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### MEMORANDUM

To: Highlands Water Protection and Planning Council

From: Eileen Swan, Executive Director  
Dan Van Abs, Senior Director of Planning and Science  
Erin Lynam, Resource Management Specialist  
Jim Hutzelmann, Water Resource Engineer

Date: February 29, 2008

Re:	Application Type:	<i>Proposed Amendment to Northeast WQMP</i>
	Name:	<i>Pinnacle</i>
	Municipality:	<i>Oakland</i>
	County:	<i>Bergen</i>
	Highlands Act Area:	<i>Preservation Area</i>
	LUCM Location:	<i>2007 LANDS- Existing Community/Protection Zone</i>
	Property:	<i>Block 3101, Lots 3&amp;6; Block 3102, Lots 1&amp;3; Block 3103, Lots 1&amp;2</i>
	Proposed Use:	<i>Residential housing with 13% affordable housing</i>
	Nearest Waterway (Name):	<i>Haycock Brook, Pond Brook</i>
	Wastewater:	<i>Proposed expansion of sewer service area served by Mountain View Wastewater Treatment Facility in Wayne Township</i>
	Water:	<i>Municipal Water Utility: Oakland Water Department</i>

This supplemental memorandum augments the Highlands Council staff recommendations, dated February 11, 2008, provided to the Natural Resources Committee (see attached).

### Overview and Procedural History

The above-captioned project is a proposed amendment to the Northeast Water Quality Management Plan (WQMP) through the Borough of Oakland Wastewater Management Plan (WMP) to allow for construction of the proposed Pinnacle Tract, a 209-unit residential development of which 28 are affordable housing on an approximately 84.5 acre plot on Block 3101, Lots 3 & 6; Block 3102, Lots 1 & 3; Block 3103, Lots 1 & 2 within Oakland Borough, Bergen County (Proposed Amendment).

On June 3, 2005, the New Jersey Department of Environmental Protection (NJDEP) issued a determination that the project qualified for Exemption 17 of the Highlands Act (Affordable Housing) because the project is a major Highlands Development located within an area designated as Planning Area 1 or Planning Area 2 as of March 29, 2004, that on or before March 29, 2004 had 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. As such, the development is exempt from the Highlands Act but is still subject to NJDEP's Water Quality Management Planning Rules (N.J.A.C. 7:15) requiring an amendment to the WQMP and WMP, which is the subject of this review.

The Proposed Amendment was reviewed by NJDEP in accordance with Executive Order No. 109 (2000) and N.J.A.C. 7:15.<sup>1</sup> On October 15, 2007, the NJDEP provided public notice of the Proposed Amendment in the New Jersey Register and then extended the public comment period in a public notice dated February 19, 2008 (see 39 N.J.R. 4451(b) and 40 N.J.R. 892(a)). The Highlands Council was asked to provide recommendations in accordance with N.J.A.C. 7:38-1.1 and N.J.A.C. 7:15.

On February 14, 2008, the Natural Resources Committee considered the Proposed Amendment and heard testimony from the applicant and the public (see attached Chair Report). In accordance with the Council's resolution on WQMP Amendments (see attached Resolution 2007-18 specifying that the Committee shall review exempt projects subject to Council review), the Committee directed Council staff to prepare a recommendation letter to be sent to the NJDEP and allow the Council an opportunity seek a full Council review of the Proposed Amendment.

Specifically, the Committee authorized the Executive Director to draft a letter recommending that NJDEP not approve the Proposed Amendment unless it is modified to address the inconsistencies identified by Council staff. The Committee specified that given that the Proposed Amendment is exempt from the Highlands Act, the inconsistencies presented to NJDEP should be limited to those matters that may be appropriately addressed by NJDEP's jurisdiction under Executive Order 109 and NJDEP's WQMP rules at N.J.A.C. 7:15. The inconsistencies identified by the Highlands Council staff include findings that the Proposed Amendment: 1) would include land uses that would alter or be detrimental to the water quality and habitat quality in and along riparian areas and open waters; 2) would result in alteration or disturbance of critical wildlife habitat for Barred Owl; 3) is located within a HUC14 subwatershed which has been identified as having a deficit of net water availability; and 4) should only be issued in compliance with the TMDL for the Ramapo River.

As noted during the Committee meeting, the Proposed Amendment was fully reviewed in terms of

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<sup>1</sup> Executive Order 109 specifies: "[u]ntil such time that the Water Quality Management Planning rules, currently set forth at N.J.A.C. 7:15, are repealed and replaced, the Department of Environmental Protection shall determine, consistent with its existing authority, including N.J.A.C. 7:15-5.18, what, if any, alternatives analyses must be conducted prior to the Department's making a final decision on an application for approval of a wastewater management plan or amendment thereto and, where applicable and consistent with its existing authority, an application for approval of a water quality management plan or amendment thereto, including, but not limited to, an evaluation of depletive and consumptive water use, detailed land use, environmental build-out and pollutant loading."

consistency with the Final Draft Regional Master Plan (RMP). However, due to the fact that the project was deemed exempt from the Highlands Act, the issues of inconsistency which may be considered outside of NJDEP's jurisdiction under Executive Order 109 and NJDEP's WQMP rules at N.J.A.C. 7:15, e.g. prime ground water recharge areas, were not included in the Council staff's proposed recommendations to NJDEP.

It is important to note that the Proposed Amendment was fully reviewed against the RMP because the Highlands Act exemption #17 issued by NJDEP does include termination provisions. The Highlands Act, at N.J.S.A. 13:20-28(a)17, specifies: "[t]he 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," P.L.1975, c. 291 (C.40:55D-1 et seq.)." Accordingly, the full RMP review was completed in order to properly advise the applicant of potential inconsistencies should the exemption either expire or be terminated.

The Committee also directed the Council staff to review and report on any supplemental material received on the Proposed Amendment. On February 25, 2008, an attorney representing Pinnacle Communities submitted legal and technical comments in response to the issues raised during the Natural Resources Committee. The Council staff has reviewed this supplemental information and as a result of this review does not recommend any changes to the original staff recommendation.

The primary legal argument asserted by Pinnacle Communities is that the project has received an exemption determination from NJDEP and thus the Highlands Council's recommendations are inapplicable as a matter of law and should not bind NJDEP. This argument ignores the fact that the Council staff recommendations, dated February 11, 2008, and the review by the Natural Resources Committee specifically stated that the Proposed Amendment was deemed exempt and that any recommendations would be limited to issues within NJDEP's jurisdiction under Executive Order 109 and NJDEP's WQMP rules at N.J.A.C. 7:15.

The Highlands Act, at N.J.S.A. 13:20-28(b) specifies: "[t]he exemptions provided in subsection a. of this section shall not be construed to alter or obviate the requirements of any other applicable State or local laws, rules, regulations, development regulations, or ordinances." Accordingly, the fact that the project has been deemed exempt from the Highlands Act does not obviate the requirement to comply with other existing requirements such as the Water Quality Planning Act. The NJDEP rules implementing the Water Quality Planning Act at N.J.A.C. 7:15-5.22(a) require consultation and consent for wastewater management plans and applicants for WQMPs must "seek comments from and offer to confer with" and seek written statements of consent, under N.J.A.C. 7:15-3.4, from governmental planning entities such as the Highlands Council. The requirement for a Highlands Council recommendation is based upon the Water Quality Planning Act rather than the Highlands Act.

The Highlands Council staff review of the Proposed Amendment identified the presence of environmentally sensitive lands whose development or alteration, as presently proposed, would be inconsistent with Executive Order 109 and NJDEP's WQMP rules at N.J.A.C. 7:15. The results of the Highlands Council's analysis of environmental quality data for the Resource Assessment of the Highlands Region indicate that the site fall within the Council's environmentally sensitive Protection Zone. The Highlands Council uses the best and most current information available to provide

recommendations to NJDEP on proposed WQMP amendments. While this project must be reviewed with deference as it is designed to provide affordable housing under a builder's remedy settlement, it is well settled under the *Mount Laurel* doctrine that the provision of affordable housing should not necessitate bad planning or the destruction of environmentally sensitive lands. The requirements of Executive Order 109 and the Water Quality Planning Act require proper planning to protect water quality and environmentally sensitive lands. While the Proposed Amendment is designed to provide affordable housing in accordance with the *Mount Laurel* doctrine, the present design of the project inadequately protects water quality and the site's environmentally sensitive lands. For the above reasons, the Highlands Council staff recommends that the conclusions of the Natural Resources Committee be approved by the full Highlands Council.