

**NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL
Petition for Plan Conformance – Final Draft Consistency Review and Recommendations Report**

APPENDIX A

PUBLIC COMMENTS/HIGHLANDS COUNCIL RESPONSES

Petition for Plan Conformance

Township of Roxbury, Morris County

Public Comment Period: April 12, 2013 – April 26, 2013

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PUBLIC COMMENTS RECEIVED

Written comments regarding Roxbury Township’s Petition for Plan Conformance were accepted by the Highlands Council through the close of the Public Comment period on April 26, 2013. Comments were provided by the following individuals/entities:

1. David Peifer, on behalf of the Association of New Jersey Environmental Commissions (ANJEC)
2. Erica Van Auken, on behalf of the New Jersey Highlands Coalition
3. Wilma Frey, on behalf of the New Jersey Conservation Foundation

The comments are summarized in the section that follows, with Highlands Council responses provided below for each.

PUBLIC COMMENT/RESPONSE SUMMARY

A. PLANNING AREA CONFORMANCE

Comment (ANJEC): ANJEC would prefer that Roxbury conform its Planning Area in addition to the request to conform for the Preservation Area. Recognizing that conformance for the Planning Area is voluntary, ANJEC wishes to remind the Highlands Council (Council) that Roxbury sits astride the headwaters of the South Branch of the Raritan River, the Musconetcong River, the Lamington (Black) River, and the Rockaway River. ANJEC states that these water bodies are important sources of potable drinking water and are valuable for ecological reasons and that the heightened protection provided by conforming the Planning Area would advance the purposes of the Highlands Act. Acknowledging that the Council cannot require such conformance, ANJEC indicates that it should be strongly advocated and recommended by the Council.

Comment (New Jersey Highlands Coalition): We question why Roxbury chose not to conform their Planning Area in addition to their Preservation Area. We recognize that Planning Area conformance is not mandatory; but Roxbury’s Planning Area, consisting of the majority of the municipality, is heavily constrained by a number of important environmental resources, such as Wellhead Protection Areas and Prime Groundwater Recharge Areas, among others. If Roxbury were to conform its entire township, the numerous Fair Share housing projects in the Planning Area could be sensibly guided by the Highlands Council to ensure the protection of priceless Highlands resources. Every possible measure of protection should be taken, starting with plan conformance, to protect Highlands resources from further detriment.

Comment (New Jersey Conservation Foundation): It is also unfortunate, from our review of the Roxbury Township Highlands Environmental Resource Inventory, that Roxbury Township, by declining to petition for plan conformance for its Planning Area, is missing a significant opportunity to protect the township’s water supply and numerous Highlands resources, and is instead placing Highlands resources in harm’s way from potential future over-development. Within the past decade, Roxbury Township imposed a moratorium on new wells, because existing wells were going dry. Virtually the entire Planning Area contains significant well head protection areas and water resource values. We urge the municipality to consider the long-term

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impacts on quality of life in the community and petition for Plan Conformance for the Planning Area as well, to safeguard the town's water supply and other important values.

Response: The Highlands Council does recommend conformance for Roxbury Township's Planning Area, just as for all municipalities having lands within the Planning Area. That said, conformance is voluntary for the Planning Area, as established by the Highlands Act, and the Highlands Council respects the Township's right to make the final decision regarding it. The Highlands Council recognizes the importance of Roxbury's location at the headwaters of the referenced rivers. Accordingly, a significant amount of funding has been included in the Township's Implementation Plan and Schedule to initiate the development of Stream Corridor Restoration/Protection Plans. These Plans will address the full extent of each stream corridor regardless of Planning or Preservation Area location. Additional funding will be made available to supplement this effort as it proceeds and the specific needs are identified, budgeted and fully scoped out. The Highlands Council also recognizes the importance of Wellhead Protection and Prime Groundwater Recharge Areas and as for all conforming municipalities, will require and provide funding for development of a municipal-wide Water Use and Conservation Management Plan.

B. LAND USE ORDINANCE WAIVER

Comment: ANJEC, New Jersey Highlands Coalition, and New Jersey Conservation Foundation oppose waiving the requirement for adoption of the Highlands Land Use Ordinance and allowing the municipality to rely wholly on a checklist ordinance and the NJDEP Highlands Rules to shape future land uses.

Response: The Highlands Council acknowledges the opposition to the "Checklist" approach to Plan Conformance. Please note that the Checklist approach is not new, however; the first municipality for which the Highlands Council authorized it had its Petition for Plan Conformance approved in January 2011. To date, 12-15 municipalities are considering or have already adopted this approach.

The Checklist approach has been made available only to certain municipalities, where a Highlands Council evaluation has determined that future development potential is severely constrained. Examples include municipalities with extensive areas of preserved lands (e.g., State parklands), with build-out potential of a very small number of units, with conformance areas that are extremely small, and/or which are located entirely (or nearly entirely) within stream beds or other like areas, which may not be developed under NJDEP regulatory provisions in any case.

In lieu of adoption of the Highlands Land Use Ordinance, the Checklist approach requires referral of all development applications to the Highlands Council, with a Consistency Determination (which determines that the application is consistent with the RMP) required as a component of application completeness. The Highlands Council review for consistency relies fully upon the model Highlands Land Use Ordinance – which embodies all RMP requirements applicable at the municipal level. **In sum, the Checklist approach does not waive all model Land Use Ordinance requirements; it simply transfers responsibility for application reviews to the Highlands Council.** This approach ensures full compliance with the RMP while limiting the burden to the applicable municipalities. From a practical standpoint, it simply does not make sense to require adoption of a 100+ page Land Use Ordinance pertinent to the regulation of just 5 or 6 potentially developable lots.

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The Checklist approach is authorized under the Highlands Council Plan Conformance Guidelines, which were adopted by the Highlands Council at the time of the RMP. The applicable language may be found under the subsection entitled “Submission Waivers,” within the section on “Plan Conformance Petition Documents.” It should be noted that a submission waiver “shall in no event preclude the Highlands Council from requiring the waived item later in the process of Plan Conformance, should it be found necessary...” Highlands Council approvals are based on existing information and municipal circumstances as identified and presented at the time of consideration of a Petition. Should circumstances change substantively with regard to any such approval, the Highlands Council will reassess the situation to determine whether an amended Petition is required, and/or whether coinciding changes must be made to the conditions of approval.

B1. LAND TENURE

Comment (ANJEC): Land tenure cannot be assumed to be permanent. Despite the fact that land is currently designated and “preserved,” the State House Commission can release such lands from development restrictions. The land conservation community has noticed an increase in these so-called “diversions” and believes that this trend will continue in the near future. Estimates of development potential should be based on the existing underlying zoning. Adoption of the Highlands Land Use Ordinance would eliminate this possibility by reducing allowable densities and establishing design requirements in conformance with the Regional Master Plan (RMP).

Response: All land within the Highlands Region falls within the Planning/Preservation Areas, Zones, Sub-Zones and Resource and Special Protection Areas as designated by the Highlands Act and the RMP. Preserved land does not contribute to anticipated yields in completing build-out analyses, nor should it. To suggest for example, that a massive State park is anticipated to yield hundreds if not thousands of dwelling units would be contrary to the public trust. If or when preserved lands lose that status however, all provisions of the Highlands Act, RMP, NJDEP Highlands Rules, and (by virtue of deferral to the Highlands Council under the Checklist Ordinance) Highlands Land Use Ordinance, inclusive of density allowances, apply – in accordance with the Zones, Sub-Zones, Resource Areas, and Special Protection Areas they lie within.

B2. MUNICIPAL OWNED LAND

Comment (ANJEC, New Jersey Highlands Coalition): Not all municipal owned land is “preserved.” Substantial parcels in the Preservation Area are owned by the Township of Roxbury and it is possible that municipally-owned land that is not deed restricted or covered by Green Acres restrictions could be developed either by the municipality itself or after sale to a private entity.

Response: The Highlands Council acknowledges that not all municipally-owned land is necessarily preserved. As noted above, all such lands continue to lie within Highlands designated Zones, Sub-Zones, Resource Areas and Special Protection Areas, and the provisions applicable to each apply in the event of any development proposal.

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B3. FENIMORE LANDFILL

Comment (ANJEC, New Jersey Highlands Coalition): Additionally oppose the modified checklist ordinance approach as there is concern regarding the status of the Fenimore Landfill remediation project (the landfill portion of the property is designated as a Highlands Redevelopment Area). According to the terms of the Highlands Redevelopment Area Designation, the portion of the property not covered by the pre-existing landfill is to be permanently deed restricted to prevent development. To date, no such restriction has been filed by the owner. In addition, ANJEC notes that there is talk of installing a State funded access road from Route 46 to route truck traffic generated by the landfill “clean-up” activities. If constructed, ANJEC states that such a road would enhance access to the portion of the site not covered by landfill. ANJEC wishes to note that the NJDEP is actively seeking to withdraw the Administrative Consent Order that governs the “clean-up” operation. Should the landfill not be satisfactorily remediated, ANJEC and the New Jersey Highlands Coalition feel that the terms of the Highlands Redevelopment Area designation would be moot, and in this case, the unfilled portion of the property would be considered developable while the landfilled portion would remain an un-remediated brownfield. Clean-up of brownfields is exempt from the NJDEP Highlands rules. The Council should be aware of these aspects; requiring adoption of the Highlands Land Use Ordinance (versus the adoption of the checklist ordinance) would eliminate any uncertainty.

Comment (New Jersey Highlands Coalition): The Fenimore landfill property has quite recently been designated as a Highlands Redevelopment Area, despite our concerns. At the time the Council was considering this site for a Redevelopment Designation, the Coalition cautioned that the Designation should be withheld until the landfill site was properly closed and remediated. At the time, the Council chose to move ahead with the Designation, leaving us to watch as the capping procedures derailed. The current landfill owner, Strategic Environmental Partners (SEP), has been at odds with the NJDEP’s standards for proper landfill closure and has outraged the neighbors. SEP has accepted unapproved waste materials to the landfill which have caused overwhelming foul odors to permeate the neighborhood and has resulted in exceptionally heavy truck traffic. It is the Coalition’s understanding that all parties involved (SEP, neighbors, NJDEP, Roxbury Township, etc.) are unhappy with the proceedings; all the while, precious water resources are subject to the problems associated with this contaminated site. If the landfill remediation fails, the Highlands Redevelopment Designation will have been for nothing, leaving the future of this site, and our drinking water supply, vulnerable. Implementing a Land Use Ordinance would vastly reduce any uncertainty.

Response: The required deed restriction is to be completed as a condition of the NJDEP’s approval of the Highlands Preservation Area Approval (HPAA). In the event the landfill is not satisfactorily remediated, the unfilled portion of the property would not automatically be considered developable. Any alternative development proposal would require an application to amend the Highlands Redevelopment Area designation approval, which would require authorization from both the NJDEP and the Highlands Council. Should the applicant choose to relinquish the Highlands Redevelopment Area designation altogether (requiring formal action of all parties to terminate), any development proposal would be subject to the Highlands Act, the RMP, the NJDEP Highlands Rules, and the Highlands Land Use Ordinance (by virtue of deferral to the Highlands Council under the Checklist Ordinance). Further, with regard to the Highlands Coalition statement that “*At the time, the Council chose to move ahead with the Designation, leaving us to watch as the capping procedures derailed*” it is important to note that the Council’s designation had nothing to do with the commencement of remediation and closure activities. The remediation and closure activities are exempt

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activities (Exemption #15) which are not under Highlands Council jurisdiction; those activities are separate and apart from the designation of a Highlands Redevelopment Area, intended to allow the ultimate redevelopment of the Brownfield. The Council’s designation did not authorize or expedite the commencement of remediation and closure activities.

C. RELIANCE ON NJDEP RULES

Comment (ANJEC): Expressed concern about Highlands Council exclusive reliance on the NJDEP Highlands Rules. While at the present time, the NJDEP Highlands Rules are in harmony with the RMP, it is possible that these rules may be amended in the future in a manner that does not comport with the RMP. Under the existing Highlands Preservation Area rules, waivers may be granted. Additionally, ANJEC notes that the NJDEP has additional authority to grant waivers under the recently adopted “Waiver Rule” (N.J.A.C 7:1B).

Response: The Highlands Council does not rely exclusively upon NJDEP Highlands Rules to effectuate the RMP – whether in the case of the Checklist Ordinance or Land Use Ordinance approach to Plan Conformance. Current Plan Conformance model documents are designed to coordinate with NJDEP Highlands Rules, however, and the Highlands Council has and will continue to modify its models to ensure full RMP implementation at the local level as needed, as an on-going process.

D. PROCESS ISSUES

Comment (ANJEC): We find the “policy change” indicated in the staff report to be a matter of considerable concern. Changing the requirements for conformance “behind the scenes” is an ill-advised policy. Such changes should be presented to the Council for its approval after public review and comment. Conformance requirements should be uniform and fair and should not be unnecessarily waived or altered without a public process. While we understand that the staff is applying these analyses on a “case by case” basis, we strongly suggest that such actions should behave more like formally adopted rules and less like what could be viewed as “let’s make a deal” planning. The reality of institutional behavior may easily cause a “case by case” policy to become precedential.

Response: As noted previously, the Checklist approach does not represent a policy change. This approach has been applied in a number of cases – beginning in 2011 – through a fully open and public process. All documents have been posted to the Highlands Council website; the modified approach has been openly discussed during Highlands Council meetings; each time the approach has been taken, it has been presented to the Highlands Council as a component of the staff recommended conditions of Petition approval; and each has received Highlands Council approval only after a duly-noticed public hearing. The Checklist approach is consistent with the Highlands Council Plan Conformance Guidelines. It merely recognizes cases where municipal circumstances make adoption of the full Highlands Area Land Use Ordinance an unnecessary and overly burdensome exercise. The Checklist approach provides that under such circumstances, Development Applications will be referred to the Highlands Council for review, thus ensuring full implementation of the RMP at the local level.

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Comment: The New Jersey Highlands Coalition supports the conformance process because it is the practical application of the Highlands Act and RMP, and in that regard, would support Roxbury’s Petition for Plan Conformance – if they were conforming. However, we are very concerned with the details of this petition. The Coalition will not support a conformance petition that is not requiring the adoption of the Land Use Ordinance (LUO). The LUO is the mechanism by which conformance is implemented.

Response: The Township of Roxbury is conforming for its Preservation Area fully in accordance with the Highlands Act, the RMP, and all Highlands Council requirements. The Checklist Ordinance approach is an alternate mechanism by which to implement Plan Conformance. Please see prior responses for full explanation.

Comment (New Jersey Highlands Coalition): Relying on the NJDEP Preservation Area Rules and an interim checklist ordinance is *not* conformance. It’s Mansfield. Mansfield Township has, so far, opted not to comply with the mandatory conformance of their lands in the Preservation Area, and by default is subject to NJDEP rules. The protection of their Preservation Area by NJDEP does not mean that they are a conforming municipality. It means they are protected by default until they petition for conformance or until the Highlands Council takes legal action to incite their conformance. Further, this all assumes that NJDEP rules for the Preservation Area will continue to provide a level of protection that supports the Highlands RMP. The future is not guaranteed; which is why the Highlands Council needs to function as the head regulatory agency for the Highlands and not rely upon other state agencies.

Comment (New Jersey Conservation Foundation): The Council’s “Final Draft Consistency Review and Recommendations Report,” dated March 11, 2013, states that “this Report proposes significant waivers and modifications to the standard requirements for municipal Plan Conformance...” The recommendations include partial waiver of Module 5, the Highlands Element, and a complete waiver of Module 6, the Land Use Ordinance. The Land Use Ordinance is the core element of Plan Conformance, and is the mechanism by which conformance is implemented. Therefore it does not appear that this petition meets the requirements for approval.

Response: The comments reflect a basic misunderstanding of the Checklist Ordinance approach to Plan Conformance. Under this approach, the Checklist Ordinance is not an interim ordinance but becomes a permanent regulatory component of the municipality’s land use ordinances. It requires that covered Preservation Area development applications be referred to the Highlands Council for review and issuance of Consistency Determinations prior to any finding of completeness or review by the local land use board. Essentially, the Highlands Council reviews such applications on behalf of the municipality, to determine and require consistency with all provisions of the RMP, specifically as set forth in the model Highlands Area Land Use Ordinance. Please see documents posted to the Highlands Council website under “Petition for Public Comment” and prior responses for detailed explanation of the Checklist approach.

Comment (New Jersey Highlands Coalition): The Coalition notes that the Council has reviewed fourteen municipal petitions that only petitioned for land in the Preservation Area and all fourteen were required to implement Module 6 (Highlands Land Use Ordinance).

Response: Please note that the Highlands Council has approved at least two previous Petitions for Plan Conformance that proposed conformance via the Checklist Ordinance approach: Mount Arlington Borough

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(Petition approved Dec 2011) and Denville Township (Petition approved Jan 2011). Based on Highlands Council recommendations, a number of additional municipalities are considering or currently in the process of developing documents needed to do so, also.

E. REDEVELOPMENT PLANNING

Comment (New Jersey Highlands Coalition): We do not support the staff recommendation to allocate funding to study Redevelopment opportunities. Without conforming its Planning Area, Roxbury has more than enough opportunities for redevelopment in these areas without wasting funding to investigate ways to further develop the Preservation Area. Before Roxbury is warranted to study Redevelopment Areas, they should first be required to fully and properly conform their Planning Area by following through with all of the required modules.

Response: Funding has been properly allocated in Roxbury Township's Implementation Plan and Schedule for redevelopment planning initiatives pertinent to properties in the Preservation Area. Planning Area conformance is not a prerequisite, and the Highlands Council cannot and will not discriminate on that basis, in allocating funding where potential Preservation Area projects appear appropriate for further study and evaluation.