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## ENVIRONMENTAL LAW

### Latest Highlands Flare-up

#### Governor clears the regional master plan

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The Highlands Water Protection and Planning Act (the Highlands Act) remains mired in controversy. N.J.S.A. 13:20-1 et seq. It all started four years ago when most of the state's environmentalists decided to boycott the signing ceremony. Rather than celebrating the enactment of this long-awaited landmark legislation, the activists used the event as an opportunity to register their displeasure with Governor McGreevey's approval of the fast track — permit expediting — legislation. N.J.S.A. 52:27D-10.2 et seq. See L. Goldshore and M. Wolf, "Not So Fast Track Law," 179 N.J.L.J. 185 (Jan. 17, 2005).

The contentious atmosphere swirling around the Highlands Act never abated. It continued through Governor Corzine's September 5<sup>th</sup> approval of [that is, by not vetoing] the regional master plan (RMP)

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despite strong opposition from a coalition of environmental groups. The Governor attempted to address some of their concerns in Executive Order (EO) #114 that provided directions to the Highlands Council, the State Transfer of Development Rights (TDR) Bank and the DEP. A copy of the EO has been posted on the Governor's Web site.

The EO directed the Highlands Council to work with COAH to develop adjusted growth projections that conform to the RMP. As to map adjustments, buffers and redevelopment areas, the Council was instructed to include a public review process and assure no net natural resource loss or water quality degradation. The state TDR Bank was directed to provide at least \$10 million to the Highlands TDR Bank. The EO instructed DEP to assure that clustering proposals in the Highlands would be consistent with smart growth and sound planning principles. DEP was also required to utilize its other statutory authorities to assure that water deficit concerns will be addressed.

The preparation and adoption of the RMP was the Highlands Council's most important statutory responsibility. The plan was intended to provide the blueprint for the region's future in a manner that would be consistent with the protection and enhancement of the Highlands' environmental resources. For a discussion of the draft

RMP's provisions, see L. Goldshore and M. Wolf, "The Vision for the Area's Future," 187 N.J.L.J. 194 (Jan. 15, 2007).

Following the plan's adoption, preservation area counties and municipalities will be required to modify their respective master plans and development regulations to assure that they conform to the Council's dictates. Local entities that fail to make the required adjustments can be superseded by the Council.

Conformance was supposed to be voluntary in the remainder of the Highlands, but incentives were authorized to induce planning area jurisdictions to opt in. In practice, the Highlands Council has adhered to a "blind to the line" philosophy which has served to blur the distinction between areas subject to mandatory and voluntary conformance.

The Highlands Act specified that the RMP would be adopted within 18 months of the Council's first meeting — that is, by June 16, 2006. N.J.S.A. 13:20-8.a. That milestone was not achieved until July 17<sup>th</sup> more than two years behind schedule.

As a result, the triggering of the conformance process and other critical elements of the law has also been delayed. Most significantly, the details of the TDR program intended to provide affected landowners with some measure of compensation for lost equity remains shrouded in mystery.

The final draft RMP was not an easy read, a fact confirmed by, at least, some of the Council's members. It consisted of 400-plus pages of text, maps, charts and photographs. Even the seasoned land

use planner or attorney would find it challenging to fully appreciate how many of the plan's vaguely worded goals, policies and objectives would be implemented. There could be no doubt, however, that the cumulative effect would be to severely restrict — nearly prohibit — future development in the preservation area and generally discourage it in large sections of the planning area.

On July 17<sup>th</sup>, prior to taking final action on the RMP, the Highlands Council approved 10 amendments that were intended to clarify and strengthen the plan. These revisions addressed policies and objectives that concerned water deficits, forest stewardship, stream buffers, well quality protection, septic system yields, state agency coordination, and water quality monitoring.

But those amendments did not go far enough to satisfy a coalition of environmental groups that have closely tracked the Highlands Council's efforts from its inception. The groups unsuccessfully argued for the adoption of seven additional changes that would have even more severely constrained future development opportunities. These were targeted at water deficit areas, stream buffers, nitrate contamination in residential clusters and elsewhere, and "map adjustments."

At the conclusion of an eight-hour meeting, the Council approved the amended plan by a vote of nine to five. Three of the members who voted in the negative contended that the RMP was not sufficiently protective of the environment, while the other two objected based on its failure to provide compensation to landowners for diminished property values.

A week later, the Council approved the prior meeting's minutes and set the stage for gubernatorial review of the RMP. The Highlands Act provided the Governor with a 30-day period, excluding Saturdays, Sundays and public holidays, to veto the Council's action respecting the plan. N.J.S.A. 13:20-5.j. The effect of a veto would have been to send the Council back to the drawing board to revise the RMP to address the

Governor's objections.

The environmentalists, having not accomplished everything they sought from the Council, lost no time in elevating the discussion to the next level. The enviro-coalition, in a detailed letter to the Governor, urged that he veto the plan. These efforts, and particularly the intemperate tone of their contemporaneous comments, did not go unnoticed.

The Council's chair, John Weingart, a well-respected and seasoned former state environmental official, in a thoughtful op-ed in the July 28<sup>th</sup> *Star-Ledger*, observed:

The response of most environmental leaders has been overwrought criticism of the plan. Their comments to the media — perhaps cleverly but certainly irresponsibly — suggest that the Highlands Council "would have homeowners drink their own septic" and that "the Governor better tell people to buy bottled water."

Unfortunately, though, their leaders . . . seem to assume that anyone who disagrees with their positions is, as the New Jersey Environmental Federation said of the majority of the Highlands Council, "more concerned about parochial, special and their own re-election interests than they are the public's interest." Apparently, none of us can possibly be as publicly spirited as they are unless we agree with their every position.

Three highly regarded planning organizations, the NJFuture, the Regional Plan Association and SmartGrowthNJ, lined up on the Council's side of the dispute. They urged the Governor to refrain from exercising his veto authority and allow the RMP to take effect. The environmentalists' rejoinder came from Jeff Tittel, director of the state's Sierra Club, who painted the plan's proponents as "lobbyists for massive sprawl" who

"have supported just about every law and regulation that favors paving over New Jersey." *The Star-Ledger*, August 7<sup>th</sup>.

Following the Council's approval, the Governor held separate meetings with the various stakeholder groups — environmentalists, agricultural interests, Highlands mayors, legislators and others. The speculation was that the Governor would be reluctant to alienate the environmentalists, an important constituency group which could have a pivotal role in next year's gubernatorial race, and was leaning in favor of vetoing the Council's minutes.

Reactions to the Governor's refusal to veto and issuance of the EO were predictable. Council chair Weingart indicated that he was "... pleased that Governor Corzine has both ratified the Highlands Master Plan and is also issuing an executive order with significant steps to enhance its implementation. . . . The order provides a clear framework that will enable the Highlands Council and other state agencies to work together to protect the state's water resources while providing clear, coordinated guidance to highlands municipal and county governments."

But the Governor's action was not so warmly received by representatives of the agricultural or environmental community. The *Star-Ledger*, September 6<sup>th</sup>, reported that the president of the New Jersey Farm Bureau, Richard Nieuwenhuis, was strongly concerned that the EO's additional development restrictions in water deficit areas would "aggravate landowner issues and create further adverse economic impacts for those who live in the region."

State Sierra Club director Jeff Tittel was not pleased, although for other reasons. He described the EO as being "more for show, than for substance" and questioned its significance since an "EO cannot trump a rule." According to Tittel, the organization will explore its legal options but is more likely to devote its energies to urging the appointment of better [more agreeable] Council members to fill the current vacancies and as terms expire. ■