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HIGHLANDS LAW IMPACTS DEVELOPMENT

by Meryl A. G. Gonchar and Lloyd H. Tubman

Property owners and developers of land in the northwest portion of New Jersey must familiarize themselves with a 100-plus page piece of legislation which dramatically changes the rules governing property development. The legislation is touted as a means to protect critical drinking water resources; however, questions have been raised regarding the means chosen to achieve the purported ends.

On August 10, 2004, Governor James E. McGreevey signed the Highlands Water Protection and Planning Act (the Act) into law. The Act encompasses 88 municipalities located in the northwest portion of the state within an area designated as the "Highlands Region," over which the Highlands Water Protection and Planning Council, an entity established pursuant to the Act, will have jurisdiction. Within the

Highlands Region, the nearly 800,000 acres of affected land are divided between the preservation and planning areas, with the former comprising more than one-half of the total regulated lands. Traditional "home rule" exercised by municipalities relative to zoning and planning determinations within their boundaries will yield to the mandatory regulations to be enacted by the Council. Municipalities within the preservation area must conform local ordinances to a Highlands master plan. Within the planning area, municipalities may elect to follow the dictates of a regional master plan. However, it appears that the "voluntary" conformance with that master plan may be somewhat illusory. Those municipalities failing to follow the recommendations of the plan will lose various financial incentives and benefits available to those opting to do so.

Immediately upon enactment of the Act and for the nine months next following, certain interim restrictions and requirements will be in effect which will either prohibit or severely limit the development of land within the preservation area. For any "major" Highlands development, defined as entailing one acre of site disturbance or one-quarter acre of impervious surface in the preservation area, an applicant will be required to obtain a Highlands Preservation Area approval from the New Jersey Department of Environmental Protection (NJDEP). Included among the requirements, which were immediately effective and implemented without compliance with the Administrative Procedures Act for enactment of rules or regulations, is a prohibition of any development within

continued on page 18



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Highlands Law

continued from page 7

300 feet of any "Highlands open water," defined under the Act to include every stream, wetlands or other surface water except, specifically, swimming pools. In addition, an impervious coverage three percent per lot will be mandatory. Included within the calculation of this limitation are porous paving, crushed stone, decks and elevated structures.

For the development community and for owners of property within the preservation area portion of the Highlands Region, the more important date is March 29, 2004, the date on which the Highlands bill was introduced in the Senate. Major Highlands projects, defined as those with one-quarter acre or more of impervious surface or one acre or more of land disturbance, are exempt from the Highlands Act provisions, provided, as of March 29, 2004, the project met all of the grandfather criteria set forth in Section 28 of the Act. To be exempt, a major Highlands development within the preservation area must have a building permit or a municipal subdivision and/or site plan approval plus, if applicable, a Water Supply Management Act permit, a water extension permit, a Realty Improvement Sewerage and Facilities Act approval or a treatment works approval. If none of the above enumerated NJDEP permits is required for the project, the project must also have, again if applicable, an NJDEP wetlands or stream encroachment permit or approval in order to be grandfathered. Exemption pursuant to the Highlands Act's grandfather provision ends with the expiration of any qualifying permit or approval or, in any event, if construction is not commenced within three years of the effective date of the Act.

While the appointed Highlands Water Protection and Planning Council will develop a regional Master Plan for the Highlands, the NJDEP is charged with the immediate implementation of the Act. On July 28, 2004, NJDEP Commissioner Bradley Campbell wrote to the mayor of each Highlands municipality advising of the expected enactment of the Act and requested that a

list, by lot, block and address, of properties receiving approval after March 29 be sent to the Assistant Commissioner of NJDEP's Division of Compliance and Enforcement.

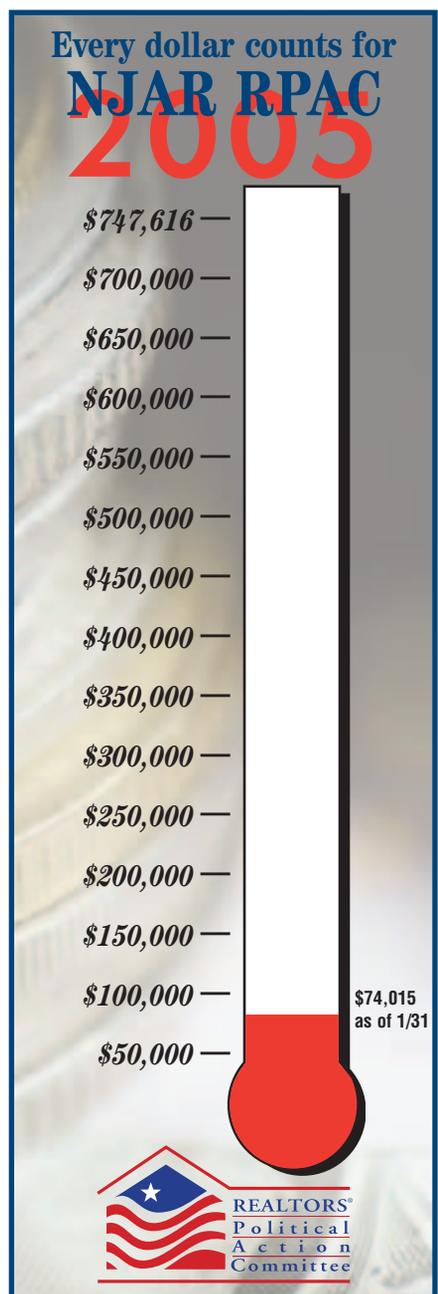
The NJDEP's Land Use Regulation Program will be the centralized Highlands permitting agency and has developed Highlands preservation area application forms available at www.state.nj.us.dep/landuse. Any application must include a Highlands applicability determination/water quality management plan consistency determination from NJDEP's Division of Watershed Planning. The consistency application form is available at www.state.nj.us.dep/highlands.

Under the Act, the Highlands Council will become the preeminent planning entity in the Highlands Region with the power to review municipal ordinances and master plans for conformance with the regional master plan and to review development applications for conformance with the regional master plan.

While the Act raises numerous legal issues, including those of regulatory takings and the impact on vested rights, perhaps the most pressing concern for property owners and developers whose properties are located within a Highlands municipality is whether their properties are located within the preservation area as defined in the Act. Each municipality identified in the Act is wholly within the Highlands Region; however, the critical issue is whether a particular parcel is within the preservation area. This determination can be made only upon a careful review of the metes and bounds description included in the Act and review of the map published along with it. It is recommended that property owners obtain the services of an engineer or other professional to plot the boundaries of the preservation area within a given municipality and determine whether a parcel is within the planning or preservation area. Those who find their properties within the preservation area but have not obtained the local and NJDEP approvals which qualify a development for exemption from the Act must await further NJDEP

and Highlands Council rules to determine with any certainty if they have any hope of developing their land. Even exempted projects may be delayed until municipalities within the Highlands Region seek clarification and explanation of the Act.

The impact on the planning area portion of the Highlands Region is less certain. The Highlands Council must adopt a master plan for the entire Highlands Region. The master plan must identify preservation area transfer of development rights (TDR) sending zones. Highlands



region municipalities may “voluntarily” designate TDR receiving zones in planning areas. The incentive for planning area TDR participation and zoning consistent with the master plan is future state funding. The Office of Smart Growth is charged with coordination of state infrastructure investment and financial assistance with the objectives of the Highlands regional master plan. Municipalities which establish voluntary receiving zones will be entitled to planning grants, may impose impact fees, and will receive priority status for state capital and infrastructure programs. The obvious implication is that those Highlands Region municipalities which fail to establish planning area TDR receiving areas will be denied state funding.

Finally, New Jersey residents should not think that the Act will not affect them because they live or own property outside of the Highlands Region. The entire state will likely bear the burden of the Act. Enormous sums of state money will be

HIGHLANDS RESOURCES

[NJDEP Highlands Web Site](#)

www.state.nj.us/dep/highlands/

[Highlands Interactive Map](#)

www.nj.gov/dep/gis/dep splash.htm

[Highlands Protection Initiative](#)

www.savethehighlands.org/

[NJAR Highlands Resources](#)

www.njar.com/private/highlands2.shtml

expended to implement the Act, to compensate municipalities for loss of tax funds as a result of the elimination of development, to provide incentives and fund enhanced planning grants and to establish a Pinelands Property Tax Assistance Fund, a Highlands Protection Fund and a Highlands Municipal Property Tax Stabilization Fund.

Highlands Region regulation will become more predictable when NJDEP adopts

Highlands permit regulations, mandated within nine months of the Act's effective date and the Highlands Water Protection and Planning Council, within eighteen months, adopts a regional master plan. Thereafter, all Highlands region counties and municipalities must submit consistent master plan revisions and preservation area ordinances and regulations for Council ratification. ▲



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