP commenced formal negotiations with Harbison-Walker to acquire the property. Da207-208. Instead of attempting to get the Club to vacate the premises in connection with the sale, the NJDEP did the opposite. Id. They requested that the Club and the existing Lease be incorporated as part of the sale. Id. The intent that the Club remain as part of the sale was communicated on multiple occasions in writing and was included in the agreement of sale. Da208. Specifically, the NJDEP communicated directly with both the Club and Harbison-Walker regarding the intent to purchase the property with the Club remaining in place. Da406; Da408.

In the beginning of June 1999, the Club contacted the NJDEP to confirm its intent to remain at the property "long-term" and referencing a discussion in which the NJDEP indicated it was possible if the Club were to incorporate some public benefit. Da406.

In response, the NJDEP noted it was amenable to an initial five-year term prior to their acquiring. Id.

On July 7, 1999, the NJDEP wrote to Harbison-Walker acknowledging the Club's 50 year history and confirming that "The State of New Jersey would like to extend the tenancy of the Club on this property by leasing a small amount of land." Da406. That same day, the NJDEP wrote to the Club and included a proposed Lease and providing that in lieu of any rent payments, the Club would instead provide public benefits such as maintaining public restrooms, performing routine clean-up and sponsoring public charitable events. Da408. The agreement of sale between the NJDEP and Harbison-Walker specifically references the Club as remaining in possession in connection with closing. Da49.

As a result of these discussions, on September 17, 1999, the NJDEP was able to acquire over 148.351 acres (or 6,462,169.56 SF) of uniquely situated waterfront property. Da208; Da31; Da445.

The Club premises is approximately half of an acre, which if converted to a percentage is approximately 0.3% of the total land acquired by the NJDEP in this area. Da209. The club premises is situated at the very edge of the property acquired by the NJDEP and adjacent to the privately owned gift shop, parking lot, and miniature golf course. Id.

The NJDEP admitted that the State would have been on notice of the Club's liquor license. Da219. Subsequent to the sale in 1999, the Club has continued to operate in the same manner that existed in 1957 and which operations were existing and expressly acknowledged by the NJDEP in 1999. Id.; Da493. The Club has continued to maintain and renew its liquor license on annual basis, as it has since the 1970s. Da488. In addition, the Club has continued to organize various public functions including charitable events and periodic "beach cleanups" Da239.

On or about February 26, 2021, the NJDEP internally concluded that the Club's service of alcohol on the property constituted a "nonconforming use" and then provided that conclusion in a letter to the U.S. Fish and Wildlife Service indicating that the Club "serves alcoholic beverages on the property" and requesting the Federal government concur with the NJDEP's interpretation that it be deemed an "interference" pursuant to Federal Regulations (50 CFR 80.134). Da73; Da211. This contact was initiated by the NJDEP, not the Federal government. Id.

The NJDEP admitted that the regulation cited provides allowances for "commercial, recreational, and other secondary uses of a grant funded parcel of land or water or capital improvement if these secondary uses do not interfere with the authorized purpose of the grant." Da212. For example, the

NJDEP permits kayak businesses, commercial agricultural using heavy machinery, and authorized an 18-hole golf course known as "White Oaks" with a clubhouse, pro-shop, banquet room, and a bar and restaurant called "The Oaks Bar & Grill". Id. The service of alcohol is permitted and provided all around the course. Id.; Da214.

Despite its drastic change in position and supposed hardline position on alcohol, the NJDEP admitted there is no categorical prohibition on alcohol on State lands. Da213.

The NJDEP was questioned on what rationale or criteria they use to evaluate exceptions, and despite permitting a for-profit entity to serve alcohol on a golf course with a bar and grill operation on State lands, they responded that "there are no exceptions". Da214. The NJDEP indicated White Oaks was "there when we purchased the property." Id.

On March 1, 2012, the NJDEP entered into an agreement with White Oaks Country Club, Inc. for the management and operation of the golf course. Da491. On February 7, 2019, the NJDEP approved a fifteen (15) year renewal term to White Oaks extending to February 29, 2032. Id. On November 23, 2020, the NJDEP approved an assignment of the agreement to "Empire Golf Management, LLC" for management and operation of the golf course. Id.

Shortly after approving the extension and assignment for White Oaks described above (including the sale of alcohol to the general public), the NJDEP began objecting to the Club's liquor license renewals and proceeding with efforts to eject the Club from the property. Da56.

The NJDEP admitted it does not have or apply any objective criteria in approving alcohol on its lands. Da214; Da216. The NJDEP admitted that White Oaks does not advance the purposes of the agency and the NJDEP instead accepts payment from the company and applies those funds toward undefined purposes. Da216. In order for members of the public to use and enjoy the golf course, they must pay to enter. Da217.

The NJDEP admitted that the Club does not interfere with the essential purposes of the property. Da221-222. The Club is located adjacent to the parking lot which most visitors "gather their stuff and move as quickly out of the parking lot as they can." Id. The NJDEP admitted that it began objecting to the liquor license renewals to "figure out another way to get to this point where we felt we needed to get to". Da222. The NJDEP also admitted the federal government is not seeking repayment of the partial aid it provided in 1999. Da225.

IV. ARGUMENT

A. The Trial Court erred as matter of law entering judgment in the NJDEP's favor and dismissed all defenses and counts of the Club's Answer and Counterclaims on Summary Judgment where genuine issues of material fact exist and the Club was to be afforded all reasonable inferences as the non-moving party. (Da527; (May 7, 2024)).

The standard of review of a trial court's grant or denial of a motion for summary judgment is de novo, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

A court deciding a summary judgment motion does not draw inferences from the factual record as does the factfinder in a trial, who "may pick and choose inferences from the evidence to the extent that 'a miscarriage of justice under the law' is not created." Id. at 536 (quoting R. 4:49–1(a)). Instead, the motion court draws all legitimate inferences from the facts in favor of the non-moving party. R. 4:46–2(c); See also Durando v. Nutley Sun, 209 N.J. 235, 253 (2012) (noting "courts construe the evidence in the light most favorable to the non-moving party in a summary judgment motion" (quoting Costello v. Ocean Cty. Observer, 136 N.J. 594, 615 (1994))); Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 536 (1995) (explaining "[o]n a motion for

summary judgment the court must grant all the favorable inferences to the non-movant").

With the factual record construed in accordance with Rule 4:46–2(c), "the court's task is to determine whether a rational factfinder could resolve the alleged disputed issue in favor of the non-moving party." Perez v. Professionally Green, LLC, 215 N.J. 388, 405–06 (2013); See also Bhagat v. Bhagat, 217 N.J. 22, 39 (2014) (noting when deciding summary judgment motion, court determines whether reasonable jury could rule in favor of non-moving party).

Accordingly, when the movant is the plaintiff, the motion court must view the record with all legitimate inferences drawn in the defendant's favor. See Bhagat, supra, 217 N.J. at 38; Durando, supra, 209 N.J. at 253; Brill, supra, 142 N.J. at 523. If a reasonable factfinder could decide in the defendant's favor, then the plaintiff has not demonstrated that it is "entitled to a judgment or order as a matter of law" and the court must deny the plaintiff's summary judgment motion. R. 4:46–2(c); See Bhagat, supra, 217 N.J. at 47–49 (reversing grant of summary judgment because genuine issues of fact exist as to elements necessary to establish irrevocable gift); Lyons v. Twp. of Wayne, 185 N.J. 426, 434–37 (2005) (reversing grant of summary judgment because

record was inconclusive as to whether dispute exists regarding plaintiffs' nuisance claim).

Here, a reasonable factfinder considering the evidence set forth in the record, *with all legitimate inferences drawn in defendants' favor*, could find that plaintiffs did not prove by a preponderance of the evidence that there is only one true opinion regarding the interpretation and application of the 1982 Lease and years of conduct surrounding performance and assignment of the same. Plaintiff was not entitled to judgment as a matter of law on their claim to eject the Club which is based on cherry picking one paragraph and divorcing it from (1) the document as a whole and other provisions that conflict with the plaintiff's position and leaving the document open to interpretation and (2) the surrounding conduct over many years informing its intent.

For obvious reasons, the plaintiff would like very much to keep this simple. However, because (1) the Lease itself is ambiguous as to renewal and (2) Plaintiff expressly acknowledged and accepted the Club as part of their acquisition of the property (rather than seeking ejectment as a condition of the sale) and waited nearly two decades to change its position on the Club – this is not so simple.

Similar to the parties in Globe Motor Co. v. Igdalev, 225 N.J. 469 (2016), the parties here sharply dispute the meaning and interpretation of the writings and conduct at issue.

The plaintiff did not meet their burden on summary judgment. First, there is genuine issue of material fact whether the NJDEP's conduct comports with the "square corners" doctrine which is an equitable principle that specifically applies to government entities. The "turn square corners" is an equitable doctrine holding that the government may not "conduct itself so as to achieve or preserve any kind of bargaining or litigation advantage." See New Concepts For Living, Inc. v. City of Hackensack, 376 N.J. Super. 394, 401 (App. Div. 2005); See also Vliet v. Board of Trustees of Public Employees' Retirement System, 156 N.J. Super. 83 (App. Div. 1978). Rather, "its primary obligation is to comport itself with compunction and integrity, and in doing so government may have to forego the freedom of action that private citizens may employ in dealing with one another." Id. To invoke the "turn square corners" doctrine, citizens need not prove that they were blameless, or that the government acted in bad faith. CBS Outdoor, Inc. v. Borough of Lebanon Planning Bd./Bd. of Adjustment, 414 N.J. Super. 563, 586-87 (App. Div. 2010); See New Concepts, 376 N.J. at 402-403.

For example, in New Concepts, a non-profit moved to a new location without informing the city tax assessor. Id. at 396. It retained its old location for leasing to other non-profits. Id. At some point after the move, the tax assessor sent the non-profit some paperwork to complete along with an "initial statement" to be filled out to continue its tax-exempt status. Id. These materials were sent to the old location but were returned by the post office, marked "forwarding expired." Id. The tax assessor then noticed the non-profit's sign at the new location and sent the paperwork to the new location. Id. at 397. However, he forgot to include the "initial statement" with the paperwork. Id. Thereafter, the tax assessor placed the old location back on the tax rolls and mailed the tax assessments to the old location. Id. The non-profit never received those assessments. Id. As a result, they went unpaid, and the old location was scheduled for a municipal tax sale. Id. When the non-profit received the municipal tax sale notice, which was communicated both by mail and by phone, it promptly reached out to the city. Id. Initially, the city agreed to reassess the situation if the non-profit would send documents verifying that it was tax-exempt. Id. at 398. However, after the non-profit sent the documents, the city reversed course and asserted that the non-profit was liable for at least some of the tax assessments because the deadline for appeal had passed. Id.

The Court found that the non-profit probably had an obligation to notify the assessor that it had relocated its operations. Id. at 402. However, they also found the government failed to notify the non-profit of its tax delinquency, and the non-profit contacted the city in a timely manner. Id. at 403. Thereafter, the government, "having lulled plaintiff into a false sense of security, reversed its position despite having led plaintiff to believe that it was willing to work with plaintiff in a fair, informal and reasonable manner to fashion a remedy to plaintiff's problem." Id. Because the government did not turn square corners, the non-profit was permitted to pursue its tax appeal. Id.

In this case, a rational fact finder giving all reasonable inferences to the Club could certainly find that the NJDEP failed to turn “square corners” with the Club. After completing discovery, it is now an undisputed fact that the NJDEP requested in writing that the Club be incorporated in the purchase and be permitted to stay. It is also an undisputed fact that both the NJDEP and the federal government (who the NJDEP now attempts to use as its cat’s paw), knew about the Club’s existence and activities on the property prior to the purchase in 1999. A rational fact finder could easily conclude that the multiple communications and affirmations in writing prior to the sale lulled the Club into a false sense of security that they would be permitted to stay and that the NJDEP was willing to treat the Club in a fair and reasonable manner.

Almost two decades later, the NJDEP has reversed course and now seeks to terminate the Lease, without cause or by utilizing various pretexts, after welcoming the Club with open arms (and in writing) which facilitated the NJDEP's purchase of the main property from Harbison-Walker. NJDEP fails to rationally distinguish their treatment of White Oaks Golf Course, where alcohol sales and commercial for-profit activity are permitted on a grander scale and found not to constitute an "interference" while the more limited and non-profit activities of the Club are claimed to be untenable. For those reasons, summary judgment must be denied as to the NJDEP's complaint and Count I of the Club's counterclaim.

Second, there is a genuine issue of material fact as to the nature of the agreement between the parties and which party is in breach. Pursuant to Paragraph 28 of the Lease, the agreement provides for a 90-day termination if the property is to be sold during the term. Paragraph 36 should be read to reinforce this provision as there is no statement that termination may be without cause. Pursuant to Paragraph 37, the Club may renew the lease for an unlimited number of additional one (1) year periods.

In their 2022 Notice to Quit, the NJDEP cites three (3) reasons for termination: (1) The sale, service, and use of alcohol is "contrary to the Division of Fish and Wildlife Rules"; (2) The Club's mission and activities is

an "interference" with the National Coastal Wetlands Conservation Grant and other funding sources used by the Department, and (3) The Club's use of the premises is inconsistent with the Division's mission.

The Club and its operations were no secret in 1999 and were either known or should have been known by the NJDEP. By that time, the building had been at its location since the late 1950s and had been operating with liquor license since the 1970s. The NJDEP requested they be included as part of their purchase but now two decades later has completely reversed its policy on the Club's use which remains the same. This decision did not happen in a vacuum. While the NJDEP was reversing course on the Club, it was at the same time extending a lease and approving an assignment for an 18-hole golf course in a WMA which includes a bar and grill. The NJDEP failed to articulate any rational application of its regulations pertaining to alcohol other than that this golf course was the only exception. The NJDEP also acknowledged that it spurred the federal government to agree with its conclusions and that it was possible the outcome would have been different had they not done so. Da225. The NJDEP also admits that the Club occupies only 0.3% of the land it acquired and its location in the parking lot on the periphery of the property does not interfere with the primary purposes and use of the property.

Accordingly, a rational juror could find that the NJDEP's complaint is without basis. For those reasons, summary judgment must be reversed as to the NJDEP's complaint and denied as to Count II of the Club's counterclaim.

Third, there is a genuine issue of material fact as to whether the NJDEP complied with the implied covenant of good faith and fair dealing. In addition to the express terms of a contract, the law provides that every contract contains an implied covenant of good faith and fair dealing. See Model Civil Jury Charge 4.10J. This means that, even though not specifically stated in the contract, it is implied or understood that each party to the contract must act in good faith and deal fairly with the other party in performing or enforcing the terms of the contract. Id. To act in good faith and deal fairly, a party must act in a way that is honest and faithful to the agreed purposes of the contract and consistent with the reasonable expectations of the parties. A party must not act in bad faith, dishonestly, or with improper motive to destroy or injure the right of the other party to receive the benefits or reasonable expectations of the contract.

Here, a rational juror could reasonably find in favor of the Club on this issue based on the NJDEP's conduct leading up to the purchase of the property in 1999 and their reversing course almost two decades later after lulling the Club into a false sense of security in connection with the sale. This conduct

deprived the Club of making alternative arrangements in connection with the impending sale (e.g. subdividing and carving out the land prior to the purchase from Harbison-Walker and before the NJDEP took ownership). A rational juror could find that when a government official writes a letter indicating their intent to renew an obligation that they should be held to that promise and not be permitted to change positions years later when different personalities assume control of an agency. For those reasons, summary judgment must be reversed as to the NJDEP's complaint and Count III of the Club's Counterclaim.

Fourth, there is a genuine issue of material fact as to whether the NJDEP made representations and promises to the Club and the Club reasonably relied on those promises and therefore the NJDEP should be estopped from changing position. The elements of estoppel are (1) that the defendant made a promise; (2) defendant expected that the promise would be relied on, (3) that the plaintiff reasonably relied on the promise, and (4) the plaintiff's reliance on the promise caused the plaintiff to suffer a definite and substantial detriment. See Peck v. Imedia, Inc., 293 N.J. Super. 151 (App. Div. 1996). Estoppel may be invoked against a public agency 'where interests of justice, morality and common fairness clearly dictate that course.'" Middletown Twp. Policemen's

Benevolent Ass'n v. Twp. of Middletown, 162 N.J. 361, 367, (2000) (quoting Gruber v. Mayor and Twp. Comm. of Raritan, 39 N.J. 1 (1962).

Based on the evidence available in this case, a rational juror could find that the NJDEP made a promise in writing that the Club would be permitted to stay in connection with their purchase, that the NJDEP expected both the Club and Harbison-Walker to rely on that promise, that it was reasonable for the Club to rely on a promise made in writing, and that the Club relied to their detriment now facing ejection almost two decades later.

The facts giving rise to estoppel also closely relate to the Club's defenses to this action including Laches. That doctrine is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party. See Knorr v. Smeal, 178 N.J. 169 (2003) (applying Laches and barring defendant's late motion to dismiss for plaintiffs' failure to timely file an affidavit of merit); In re Kietur, 332 N.J. Super. 18, 28 (App. Div. 2000) (citing County of Morris v. Fauver, 153 N.J. 80, 105 (1998)). The doctrine is available when the delaying party had an opportunity to assert its right, and the prejudiced party acted in good faith in believing that the right had been abandoned. Fox v. Millman, 210 N.J. 401, 417 (2012).

In this case, Laches applies to both the NJDEP's attempt to terminate the Club's tenancy and its assertion that the Counterclaims should be barred by the New Jersey Contractual Liability Act (CLA). There is a termination clause in the lease tied to the sale of the property. The NJDEP's interest and investigations of the property dates back at least 5 years before the purchase in 1999 based on their application for federal funding in 1994. Neither the prior owner nor the NJDEP sought to exercise the termination clause in connection with the sale. Instead, the NJDEP took the position that the Club should remain in recognition of their extensive history and made that intention known in writing multiple times prior to their acquisition of the property, only to change their position almost two decades later after all parties had relied on this position and facilitated the sale.

Furthermore, the NJDEP seeks to bar the Club from asserting counterclaims in litigation the NJDEP has brought against the Club and arising from the same factual background, on the basis that the Club did not provide notice pursuant to the CLA. At the infancy of this litigation, the Club responded to the NJDEP's Complaint with a Motion to Transfer to Law Division which the Court granted and resulted in an opportunity for extensive discovery of the various claims and defenses raised. The Court should take note that the NJDEP did not assert the CLA in response to that motion and has

had every opportunity to investigate and respond to the claims raised. Accordingly, there is no prejudice to the NJDEP in proceeding with these claims where they have brought this litigation on themselves and waited until the eleventh hour to cite the CLA in hopes that it will stick. The CLA is designed to provide the government with adequate notice of issues and claims which it has in abundance here; it is not designed to be a tool for gamesmanship. For those reasons, the Court should reverse summary judgement as to the NJDEP's complaint and Count IV of the Club's Counterclaim.

Fifth, the NJRA applies to the Club and the NJDEP completely failed to perform on its obligations. The Relocation Assistance Law of 1967 (N.J.S.A. 52:31B-1 et seq.) and the Relocation Assistance Act / 1971 (N.J.S.A. 20:4-1 et seq.) were enacted by the New Jersey State Legislature to ensure the equitable treatment of individuals, families, businesses (including non-profit organizations), and farm operations displaced by government action. See also N.J.A.C. 5:11-1 et seq.

The provisions of the law are to be "liberally construed" to effectuate its purposes. See also, N.J.S.A 52:31B-1 et seq.; N.J.S.A. 20:4-1 et seq. as amended; and N.J.A.C. 5:11-1 et seq. These laws apply to all State agencies

and local government units. See N.J.S.A. 52:31B-3; N.J.A.C. 5:11-1.2. The NJDEP as a "state agency" is subject to these laws.

As part of those regulations, when a state agency decides that a tenant, resident, business owner, or farm operation must leave their dwelling or place of business, the state actor must send a plan, called a Workable Relocation Assistance Plan (WRAP), to the Department of Community Affairs for review. The WRAP must show that the state agency knows the number of people, businesses, or farm operations impacted by the relocation plan and then must demonstrate that there are enough comparable replacement housing units or business sites in the area for the people to find new homes, apartments, or business locations. Each state agency must designate the individual who will carry out the obligation established by law. Once the WRAP has been approved, the state agency informs the tenants, residents, business owners, or farms that they are being moved; the state agency must also tell the tenants, residents, business owners, or farms that the state agency will help them find another place to live or conduct business and that they have the right to appeal the actions.

In connection with the WRAP process, the state agency seeking to displace a person, business, or non-profit must notify the effected party in writing, which notice shall include direction that the "displacee should not

vacate the property prior to being authorized to do so in order to remain eligible for payments and assistance…" See N.J.A.C. 5:11-4.2. No State Agency shall displace or remove any person or business (including non-profits) unless there is a WRAP approved by the Department of Community Affairs. See N.J.S.A. 52:31B-6; N.J.A.C. 5:11-6.1.

Here, not only is there no WRAP, there was not even an attempt on the NJDEP's part to comply with the relocation laws. For that reason, the Court should deny summary judgment as to Count V and because the clubhouse would "lose substantially all its value if removed" from the property the Court should deny as to Count VI. See N.J.S.A. 20:3-2.

The NJDEP has always wanted this to be a simple Landlord-Tenant Court case. However, their representations, conduct, and delay in this case make this dispute hardly a conventional one. Due process should not be cast aside for the sake of expediency. Based on the foregoing, the Club respectfully requests summary judgment be reversed and a trial by jury be scheduled on all issues.

IV. CONCLUSION

Based on the foregoing, the Trial Court erred in granting summary judgment to the plaintiff where both the meaning and interpretation of the Lease and conduct of the parties over many years surrounding the Club's

tenancy result in unresolved genuine issues of material fact. Summary Judgment should be reversed and this matter remanded for a trial on all issues raised.

Respectfully submitted,

GILLIN-SCHWARTZ LAW

By:_____

Dated: 8/28/2024 CHRISTOPHER GILLIN-SCHWARTZ, ESQUIRE

	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-003032-23T2
NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, FISH & WILDLIFE, Plaintiff/Respondent, v. SUNSET BEACH SPORTSMEN'S CLUB, INC., Defendant/Appellant.	CIVIL ACTION ON APPEAL FROM FINAL ORDER OF THE SUPERIOR COURT OF NEW JERSEY, CAPE MAY COUNTY, LAW DIVISION ON MAY 7, 2024 IN DOCKET NO. CPM-L-415-22 SAT BELOW: THE HONORABLE DEAN R. MARCOLONGO, J.S.C.

BRIEF ON BEHALF OF RESPONDENT NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, FISH & WILDLIFE

Date Submitted: January 16, 2025

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PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

This matter arises from a standard landlord-tenant order for removal of the Sunset Beach Sportsmen's Club, Inc. (the "Club") from the leased premises located within the New Jersey Department of Environmental Protection, Fish and Wildlife's ("DEP") Higbee Beach Wildlife Management Area in Lower Township, Cape May County ("Higbee Beach WMA").

A. DEP's Administration of Wildlife Management Areas.

DEP, through its Fish & Wildlife division, is the state agency statutorily authorized to protect and manage the State's fish and wildlife to maximize their long-term biological, recreational, and economic values for all New Jerseyans. (Da9).[2] N.J.S.A. 13:1B-23 through -28. As part of this mission, DEP manages over 360,000 acres of land divided into distinct Wildlife Management Areas ("WMA") throughout the state. (Da219 at T82:14).

DEP promulgated rules for the administration of its WMAs at N.J.A.C. 7:25-2.1 to -2.26. Of particular relevance here, the rules prohibit the consumption, possession, or control of alcoholic beverages on a WMA without

[1] Because they are closely related, these sections are combined for efficiency and the court's convenience.

[2] "Da" refers to the Club's appendix; "Db" refers to the Club's brief; and "DEPa" refers to DEP's appendix.

"written permission or other authorization" from DEP. N.J.A.C. 7:25-2.4. Historically, DEP's practice is to deny requests for exemption from the above rule and DEP has granted permission on only one occasion. (Da215-16 at T69:19–71:2).

One WMA is at Higbee Beach in Lower Township, Cape May County, which contains 1,160 acres of State property purchased in part with federal funding. (Da10; Da297-300). DEP operates and maintains the Higbee Beach WMA using a combination of State funds, federal grant funds under the Pittman-Robertson Wildlife Restoration Program and the Dingell-Johnson Sport Fish Restoration Program ("Wildlife and Sport Fish Restoration Program"), and revenue from the sale of State hunting and fishing licenses. (Da10; Da74-75; Da83-84).

B. The Club Moves to The Property in the 1950s And Executes A Lease with Harbison-Walker for The Premises.

In or around 1957, the Club moved its clubhouse from its original location in Cape May Point to its present location. (Da104-05; Da262-63 at T47:1-7, 50:18–51:5). The clubhouse is located on approximately 0.57 acres within Block 748, Lot 35.01, Lower Township, Cape May County (the "Premises"). (Da1; Da9; Da107; Da142-43). In 1957, the property now known as Higbee Beach WMA was owned by Harbison-Walker Refractories, U.S., a division of Dresser Industries, Inc. ("Harbison-Walker"), as a part of a magnesite plant.

(Da2; Da107). On numerous occasions throughout its occupancy on the Premises, the Club was unaware that Harbison-Walker owned the land, and instead, mistakenly believed that either the Club owned the land or that the land was owned by other nearby landowners. (Da263 at T50:11–51.7, T53:14–4:1; Da272-73 at T28:1–31:7; Da276 at T43:25–45:3). In the early 1980s, Harbison-Walker requested that the Club begin paying rent. (Da263 at T51:23–52:24).

In 1982, Harbison-Walker entered into a lease with the Club ("Lease") and established a tenancy on the Premises with a one-year term in consideration of a single $750 rental payment. (Da2; Da23-30). It is undisputed that the Lease is the only agreement concerning the Club's occupancy on the Premises. (Da432-39).

The Lease allowed for annual renewals "upon written notice to the landlord sixty (60) days prior to the expiration of the term hereof, or any one (1) year renewal." (Da28). At paragraph thirty-six, the Lease also provided the landlord with the option to "terminate this lease upon ninety (90) days written notice to the [Club]." (Da2; Da28). Paragraph twenty-eight provides that the Club agrees to vacate within ninety days in the event the Premises are sold and the lease terminated. (Da2; Da25). The Lease clarifies that the clubhouse is the Club's property and grants the Club 180 days "to remove all structures from the leasehold lands" in the event of termination, otherwise said structures and all

other property become "the property of the landlord." (Da25). Under the terms of the Lease, the Club is required to comply with all applicable laws and regulations, possess general liability insurance, and "pay any real estate taxes attributable to improvements located on the leasehold premises." (Da3; Da23; Da28).

C. DEP Purchases the Property from Harbison-Walker and Becomes the Club's Landlord.

In or about 1990, with the support of Cape May County, DEP sought to preserve Higbee Beach in order to protect the "coastal wetlands, beachfront, dune, maritime forest, and disturbed lands" that are "critical migratory bird habitat," including habitat for the endangered Piping plover, Least tern, and two endangered plant species. (Da285-91; Da294; Da299). In order to purchase the 1,160-acres of Higbee Beach, in 1994, DEP applied for a federal assistance grant of $500,000 from the United States Fish and Wildlife Service ("USFWS"), within the United States Department of the Interior, to be used in addition to State funding. (Da282).

DEP then appraised the Higbee Beach property as required for the federal grant application and to support the use of State Green Acres funding. (Da300-404). The appraisal acknowledged the Club's Lease with Harbison-Walker. (Da330). In July 1999, USFWS approved DEP's federal assistance grant application under the National Coastal Wetlands Conservation Grant Program

("Coastal Grant Program") administered by the Wildlife and Sport Fish Restoration Program. (Da74; Da297-98).

Meanwhile, in February 1999, DEP and Harbison-Walker entered into the Purchase Contract for DEP to purchase the Higbee Beach property. (Da49-55). The Purchase Contract acknowledges that the Club's tenancy may remain on the Premises subject to the 1982 Lease terms:

> Seller represents that the premises shall be free of any tenancies or any written or oral lease for the outstanding use of the property, except for the tenancy by The Sunset Beach Sportsman's Club. This Agreement is subject to the terms of said lease and Purchaser shall assume all of Seller's obligations under said Lease.
>
> [Da53.]

After execution of this Purchase Contract, the Club, through its attorney, contacted DEP to request a new lease to remain on the Premises after State acquisition. (Da405-06). DEP then asked Harbison-Walker to enter into a new lease with the Club prior to DEP's acquisition. (Da407). DEP staff also made an internal notation that entering into a five-year lease with the Club prior to acquisition of Higbee Beach was "OK." (Da406; Da408-14). However, the Club never entered into a new lease with DEP or Harbison-Walker, seemingly due, at least in part, to the Club's refusal to end the sale and use of alcohol on

the Premises, as required by DEP regulations. (Da272-73 at T29:14–30:1; Da276 at T44:16–45:7; Da414).

DEP acquired title to the Higbee Beach property in September 1999. (Da31-48). The Club acknowledged DEP as the owner of Higbee Beach, including the Premises on which the clubhouse is located. (Da406; Da415). As such, DEP became landlord to the Club's tenancy pursuant to the Purchase Contract by virtue of the 1982 Lease. (Da53; Da143). It is undisputed that no new lease between DEP or Harbison-Walker and the Club was ever executed. (Da409-14; Da432-39).

D. The Club Occupies the Premises Undisturbed for Nearly Twenty Years Until DEP Objected to The Club's Alcohol Use and Asked the Club for Information In 2018.

After the 1999 acquisition of Higbee Beach WMA, the Club operated undisturbed nearly twenty years. (Da109; Da437). The Club serves alcohol at the Premises as part of its regular operations. (Da144-48; Da239 at T26:23–27:1; Da240-41 at T32:17–35:24; Da257-58 at T29:24–30:16, T31:3-23; Da270-71 at T19:17–T22:24). DEP never gave the Club permission to use, sell, serve, possess or consume alcohol on the Premises and, as early as 2018, has repeatedly demanded that the Club cease such alcohol use. (Da56-73; Da78).

Specifically, in 2018, then-Director of Fish & Wildlife formally requested a copy of the Club's current lease, certificate of insurance, and liquor license,

and informed the Club that it must cease service of alcoholic beverages pursuant to agency regulations. (Da56-59). The Club failed to demonstrate that it had an active liability insurance policy and refused to cease service of alcoholic beverages. (Da60-62; Da239 at T26:23-27:5; Da258 at T31:1-23; Da427). In response to the Club's demonstrable confusion regarding ownership, DEP provided proofs of its ownership of Higbee Beach, including the Premises on which the Club's clubhouse is located. (Da60-66; Da428-31).

The Club continues to refuse to cease its sale and use of alcohol on the Premises despite DEP's repeated demands to stop. (Da145-48).

E. DEP Explored Options to Resolve the Issue Amicably.

DEP began trying to resolve the above-described conflict, namely, by pursuing a "land swap" in which the Club would purchase a property comparable to that of the Premises and convey it to DEP in exchange for DEP conveying the Premises to the Club. (Da416-22). In August 2020, while DEP was considering comparable properties for the "land swap," DEP informed the Club that USFWS approval was required in order to convey federally-encumbered State property, such as the Premises within Higbee Beach WMA. (Da421-22; Da210 at T48:1–49:15). As an alternative in the event USFWS would not approve of the "land swap," DEP offered to buy the Club's clubhouse in order to provide the Club with funds to purchase "an alternate piece of private land and not cause the

cessation of the Club's activities." (Da421-22). The Club did not see the offer as an "agreeable solution" and was "disappointed." (Da423).

On February 26, 2021, DEP inquired with USFWS whether either a "land swap" or an "equitable cash payout" for the Premises would be acceptable remedies to resolve the conflict with the Club. (Da73; Da210-11 at T47:17–53:23; Da220 at T86:4–87:14). On July 21, 2021, USFWS concluded that the Club "interferes" with the purposes of the federal Coastal Grant Program, which DEP used to acquire the Higbee Beach property, and further indicated that the Club's location on the Premises violated federal regulations governing the administration of federal grants through the Wildlife and Sport Fish Restoration Program that DEP uses to operate and maintain its WMAs throughout the State and to execute its statutory wildlife management charge. (Da74-75). 16 U.S.C. §3954.

USFWS recommended DEP "1) fully investigate and take appropriate action to cease the Club's occupancy, and 2) restore the [Premises] to the full administrative control of [DEP]." (Da75). And, USFWS indicated that because DEP "is not in compliance with the requirements of the [federal grant program] and is not in control of license acquired lands, [DEP] is in jeopardy of losing eligibility to receive future Federal awards," throughout the Wildlife and Sport Fish Restoration Program. (Da75).

F. After Attempts for An Amicable Resolution Failed, DEP Served A Notice to Quit and Objected to Lower Township Issuing the Club an Alcohol License.

In 2021 and 2022, DEP continued trying to create a mutually agreeable plan for the Club to vacate the Premises, but DEP's efforts were rejected. (Da78-82). On February 1, 2022, DEP served by personal service, email, certified and regular mail, a letter and three-month Notice to Quit demanding the Club vacate the Premises by May 2, 2022. (Da83-87). The February 1, 2022 Notice included DEP's reasons for terminating the Lease as: (1) the Club's sale, service and use of alcohol on a WMA without prior written permission or authorization from DEP contrary to DEP regulations; (2) the Club's mission and activities on the Premises interfere with federal funding; and (3) the Club's private use of the Premises is inconsistent with a public WMA. (Da83-84).

DEP issued the Notice to Quit pursuant to Paragraphs twenty-eight and thirty-six of the 1982 Lease which authorized termination upon ninety days' notice, pursuant to N.J.S.A. 2A:18-53(a) for holding over after expiration of the lease term, and pursuant to N.J.S.A. 2A:18-53(c)(4) for the Club's violation of DEP's regulations for alcohol use. (Da85-86). The Club continued to refuse to vacate the Premises beyond May 2022 even after being served proper notice and it continues to hold over its possession of the Premises without DEP's authorization. (Da144).

In furtherance of the breakdown in finding a mutually agreeable resolution and consistent with its concerns regarding alcohol use on the property, DEP objected to Lower Township's reissuance of the Club's retail liquor license. (Da65-72). DEP's objections are based on the fact that DEP, as the landowner, never gave permission to the Club to sell or serve alcohol on its property in accordance with N.J.A.C. 7:25-2.4. (Da65-72). Nevertheless, Lower Township has continued to renew the Club's liquor license despite DEP's repeated objections. See, e.g., (Da94).

G. The Club Refused to Vacate Pursuant to The Notice to Quit and Litigation Followed.

On June 15, 2022, DEP filed a verified complaint for summary dispossession in the Special Civil Part, Law Division, Cape May County. (Da8-22). On July 29, 2022, the Club filed its answer and six counterclaims, including: Violation of the "Square Corners" Doctrine; Breach of Contract & Unlawful Enforcement; Breach of the Covenant of Good Faith and Fair Dealing; Estoppel; Violation of the New Jersey Relocation Assistance Laws; and Inverse Condemnation. (Da95-121). On October 26, 2022, after briefing and oral argument, the court removed the matter to the Law Division. (Da526).

On May 7, 2024, the court granted summary judgment to DEP on the eviction count and dismissed all six of the Club's counterclaims. (Da527-44). The court found that the Club is a holdover tenant subject to dispossession and

that each of the Club's counterclaims were either meritless or not a defense to eviction even if they were viable. (Da536-43). Thus, the court ordered that DEP has the legal right to exclusive sole possession of the Premises, that the Club no longer has a legal right to possession, and that DEP could apply to the court to issue a Warrant of Removal in the normal course on or after November 11, 2024. (Da527). The order also provided that any personal property left by the Club after November 11, 2024, including the clubhouse, "shall become the property of [DEP] who may dispose of same at their discretion pursuant to Paragraph 34 of the 1982 Lease Agreement." (Da528).

On June 4, 2024, the Club appealed the trial court's summary judgment decision and simultaneously filed a motion with the trial court to stay the May 7, 2024 eviction order. (Da545-53). On July 1, 2024, the trial court granted the Club's request for a stay pending the outcome of the Club's appeal, but preserved DEP's right to appeal the stay "should some type of escalation of the current situation threaten Federal funding." (DEPa1).

ARGUMENTS

THE COURT SHOULD AFFIRM SUMMARY JUDGMENT IN FAVOR OF DEP ON ALL COUNTS BECAUSE THE TRIAL COURT CORRECTLY GRANTED EVICTION. (Responding to the Club's Brief Point IV.A)

This court "reviews the grant of a motion for summary judgment de novo applying the same standard used by the trial court." Samolyk v. Berthe, 251 N.J. 73, 78 (2022). A reviewing court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co of Am., 142 N.J. 520, 540 (1995). Facts that are "immaterial or of an insubstantial nature, a mere scintilla, 'fanciful, frivolous, gauzy or merely suspicious'" cannot overcome true and uncontradicted facts. Id. at 529 (quoting Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 75 (1954)).

The non-movant "cannot defeat the motion by raising a misguided subjective belief . . . to create the existence of a genuine issue of material fact." Swarts v. Sherwin-Williams Co., 244 N.J. Super. 170, 178 (App. Div. 1990) (affirming summary judgment despite conflict between a party's affidavit and the same party's prior assertions). Moreover, "the existence of a counterclaim does not bar a proceeding for summary judgment on the original claim where

the counterclaim is shown to be sham, frivolous, or without merit." Optopics Laboratories Corp. v. Sherman Laboratories, Inc., 261 N.J. Super. 536, 544 (App. Div. 1993) (quoting P.A. Agabin, Annotation, Summary Judgment – Counterclaim, 8 A.L.R.3d 1361, 1364 (1966); 73 Am. Jur.2d Summary Judgment § 31 at 759-61 (1974)).

Here, the trial court correctly concluded there was no dispute of material fact on DEP's eviction claim and granted DEP the right to recover exclusive sole possession of its own property as a matter of law. (Da535-36). On appeal, the Club does not challenge the court's findings on DEP's eviction claim. Instead, the Club takes issue with the trial court not having ruled in its favor on its counterclaims. (Db21-35). But on the record presented, the trial court properly found that each of the Club's counterclaims were without merit, and even if they had been viable, would not have been a defense to eviction, which DEP is indisputably entitled to as a matter of law. (Da537-43). The Club's disagreement with the trial court's findings cannot prevail over basic principles of landlord-tenant law nor in overturning the decision below. Accordingly, the decision below must be affirmed.

A. The Trial Court Correctly Granted Summary Judgment to DEP When the Club Continued to Holdover and Continues in Possession of The Premises After the Expiration of The Lease Term and Proper Notice.

With this appeal, the Club does not challenge the trial court's eviction findings, nor would such a challenge hold any merit. The court properly found that the Club is a holdover tenant subject to summary dispossession and therefore, DEP is entitled to "speedy recovery of the [P]remises" as a matter of law. (Da534-36 (citing Fargo Realty, Inc. v. Harris, 173 N.J. Super. 262 (App. Div. 1980)). There was simply no dispute of material fact regarding whether DEP satisfied all substantive and procedural requirements pursuant to the Lease and Summary Dispossession Act.

As a non-residential tenant, the Club is subject to the statutes within the Summary Dispossession Act ("Act") at N.J.S.A. 2A:18-53 through -61. One of the six grounds outlined by the Act provides that a tenant can be removed from property "[w]here such person holds over and continues in possession of all or any part of the demised premises after the expiration of his term, and after demand made and written notice given by the landlord or his agent, for delivery of possession thereof." N.J.S.A. 2A:18-53(a). The trial court properly found the facts in the record indisputably demonstrated that DEP is entitled to repossession of its property on the basis of the Club's holdover status. (Da535).

As such, it is undisputed on this record that the Club is a holdover tenant. Ibid. The only lease agreement which the Club ever entered into to occupy the Premises is the 1982 Lease with Harbison-Walker. Ibid. The terms of that Lease explicitly provide that "[t]he landlord may terminate this lease upon ninety (90) days written notice to the tenant." (Da28). And, the tenant must provide a written renewal notice to the landlord within sixty days of expiration of the term. Ibid.

As the court noted, there is no evidence in the record that the Club gave any written notification of a desire to renew the Lease term or that a new or superseding agreement was ever reached between the Club and DEP or Harbison-Walker to stay on the Premises. (Da536). While many of the Club's complaints are based on a five-year draft lease that DEP proposed in 1999, the court found it "undisputed that [that] proposed lease was never signed." Ibid. Yet, as noted by the court, the Club "continued to occupy the property without paying rent, without entering into a new lease, or entering any type of agreement to stay on the property for any period, let alone indefinitely." Ibid. (emphasis in original). On that record, the court correctly concluded that the Club remained on the Premises as a holdover tenant after expiration of the terms of the 1982 Lease, and that the terms of the 1982 Lease control as the only operable agreement in this matter. Ibid.

Nor did the court find any dispute that DEP satisfied the procedural requirements under the Act and the Lease by delivering the Notice to Quit to the Club on February 1, 2022, over ninety days before filing the underlying eviction complaint. (Da535-36). N.J.S.A. 2A:18-53(c) requires the landlord to personally serve the tenant a demand for possession of the premises by written notice which identifies the cause of termination. Notice requirements for holdover tenants are codified at N.J.S.A. 2A:18-56(b). For purposes of summary dispossession, where there is no other agreement between a holdover tenant and a landlord, the holdover tenant is considered a "month to month" tenant. N.J.S.A. 46:8-10. And, month to month tenants require a one month notice period prior to a demanded removal date. N.J.S.A. 2A:18-56(b).

Paragraph thirty-six of the Lease here allows the landlord to terminate the Lease for any reason with ninety days' prior notice to the tenant. (Da28). The court found it undisputed that DEP served the Notice to Quit ninety days before the May 2, 2022 date of demanded possession. (Da536). Although termination based on paragraph thirty-six of the Lease was sufficient in and of itself and did not require any other reasoning (Da536), the Notice to Quit included three reasons for DEP's decision to terminate the Lease: (1) the sale, service, and use of alcohol on a WMA without permission pursuant to N.J.A.C. 7:25-2.4; (2) the USFWS' determination that the Club interferes with DEP's federal funding; and

(3) the Club's private use of the Premises is inconsistent with use of public land to preserve, conserve and protect habitat for game, nongame, and threatened and endangered species. (Da83-84).

On appeal, the Club claims that the Lease is ambiguous based on DEP's "surrounding conduct," namely that DEP purchased the Higbee Beach property subject to the Club's 1982 Lease and allowed the Club to remain there undisturbed for over two decades. (Db23). Regardless of how long DEP allowed the Club to remain on the Premises, the terms of the Lease are clear and upon its termination, there was no operable agreement by which the Club could legally remain on the Premises. (Da536). Therefore, based on the undisputed facts in the record, the trial court correctly concluded that the Club is a holdover tenant subject to eviction pursuant to the Act and the explicit language of the 1982 Lease. Ibid. The summary judgment decision should be affirmed.[3]

B. The Trial Court Properly Granted Summary Judgment in Favor of DEP on All of The Club's Counterclaims.

In its appeal, the Club rehashes arguments made below in support of its counterclaims (Db21-35), each of which were properly rejected by the trial

[3] As an alternative basis for this court to affirm the eviction, the Club is further subject to removal under N.J.S.A. 2A:18-53(c)(4) for violating the covenants of the Lease. The trial court did not feel the need to address this issue due to its finding ample justification for removal of the Club as a holdover tenant. (Da536).

court. (Da537-43). Each counterclaim either fails to set forth a cognizable cause of action or is meritless, and even if any one of these counterclaims were viable, they each fail to affect an outcome in which DEP prevails in evicting the Club in this "simple landlord tenant matter." (Da543). Therefore, the trial court properly dismissed all six of the Club's counterclaims and granted DEP summary judgment. Ibid.

a. The Trial Court Properly Found There Is No Violation of The Square Corners Doctrine.

In its appeal, the Club reiterates the same arguments raised below in support of its first counterclaim alleging DEP violated the "square corners doctrine." (Db24-27). However, the trial court correctly determined that the Club cannot succeed in alleging that DEP violated the "square corners doctrine" because it is not a valid cause of action and DEP treated the Club fairly. (Da537-38). This doctrine is based on a government entity's obligation to "turn square corners" in its dealings with the public and to "comport itself with compunction and integrity." F.M.C. Stores Co. v. Borough of Morris Plains, 100 N.J. 418, 426-27 (1985) (internal citations omitted). In turning square corners, the government "may not conduct itself so as to achieve or preserve any kind of bargaining or litigational advantage . . . ." Id. at 427. But, an allegation of a violation of the "square corners" doctrine is not a stand-alone cause of action for which relief can be granted, as the Club contends. (Db24-27). Rather, this

doctrine may be successfully raised by private parties as an equitable defense where a government exploits a tactical advantage. CBS Outdoor, Inc. v. Borough of Lebanon Plan. Bd., 414 N.J. Super. 563, 585-86 (App. Div. 2010); W.V. Pangborne & Co. v. N.J. Dep't of Transp., 116 N.J. 543, 561-62 (1989).

Here, the court correctly found that there is no indication on this record that DEP's conduct achieved any bargaining or litigational advantage in its dealings with the Club. (Da537-38). The relief DEP sought under the Summary Dispossession Act is available to all commercial landlords, not just government agencies. N.J.S.A. 2A:18-53. DEP's policy decision to terminate the Lease was a considered judgment as outlined in the February 1, 2022 Notice to Quit. See In re Att'y Gen. Law Enf't Directive Nos. 2020-5 and 2020-6, 246 N.J. 462, 502 (2021) (no finding of a violation of "square corners" where policy decisions reflected a "considered judgment").

Contrary to the Club's contentions that DEP "lulled the Club into a false sense of security," and suddenly "reversed course" (Db26-27), the trial court acknowledged that DEP conducted itself with compunction and integrity and noted DEP's multiple attempts to reach a mutual resolution before resorting to litigation. (Da538). DEP explored several resolutions in good faith, including (1) executing a new lease with the Club; (2) conveying the Premises to the Club, by sale or exchange; (3) purchasing the Club's building so that the Club would

have funds to establish itself at a new location; and (4) developing a mutually agreeable plan for the Club to relocate. (Da405-22). Each of these attempts ultimately failed, resulting in more beneficial time for the Club to remain on DEP's Premises and further delaying DEP's repossession rather than bestowing DEP with any advantage.

DEP's compunction and integrity in its dealings with the Club is further demonstrated by the fact that DEP has never taken specific enforcement action for the Club's violations regarding the sale and use of alcohol on a public WMA. Instead, DEP's communications with the Club have been fair and accommodating, as evidenced by the transparent and consistent communication throughout the record. (Da83-87; Da405-22). See Gloucester Cnty. Imp. Auth. v. N.J. Dep't of Env't Prot., 391 N.J. Super. 244, 252 (App. Div. 2007) ("turning square corners" includes communicating transparently and forthrightly with the public).

On appeal, the Club points to the White Oaks Golf Course and Bar and Grille ("White Oaks"), which is also located within a WMA and is permitted to serve alcohol on the premises, as purported evidence that the court should have denied summary judgment and found in the Club's favor on its square corners counterclaim here. (Db19-20). However, White Oaks is the only instance where

DEP granted an exception to its alcohol prohibition (Da214-17 at T62:1–76:8), and the reasons for that singular exception are clear on this record.

In fact, the numerous clear and obvious distinctions between White Oaks and the Club were discussed and considered by the court at oral argument. (T16:18–17:9; T36:23–37:13; T40:23–41:24). For instance, unlike the Club: (1) DEP did not purchase the White Oaks property with federal funding; (2) White Oaks is open to the public; and (3) White Oaks generates annual funding for DEP's wildlife management mission. (T36:23–37:13). The Club's argument regarding White Oaks, which is essentially that "if they can do it, why can't we" (Db19-20), fails to illustrate any infirmity in the trial court's reasoning. Simply put, the Club's claim that DEP failed to "rationally distinguish their treatment of White Oaks Golf Course" (Db27), is not supported by the record.

Even if the Club could demonstrate here that DEP failed to "turn square corners" in its dealings with the Club, which it cannot, this would only result in a correction to an unfair litigation or bargaining advantage, F.M.C. Stores, 100 N.J. at 426 (prohibiting a municipality from taking litigational advantage of another party under the doctrine), and would not affect the trial court's finding that DEP has a right to terminate the Lease and regain possession of its Premises. (Da537). The court correctly found there is no violation of the "square corners"

doctrine in this matter, and correctly dismissed the Club's first counterclaim and granted DEP summary judgment. (Da537-38).

b. The Trial Court Properly Found That DEP Did Not Breach Any Contract.

On appeal, the Club also argues that the court should not have dismissed their second counterclaim alleging breach of contract. (Db27-28). But, the trial court rightly concluded that the Club cannot succeed on its breach of contract claim because the Club cannot demonstrate the requisite criteria. (Da538-39).

To prove a breach of contract, the Club must "establish three elements: (1) the existence of a valid contract between the parties; (2) failure of [DEP] to perform its obligations under the contract; and (3) a causal relationship between the breach and the [Club's] alleged damages." Sheet Metal Workers Int'l Ass'n Local Union No. 27 v. E.P. Donnelly, Inc., 737 F.3d 879, 900 (3d Cir. 2013) (citing Coyle v. Englander's, 199 N.J. Super. 212, 223 (App. Div. 1985)).

Here, it is undisputed that the Lease is the controlling agreement. But, there is no support for the Club's readings of the Lease where its terms are clear and unambiguous. Onderdonk v. Presbyterian Homes of N.J., 85 N.J. 171, 182 (1981) (implied terms of a contract only exist where the parties intended them because they are apparent and necessary for contract efficacy). Paragraph thirty-six permits DEP to terminate the Lease upon ninety days written notice to the Club, which was indisputably satisfied here. (Da28; Da83-87). Paragraph

twenty-eight also provides a ninety-day timeframe for written notice where the Lease is terminated due to the sale of the Premises. (Da25).

The trial court refused to accept the Club's assertion, raised again on appeal (Db27), that a "termination only for cause" provision should be read into the Lease where such requirement does not exist and where there is no basis for the Club's contention that Paragraph thirty-six was merely intended to reinforce Paragraph twenty-eight. (Da23-28; Da538). Nor did the court accept the Club's assertion that Paragraph thirty-seven unequivocally allows for unlimited one-year renewals (Db27), especially where there is no evidence the Club ever submitted a renewal request to DEP pursuant to this provision. (Da28; Da538).

And, the record does not support the Club's assertion (Db34), that the Lease was premised on the availability of comparable property for the Club to relocate to in the event of termination. (Da23-28; Da106). Rather, DEP provided more than ninety-days' written notice to the Club as required by the Lease's terms. (Da28; Da83-87). On this record, there are no contractual obligations which DEP had to the Club which were not fulfilled, and thus, no grounds upon which to find a breach of contract. (Da538). Therefore, the trial court correctly dismissed the Club's second counterclaim and granted DEP summary judgment. (Da538-39).

Additionally, on appeal, the Club challenges DEP's statute of limitations argument under the Contractual Liability Act ("CLA") raised in support of its summary judgment motion (Db32-33), although this argument was not addressed by the court in the order for removal. The Club now claims that in not raising this argument in its opposition to the Club's Motion to Transfer to the Law Division, DEP somehow waived its right to assert the CLA's statute of limitations at a later point in the litigation. Ibid. That is simply not the case. Nonetheless, the court correctly dismissed the Club's breach of contract claim because it failed to establish a claim upon which relief could be granted. (Da538-39).

c. The Trial Court Found No Evidence of a Violation of The Implied Covenant of Good Faith and Fair Dealing.

The Club next argues on appeal that the court should not have dismissed its third counterclaim alleging DEP violated the implied covenant of good faith and fair dealing. (Db29-30). The trial court correctly found that there was no support in the record for the Club's claim and that DEP's dealings with the Club were, in fact, in good faith. (Da539). This covenant is implied in every New Jersey contract and requires that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001) (quoting Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 421 (1997)

(additional citations omitted). A breach can only be established where a party acted "arbitrarily, unreasonably, or capriciously" with a "bad motive or intention." Wilson, 168 N.J. at 244, 251.

Here, contrary to the Club's narrative that it was "lulled into a false sense of security" (Db26), the court found that the record overabundantly demonstrates DEP's fairness and good faith towards the Club. (Da539). DEP allowed the Club to remain on the Premises since 1999 without receiving the benefit of a new lease or rent, as the Club admits. (Da109; Da539). DEP pursued multiple solutions to resolve this matter before exercising its legal right to exclusive, sole repossession of its Premises only after those attempts failed. (Da405-22). There is simply no support for the Club's alleged violation of a breach of the implied covenant of good faith and fair dealing. (Db29-30). Therefore, the court was correct in dismissing the Club's third counterclaim and granting DEP's summary judgment. (Da539).

d. The Trial Court Correctly Found That the Club Cannot Meet the Elements of Estoppel.

Next, the Club asserts that the court should have further considered its fourth counterclaim alleging equitable estoppel. (Db30-33). Once again, the trial court accurately concluded that the Club failed to assert a claim upon which relief can be granted or one which would protect the Club from eviction in alleging equitable estoppel. (Da540-41).

Equitable estoppel requires (1) "a knowing and intentional misrepresentation by the party sought to be estopped"; (2) a reasonable reliance induced by the misrepresentation; and (3) a detriment to the party seeking estoppel which was caused by the reliance. O'Malley v. Dep't of Energy, 109 N.J. 309, 317 (1987). Estoppel can only be invoked against a government entity to "prevent manifest wrong and injustice," Vogt v. Belmar, 14 N.J. 195, 205 (1954), where such invocation will not "interfere with essential government functions." O'Malley, 109 N.J. at 316 (quoting Vogt, 14 N.J. at 205).

The court here could not have found any chance of success on the Club's estoppel claim where the Club: (1) did not identify that DEP made a knowing and intentional misrepresentation; and (2) cannot demonstrate a reasonable reliance; or (3) a detriment to the Club based on such reliance. (Da540-41). As discussed above, the record shows DEP's consistently fair and transparent conduct and communications with the Club throughout the parties' course of dealing. (Da83-87; Da405-22). And there is no evidence of DEP making any misrepresentations to the Club. (Da114-15). There is no indication, nor does the Club assert, that DEP ever offered a solution in which the Club could remain on the Premises indefinitely while continuing to serve alcohol.

Instead, on appeal, the Club equates the fact that DEP did not terminate the Lease when it purchased the Premises in 1999 with an intentional

misrepresentation that the Club detrimentally relied on in believing it could remain on the Premises indefinitely. (Db30-33). The court rightfully disagreed, finding that, even giving the Club every benefit of a doubt, "[t]he course of dealings between the parties, including the evidence [of] the [1999] negotiations toward a possible five-year lease, would have given the [Club], at most, a reasonable reliance that they could have stayed on the [Premises] for at least five more years." (Da406-13; Da540). Twenty-five years later, the court could not find any grounds by which the Club could reasonably rely on to remain on the Premises indefinitely. (Da540). Especially where the Purchase Agreement expressly established that the Club was allowed to remain on the Premises subject to the 1982 Lease. (Da53; Da540-41). And, as the court noted, the express terms of the 1982 Lease and inclusion of the ninety-day termination clause provision is "binding upon the parties." (Da23-30; Da540-41).

Nor does the Club on appeal point to any detriment it suffered which the court overlooked, such as passing up an opportunity to move, rent or purchase real property based on a knowing and intentional misrepresentation made by the State. (Db30-33). Instead, the Club admits that it continues to enjoy DEP's Premises as it has for over twenty uninterrupted years. (Da109; Da115). Thus, the court was correct in determining that the Club cannot meet the required criteria for estoppel. (Da541).

Although not specifically addressed by the court, its rejection of the Club's equitable estoppel allegation (Da540-41), was also correct here for another reason. Allowing the Club to invoke equitable estoppel would improperly interfere with DEP's ability to manage public lands and jeopardize federal funding, which would interfere with DEP's "essential government functions." (Da74-75). N.J.S.A. 23:1-1 to 23:13-6; O'Malley, 109 N.J. at 316 ("Equitable estoppel is rarely invoked against a governmental entity . . . particularly when estoppel would 'interfere with essential governmental function.'") (quoting Vogt, 14 N.J. at 205) (additional citation omitted).

Likewise, the Club's laches defense raised on appeal (Db31), is also inapplicable here as DEP did not refrain from asserting its right to exclusive, sole possession of its property, see Knorr v. Smeal, 178 N.J. 169, 181 (2003) ("[l]aches may only be enforced where the delaying party had sufficient opportunity to assert the right . . . and the prejudiced party acted in good faith believing that the right had been abandoned."). The record here reflects the very opposite. Upon its 1999 acquisition of Higbee Beach WMA, DEP acknowledged and included the Lease in the Purchase Agreement. (Da53). And, since at least 2018, DEP communicated directly with the Club in an effort to amicably resolve this matter before filing for eviction in 2021. (Da405-22). It is, at best, unreasonable for the Club to assume that DEP abandoned its right to

possession of its own property by permitting "the Club to enjoy the property peacefully and quietly since 1999." (Da109). Thus, the court did not err in granting DEP summary judgment on all counts.

e. The Trial Court Was Correct in Not Applying The New Jersey Relocation Assistance Laws in This Eviction.

On appeal, the Club reargues its fifth counterclaim for relief under the New Jersey Relocation Assistance Laws ("NJRA") (Db33-35), but the court was correct in finding that NJRA is inapplicable to the present matter and cannot bar DEP's right to sole, exclusive possession of its property. (Da541-42).

The NJRA laws were designed to aid persons or tenants with relocation in three specific situations of "displacement" where there is a lawful order or notice from a State agency or unit of local government on account of: (1) the acquisition of real property for public use; (2) a program of law enforcement; or (3) a program or project for the voluntary rehabilitation of dwelling units. N.J.S.A. 52:31B-3(e); N.J.A.C. 5:11-1.1. Here, the court found that the Club did not meet the above definition for relocation assistance eligibility because it was not "displaced" pursuant to any of the three scenarios envisioned by the NJRA laws. (Da542).

The court opined that the "closest possible argument" for the Club to meet the above requirements for relocation assistance eligibility is that it was "required to vacate pursuant to the acquisition of real property for public use."

(Da542). But, the court considered that DEP did not purchase the Premises in 1999 with the intent of evicting the Club for a public use and that, instead, the property was purchased subject to the Lease. Ibid. The Club was permitted to occupy the Premises for over twenty years after DEP's acquisition. Ibid. There was "no surprise or unreasonably short time for [the Club] to make other plans for continuation of their use or an alternate location," especially in light of DEP's multiple attempts for an amicable resolution. (Da405-22; Da542). As such, the court ultimately concluded that the Club was being evicted pursuant to the simple terms of the Lease and that the NJRA laws are not crafted to encompass such simple landlord-tenant disputes. (Da542). The Club is thus not entitled to any compensation under the NJRA laws. N.J.A.C. 5:11-1.2. And, even if it were determined that the Club is entitled to some type of relocation assistance, this would not prevent the Club's ultimate removal. (Da541-42).

The court was correct in dismissing the Club's fifth counterclaim for relocation assistance and granting DEP summary judgment. Based on all of the above, the trial court correctly found in DEP's favor on each of the Club's counterclaims[4] and ultimately acknowledged that this is a standard landlord-

[4] In its appeal, the Club does not address or challenge the court's findings regarding the sixth counterclaim for inverse condemnation. (Da542-43).

tenant issue in which DEP is entitled to repossess its own property. The court's order of removal must be affirmed.

CONCLUSION

For the foregoing reasons, this court should uphold the trial court's order granting DEP eviction and summary judgment on all counts.

Respectfully submitted,

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February 10, 2025

Superior Court of New Jersey
Appellate Division
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Trenton, NJ 08625

Re: NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, FISH & WILDLIFE V.
SUNSET BEACH SPORTSMEN'S CLUB, INC.,
DOCKET NO. A-003032-23

REPLY BRIEF PURSUANT TO R. 2:6-5

Honorable Judges:

On behalf of appellant Sunset Beach Sportsmen's Club, Inc. (the Club), please accept this letter brief in reply to the submission of respondents. R. 2:6-5.

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I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

The Club incorporates the procedural history and statement of facts from its principal brief.

II. ARGUMENT

THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO THE GROUNDS FOR EVICTION OFFERED BY THE NJDEP AND THE ORDER GRANTING SUMMARY JUDGMENT SHOULD BE REVERSED

The standard of review of a trial court's grant or denial of a motion for summary judgment is de novo, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022); Stewart v. N.J. Tpk. Auth./Garden State Parkway, 249 N.J. 642, 655 (2022); Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021).

On a motion for summary judgment, the Court must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." See Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995)(emphasis added). Further, the trial court may not resolve contested factual issues; rather, it may only determine whether there are any genuine factual disputes. Agurto v. Guhr, 381 N.J. Super. 519, 525 (App. Div. 2005).

A determination of whether there exists a "genuine issue" of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Id. at 540.

A. The lease is ambiguous and there is no express authority for a 90 day termination clause for any reason at any time.

An ambiguity in a contract exists if the terms of the contract are susceptible to at least two reasonable alternative interpretations. Kaufman v. Provident Life and Cas. Ins. Co., 828 F. Supp. 275, 283 (D.N.J.1992), aff'd, 993 F.2d 877 (3d Cir.1993). To determine the meaning of the terms of an agreement by the objective manifestations of the parties' intent, the terms of the contract must be given their "plain and ordinary meaning." Id. "**A writing is interpreted as a whole and all writings forming part of the same transaction are interpreted together.**" Barco Urban Renewal Corp. v. Housing Auth. of Atlantic City, 674 F.2d 1001, 1009 (3d Cir.1982) (citing Restatement (Second) of Contracts § 202(2) (1981)). "In the quest for the common intention of the parties to a contract, the court must consider the relations of the parties, the attendant circumstances, and the objects they were trying to attain." Anthony L. Petters Diner, Inc. v. Stellakis, 202 N.J. Super. 11, 27 (App. Div. 1985).

Ambiguities in a commercial lease must be resolved in favor of the tenant. Carteret Properties v. Variety Donuts, Inc., 49 N.J. 116, 127 (1967). Public authorities, who choose and direct their own contract terms, are not exempt from this doctrine. Terminal Constr. Corp. v. Bergen County Hackensack River Sanitary Sewer Dist. Auth., 18 N.J. 294, 302 (1955).

Here, in their February 1, 2022 "Notice of Termination", the NJDEP cites to Paragraphs 28 and 36 of the Lease and indicates they are providing a 90-day notice to terminate (Da83). Paragraph 28 specifies a *specific event* that triggers the landlord's right to send a 90-day notice - a sale. Absent a sale, there is no right. The full language of Paragraph 28 is below for reference:

> *28th: **If the premises** leased hereunder or of which the leased premises are a part, **shall be sold** during the term hereof, the **Tenant agrees to vacate the premises**, remove all the Tenant's property and deliver up peaceable possession thereof to the Landlord **within 90 days of written demand therefor**, and the term hereof and this lease shall terminate upon the date fixed in said demand.*
>
> (Da25) (emphasis added).

Paragraph 36 goes on to reiterate the 90-day notice referenced in Paragraph 28. However, Paragraph 36 does nothing to distinguish itself from the limitations of Paragraph 28. For example, Paragraph 36 does not contain any language that would *broadly expand* the scope of termination beyond the event of a sale to ***any reason at any time***. If some boundless termination right were

intended in Paragraph 36, there would no reason to include the more specific language in Paragraph 28. The full language of Paragraph 36 is below for reference:

> *36th: The landlord may terminate this lease upon ninety (90) days written notice to the tenant.*
>
> (Da28).

The NJDEP's reading of this lease that the above contains an "any reason, any time" cancellation clause also conflicts with the paragraph that immediately follows (Paragraph 37) which appears to provide the tenant the right to evergreen-like renewals. The full language of Paragraph 37 is below for reference:

> *37th:* ***This lease may be renewed by the tenant for additional one (1) year periods*** *upon written notice to the landlord sixty (60) days prior to the expiration of the term hereof, or any one (1) year renewal. The rent to be paid during any yearly renewal term shall be mutually agreed to at the time of renewal. Failure to agree on the terms of said renewal within sixty (60) days of receipt of the renewal notice shall automatically terminate this Lease and any renewals hereunder.*
>
> (Da28) (emphasis added).

The Appellate Division has held that a failure to state a rent amount will not defeat a claim to enforce the exercise of a renewal referencing an amount to be determined. See P.J.'s Pantry v. Puschak, 188 N.J. Super. 580 (App. Div.

1983) (remanding for a determination of fair market value rather than dismissing the enforcement of a renewal option.).

What does all this mean and why does it matter to this appeal? The NJDEP is relying on *their* interpretation of the lease in order to eject the Club. However, there is another reading of the lease which attempts to resolve an apparent conflict in the language rather than narrowly construing a single paragraph in favor of the landlord. **The Lease expressly references a 90 day right to terminate *in connection with sale*. It does not expressly state that the Landlord has the right to terminate for any reason at any time**.

B. There is a genuine of material fact as to whether the NJDEP can sustain their burden to show grounds for eviction.

The landlord has the burden of proving every element of their claim by the greater weight of the credible evidence. See Village Bridge Apts. v. Mammucari, 239 N.J. Super. 235, 240 (App. Div. 1990). For the following reasons, there is a genuine issue of material fact as to the grounds offered the NJDEP in this case.

1. The NJDEP claims the limited service of alcohol by a non-profit Club is inconsistent with its regulations, while it renews (and promotes) the opportunity for other for-profit entities to sell alcohol across properties under its management.

Despite the seemingly categorical prohibition on alcohol in initial communications with the Club, the NJDEP admits the agency has discretion under the regulations and that they continue to permit for-profit service of alcohol on state lands. (Da213; 61:22-25). See also N.J.A.C. 7:25-2.4.

In fact, the NJDEP permits a wide range of uses of the land it manages including kayak businesses, commercial agricultural using heavy machinery, *and* an 18-hole golf courses with event spaces and sale and service of alcohol. Specifically, the NJDEP has a long-term lease for a private for-profit entity to manage the property known as "White Oaks" golf course including a clubhouse, pro-shop, banquet room, and a bar and restaurant called "The Oaks Bar & Grill". The service of alcohol is permitted and provided all around the course. (Da212; Da214).

The NJDEP was questioned on what rationale or criteria they use to evaluate exceptions, and despite permitting a for-profit entity to serve alcohol on a golf course with a bar and grill operation on State lands, they responded that "there are no exceptions". (Da214). The NJDEP explained White Oaks was "there when we purchased the property." Id.

On March 1, 2012, the NJDEP entered into an agreement with White Oaks Country Club, Inc. for the management and operation of the golf course.

(Da491). On February 7, 2019, the NJDEP approved a fifteen (15) year renewal term to White Oaks extending to February 29, 2032. Id. On November 23, 2020, the NJDEP approved an assignment of the agreement to "Empire Golf Management, LLC" for management and operation of the golf course. Id.

Shortly after approving the extension and assignment for White Oaks described above (including the sale of alcohol to the general public), the NJDEP began objecting to the Club's liquor license renewals and proceeding with efforts to eject the Club from the property.

The NJDEP admitted it does not have, or apply, any objective criteria in approving alcohol on its lands. (Da214; Da216). The NJDEP admitted that White Oaks does not advance the purposes of the agency and the NJDEP instead accepts payment from the company and applies those funds toward undefined purposes. (Da216).

Based on the above, there is a genuine issue of material fact as to whether the comparably limited sale of alcohol in connection with a Club license serves as a genuine ground for termination.

2. The NJDEP claims the Club is an "interference" with federal grant source funding but disregards flexibility under federal regulations and discovery shows any assertion of interference has been manufactured by the NJDEP – not by any genuine concern originating with the federal government.

On February 26, 2021, NJDEP Director of Fish and Wildlife David Golden wrote to Colleen Sculley at the U.S. Fish and Wildlife Service with his conclusion that the Club was a "nonconforming use" and an "interference" under Federal Regulations and then sought her concurrence in writing. (Da73). In that same letter, the NJDEP communicates their experience that a "land swap" for "federally funded property is disallowed". Id. Many months later, after direct coordination between Mr. Golden and Ms. Sculley via email, the Federal Government provided a response concurring with the NJDEP. (Da74).

The NJDEP admitted that despite these letters, the federal government is not requesting a "refund" of the funding dedicated toward the purchase of the site. (Da225). Nor would that be required under the federal regulations which permit a state agency to allow commercial, recreational and other secondary uses of a grant-funded parcel so long as the authorized purposes of the grant are not impaired. See 50 CFR 80.134.

Based on the above, there is a genuine issue of material fact as to whether the Club's limited activities on a remote portion of the property at the very edge of the site constitutes an "interference" that is incapable of being reconciled with the federal regulations cited by NJDEP.

3. The NJDEP claims the Club is inconsistent with their mission and purposes but has admitted that the Club interferes with none of its uses or purposes.

The NJDEP admitted that the Club does not interfere with the essential purposes of the property. (Da221-222). The Club is located adjacent to the parking lot which most visitors "gather their stuff and move as quickly out of the parking lot as they can." Id. The NJDEP admitted that it began objecting to the liquor license renewals to "figure out another way to get to this point where we felt we needed to get to". (Da222). The federal government is not seeking repayment of the grant funding that provided in 1999 for a portion of the purchase price. (Da225).

Based on the above, there is a genuine issue of material fact as to whether the Club's limited non-profit activities are incapable of being reconciled with the uses and purposes of the NJDEP.

III. CONCLUSION

Based on the foregoing, the Trial Court erred in granting summary judgment to the plaintiff where both the meaning and interpretation of the Lease and conduct of the parties over many years surrounding the Club's tenancy result in unresolved genuine issues of material fact. Summary Judgment should be reversed and this matter remanded for a trial on all issues.

Respectfully submitted,

GILLIN-SCHWARTZ LAW

By:_____

Dated: 2/10/2025 CHRISTOPHER GILLIN-SCHWARTZ, ESQUIRE