

Highlands Legislation – Summary of Relevant Provisions Affecting Developers

Set forth below is a summary of various provisions of the recently enacted Highlands Water Protection and Planning Act which was signed into law on August 10, 2004. This summary addresses the potential adverse impacts the Act will have on development within the Highlands Region and discusses exemption and other provisions that may assist in the development of property within the strictly regulated Preservation Area.

Effect of Preservation Area Designation

The Highlands legislation defines a Highlands Region and divides it into two areas. The Preservation Area (which will be strictly regulated) and the Planning Area.

The bill establishes the Highlands Water Protection and Planning Council (the “Council”), which will prepare and implement a regional master plan for the Highlands Region. Within 9-15 months of adoption, municipalities and counties with property in the Preservation Area will be required to conform their master plan to the regional master plan (Section 14). Development within the Preservation Area is subject to review by both the Council and the NJDEP as follows:

(a) Once the regional master plan is adopted, Section 17 provides that the Council may review, within 15 days of any final local government approval, rejection or approval with conditions, any application for development in the Preservation Area. If the Council determines to exercise that authority, it will provide written notice to the applicant and the local government unit that it is doing so. Within 60 days of the notice, and after a public hearing, the Council shall approve, reject, or approve with conditions any application or decision. Pending that review, the applicant may not proceed with the development. Every person submitting an application in the Preservation Area must notify the Council in accordance with procedures to be established by the Council.

(b) Within 9 months from enactment of the bill, NJDEP is to enact rules and regulations establishing a permanent Highlands permitting review program setting strict standards for reviewing major development in the Preservation Area (Sections 33 and 34). From the date of enactment until adoption of these regulations (i.e. for the first 9 months following enactment of the bill) any “major development” within the Preservation Area will be required to obtain from NJDEP a Highlands Preservation Area approval (Section 32).

Section 23 of the bill provides that within 10 days of enactment the NJDCA, in consultation with the NJDEP, will provide guidelines and instructions to all local government units located wholly or partially within the Preservation Area with respect to the processing, review and enforcement of applications for development after the date of enactment of this act and before the adoption of the regional master plan. Forms for the Highlands Preservation Area Approval and a fee schedule will be established by the Department during this period.

The Planning Area of the Highlands Region, in which municipal conformance with the Council's regional master plan is optional, and in which the strict NJDEP permitting requirements will not apply, will consist of all areas in the Highlands region which are not in the Preservation Area. Originally the property was believed to be in this Planning Area, but newspaper reports have reported that the property is now in the Preservation Area and the purchaser and its counsel and the municipality are all proceeding in that belief. However, even if the subject property is not within the Preservation Area, the local municipality could still elect to conform with the regional master plan and apply the strict standards (provided they also accommodate within the Planning Area a "receiving area" for the transfer of development rights program being created by the bill). As an incentive, municipalities that comply with the Highlands master plan are entitled to seek state aid for any loss of property tax revenue and to charge impact fees. Property owners within the Planning Area must be alert for any action on the part of the local municipality to adopt the stricter standards.

The Highlands Preservation Area approval that will be required prior to the adoption of the NJDEP permitting process will mandate compliance with the following strict standards:

1. A 300 foot buffer from Highlands open waters (streams, wetlands and other bodies of surface water) in which major development will be prohibited (provided, however, that the buffer shall not extend into the Planning Area.
2. The quality of Highlands open waters not be degraded.
3. A review of a water diversion permit will be triggered by a more than 50,000 gallon per day diversion (100,000 is the current threshold).
4. A zero net fill requirement for flood hazard areas.
5. The anti-degradation and other provisions applicable to Category One waters will be applied to Highlands Open Waters.
6. Impervious cover of more than 3% of the land area of a site will be prohibited on existing lots.
7. Development, excluding linear development, will be prohibited on steep slopes with a grade of 20% or greater.
8. Prohibition on development that disturbs uplands forested areas. However, if a major development complies with all other applicable requirements for a Highlands Preservation Area approval and such disturbance is unavoidable, NJDEP will allow disturbance of no more than 20 feet directly adjacent to a structure and of no more than 10 feet on each side of a driveway as necessary to access a non-forested area of the site.

The regulations to be adopted establishing the permitting process will include these prohibitions and will add several others relating to application of criteria used for general permit type activities in wetlands, a septic system density standard and limitations on the construction or extension of public water systems to serve new development in the Preservation Area.

For properties located within the Preservation Area, it would appear that at the very least the 3% impervious cover limitation will severely restrict any proposed development. The definition of “impervious surface” under the Act is extremely broad, and includes “any structure, surface or improvement that reduces or prevents absorption of stormwater into land, and includes porous paving, paver blocks, gravel, crushed stone, decks, patios, elevated structures and other similar structures, surfaces of improvements.”

Applicability Issues

A. Preservation Area Designation. Any property in the Highlands region that is not within the Preservation Area automatically falls within the Planning Area where the strict development standards will not apply unless the municipality elects to apply them. The legislation contains a narrative description of the Preservation Area within the Highlands Region. The location of a property in the Preservation Area within New Jersey can be confirmed by obtaining Highlands Preservation Area mapping from the County in which the property is located. It must be remembered, however, that the mapping cannot be considered final until the legislation is signed by the governor. We have also been advised of instances where errors in County mapping have been discovered. Clients are advised to have their consultants carefully review the mapping for accuracy.

B. Definition of Major Highlands Development. The bill applies to major development in the Preservation Area. Major Highlands Development is broadly defined as: (1) any non-residential development in the Preservation Area; (2) any residential development in the Preservation Area that (a) disturbs one acre or more of land or increases impervious surface by one-quarter acre or more or (b) requires an environmental land use or water permit, which includes all DEP permits as well as county sewage disposal system permits; (3) any activity in the Preservation Area that is not a development but results in the ultimate disturbance of one-quarter acre or more of forested area or an increase in impervious surface by one-quarter acre or more; and (4) any capital or other project of a State entity or local government unit in the Preservation Area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or an increase in impervious surface by one-quarter acre or more. For purposes of determining the cumulative increase in impervious surface, it is important to note that “impervious surface” is so expansively defined that it includes pervious surfaces such as porous paving, gravel, crushed stone and decks. It appears clear from a review of the proposed application that the proposed development is a “Major Highlands Development.”

C. Mt. Laurel Housing. Section 25 provides that nothing in the act will affect protections provided through a grant of substantive certification or a judgment of repose granted prior the date of enactment of the act.

D. Regional or Town Centers. Section 7(d) provides that the Preservation Area shall not include any land located within the boundaries of any regional center or town center designated by the State Planning Commission under the State Planning Act as of the date of enactment, except to the extent necessary as set forth in the boundary description of

the Preservation Area in subsection 7(b) to reflect appropriate and nearest practicable on the ground and easily identified reference points (Section 7(b) contains the narrative description of the Preservation Area). A list of Designated Centers and Endorsed Plans is maintained by the NJDCA Office of Smart Growth and is available on their website.

E. Federal Religious Land Use and Institutionalized Persons Act (RLUIPA). This 4 year old federal act endeavors to prevent use of local zoning powers to discriminate against religious institutions. We have not assessed how this statute may apply to the Highlands bill, the origins of which are environmental protection and not zoning per se.

F. Grandfathering/Exemptions. In order to be grandfathered, development approvals were required to be received by March 29, 2004. Obviously this has not occurred.

Section 30 of the act, however, also exempts certain activities from the provisions of the Act. These are as follows:

(1) Section 30(a)(1) exempts the construction of a single-family dwelling, for an individual's own use or the use of an immediate family member, on a lot owned by the individual on the date of enactment or on a lot for which the individual has on or before May 17, 2004 entered into a binding contract of sale to purchase that lot.

(2) Section 30(a)(2) exempts the construction of a single-family dwelling on a lot in existence on the date of enactment, provided that the construction does not result in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more.

(3) Section 30(a)(3) exempts major Highlands developments that received on or before March 29, 2004 (a) one of the following approvals under the Municipal Land Use Law: (i) preliminary or final site plan approval, (ii) final municipal building or construction permit, (iii) minor subdivision approval where no subsequent site plan is required, (iv) final subdivision approval where no subsequent site plan is required, (v) preliminary subdivision approval where no subsequent site plan is required **and** (b) at least one of the following permits from the NJDEP if applicable to the proposed major Highlands development: (i) a permit or certification pursuant to the Water Supply Management Act, (ii) a water extension permit or other approval or authorization pursuant to the Safe Drinking Water Act, (iii) a certification or other approval or authorization issued pursuant to The Realty Improvement Sewerage and Facilities Actor (iv) a treatment works approval pursuant to the Water Pollution Control Act, **or** (c) one of the following permits from the NJDEP if applicable to the proposed major Highlands development and if the proposed major Highlands development does not require on of the permits listed in (b)(i) through (iv) above: (1) a permit or other approval or authorization issued under the Freshwater Wetlands Protection Act, or (2) a permit or other approval or authorization issued under the Flood Hazard Area Control Act.

(4) Section 30(a)(4) exempts the reconstruction of any building or structure for any reason within 125% of the footprint of the lawfully existing impervious surfaces on the

site, provided that the reconstruction does not increase the lawfully existing impervious surface by one-quarter acre or more.

It is unclear whether NJDEP will require reconstruction in the area of the existing building footprint or whether a developer will be able to tear down buildings in various areas, aggregate their area, and use it to justify the construction of one slightly larger building. It is anticipated that future regulations and guidance by NJDEP and the Council will elaborate on such issues. Absent such guidance, even under the most favorable interpretation, the impervious surface limitation to an additional one-quarter acre will prevent any large-scale expansion. It is unclear whether an applicant would be able to design a proposed structure with underground parking or to increase the height of the proposed building in order to obtain additional floor space. Local zoning requirements would also need to be reviewed to determine if variance relief is necessitated by such proposals.

(5) Section 30(a)(5) exempts any improvement to a single family dwelling in existence on the date of enactment of the Act including, but not limited to, a garage, shed, driveway, porch, patio, swimming pool or septic system.

(6) Section 30(a)(6) exempts any improvement, for non-residential purposes, to a place of worship owned by a nonprofit entity, society, or association organized primarily for religious purposes, or a public or private school, or a hospital, in existence on the date of enactment of this act, including but not limited to new structures, an addition to an existing building or structure, a site improvement, or a sanitary facility.

Although we await further clarification of this exemption, we interpret this Section as applying to facilities in existence at the site as of the date of enactment.

(7) Section 30(a)(7) exempts an activity conducted in accordance with an approved woodland management plan pursuant to section 3 of P.L.1964, c.48 (C.54:4-23.3) or the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester

(8) Section 30(a)(8) exempts the construction or extension of trails with non-impervious surfaces on publicly owned lands or on privately owned lands where a conservation or recreational use easement has been established.

(9) Section 30(a)(9) exempts the routine maintenance and operations, rehabilitation, preservation, reconstruction, or repair of transportation or infrastructure systems by a State entity or local government unit, provided that the activity is consistent with the goals and purposes of this act and does not result in the construction of any new through-capacity travel lanes;

(10) Section 30(a)(10) exempts the construction of transportation safety projects and bicycle and pedestrian facilities by a State entity or local government unit, provided that the activity does not result in the construction of any new through-capacity travel lanes;

(11) Section 30(a)(11) exempts the routine maintenance and operations, rehabilitation, preservation, reconstruction, repair, or upgrade of public utility lines, rights of way, or systems, by a public utility, provided that the activity is consistent with the goals and purposes of this act;

(12) Section 30(a)(12) exempts the reactivation of rail lines and rail beds existing on the date of enactment of this act;

(13) Section 30(a)(13) exempts the construction of a public infrastructure project approved by public referendum prior to January 1, 2005 or a capital project approved by public referendum prior to January 1, 2005;

(14) Section 30(a)(14) exempts the mining, quarrying, or production of ready mix concrete, bituminous concrete, or Class B recycling materials occurring or which are permitted to occur on any mine, mine site, or construction materials facility existing on June 7, 2004;

(15) Section 30(a)(15) exempts the remediation of any contaminated site pursuant to P.L.1993, c.139 (C.58:10B-1 et seq.);

(16) Section 30(a)(16) exempts any lands of a federal military installation existing on the date of enactment of this act that lie within the Highlands Region; and

(17) Section 30(a)(17) exempts a major Highlands development located within an area designated as Planning Area 1 (Metropolitan), or Planning Area 2 (Suburban), as of March 29, 2004, that on or before March 29, 2004 has been the subject of a settlement agreement and stipulation of dismissal filed in the Superior Court, or a builder's remedy issued by the Superior Court, to satisfy the constitutional requirement to provide for the fulfillment of the fair share obligation of the municipality in which the development is located. The exemption provided pursuant to this paragraph shall expire if construction beyond site preparation does not commence within three years after receiving all final approvals required pursuant to the "Municipal Land Use Law."

Waivers

In addition to the exemption provisions, Section 35(b) of the Act provides that the Highlands permitting review program to be established under Section 35 shall include:

1. A provision that may allow for a waiver of any provision of Highlands permitting review on a case-by-case basis if determined to be necessary by NJDEP in order to protect public health and safety;

2. A provision that may allow for a waiver of any provision of Highlands permitting review on a case-by-case basis for redevelopment in certain previously developed areas in the Preservation Area identified by the Council under Sections 9(b) or Section 11(a)(6)(h). These properties would be identified during the regional master plan process and include only a brownfield site designated by NJDEP or sites with 70% or more of area covered by impervious surfaces.

Under New Jersey law, a “brownfield” is defined as “any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant.” N.J.S.A. 58:10B-23.d. The NJDEP website provides that, generally, brownfields are properties that are abandoned or underutilized because of either real or perceived contamination.

The “Brownfield and Contaminated Site Remediation Act” (the “Brownfield Act”), adopted in 1998, provides the possibility for reimbursement to the purchaser of up to 75% of clean-up costs. In order to be eligible for reimbursement under the Brownfield Act, a purchaser must enter into a Memorandum of Agreement with NJDEP and undertake the responsibility for cleanup of the property. The MOA will require the developer to perform any remediation activity required by NJDEP (which could increase potential clean-up costs). If certain conditions are met, the State will enter into a Redevelopment Agreement, pursuant to which the purchaser may be reimbursed up to 75% of the remediation costs. Among these conditions is a prohibition against the State entering into a Redevelopment Agreement unless the state tax revenues to be realized from the redevelopment project exceed the amount of money necessary to reimburse the developer for the clean-up costs. The burden of demonstrating this is on the developer. The State will also consider the economic feasibility of the project, the economic and social distress of the redevelopment area, and the extent to which the project will advance state, local and regional planning strategies.

It appears clear from a review of the Highlands legislation that the sponsors intended that municipalities focus redevelopment efforts on brownfield sites or sites containing 70% or more impervious cover. Section 6(v) of the legislation calls on the Highland Council to “promote brownfield remediation and development in the Highlands Region”. Section 9(b) provides that prior to adoption of the regional master plan the Council may work with municipalities in the Preservation Area to identify areas in which redevelopment should be encouraged. Section 10(b)(7) indicates that a goal of the regional master plan for the entire Highlands Region is to promote brownfield remediation and redevelopment. Section 11 requires the regional master plan to contain a smart growth component identifying brownfield sites for redevelopment.

The NJDEP Known List of Contaminated Sites available on the NJDEP website may be used to locate contaminated sites within New Jersey that may be eligible for treatment as brownfields. In this regard, we note that NJDEP has created a Brownfields Development Area (BDA) Initiative pursuant to which NJDEP works with selected communities impacted by multiple brownfield sites to design and implement plans for these properties simultaneously, so remediation and reuse occurs in a coordinated

fashion. Under the designation, all brownfield sites within a designated BDA will be assigned to a single manager, who will coordinate with partnering state agencies to direct targeted technical and financial assistance to sites within the BDA neighborhoods. Our client may want to further explore whether this or other brownfields programs may provide an avenue to ease development restrictions through the waiver process.

3. A provision that may allow for waiver of any provision of the Highlands permitting review on a case-by-case basis in order to avoid the taking of property without just compensation. (We have not yet assessed the legal options available to clients under inverse condemnation strategies. In general we believe that most such efforts have been time consuming, expensive, and rarely have provided substantial net relief if the property in question has been usable for other purposes).

The grant of any of these waivers by NJDEP will be conditioned upon NJDEP's determination that the development meets the restrictive standards outlined above to the maximum extent possible.

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