

**FOR CONSIDERATION AT THE NOVEMBER 19, 2010 MEETING OF THE
NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL
Petition for Plan Conformance – Final Consistency Review and Recommendations Report**

APPENDIX C

PUBLIC COMMENTS/HIGHLANDS COUNCIL RESPONSES

Petition for Plan Conformance

Borough of Hampton, Hunterdon County

Public Comment Period: Oct 14, 2010 - Nov 4, 2010

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PUBLIC COMMENTS RECEIVED

Written comments regarding Hampton Borough's Petition for Plan Conformance were accepted by the Highlands Council through the close of the Public Comment period on November 4, 2010. Comments were provided by the following individuals/entities:

1. Richard P. Cushing, Esq. on behalf of the Borough of Hampton
2. Kevin Walsh, Esq. on behalf of the Fair Share Housing Center
3. Guilet Hirsch, Esq., on behalf of Hampton Farm, LLC
4. Julia Somers, on behalf of the New Jersey Highlands Coalition

The comments are summarized below with Highlands Council responses provided for each.

MUNICIPAL COMMENT/RESPONSE SUMMARY

1. **Comment:** Richard P. Cushing, Esq. submitted comments and documents on behalf of the Borough of Hampton (Hampton Borough). Hampton Borough's comments summarized the dispute regarding an affordable housing site, known as Hampton Farm, which is pending before both the Law Division of the Superior Court (Law Division) and the Council on Affordable Housing (COAH). Hampton Borough maintains that it is appropriate for the Highlands Council to review Hampton's Petition for Plan Conformance and that such a review will not preempt either the Law Division's review or COAH's review of Hampton's Fair Share Plan and Housing Element. Hampton maintains that the Council's review of Hampton's affordable housing plans is a necessary predicate to COAH's review and that the Council's review will inform the Court's analysis of the dispute.

Response: The Highlands Council agrees with Hampton Borough that consideration of the Petition for Plan Conformance prior to the review of the Housing Element and Fair Share Plan by the Law Division and by COAH is appropriate. As specified in the Highlands Act at N.J.S.A. 13:20-23 and memorialized in the Memorandum of Understanding (MOU) between the Highlands Council and COAH, COAH is required to take into consideration the Highlands RMP prior to making final determinations. The MOU was approved by COAH and the Highlands Council, as required by Executive Order 114, to ensure that agency action was coordinated in order to implement both the Fair Housing Act and the Highlands Act. Pursuant to this agreement, COAH shall consult with and consider any recommendation from the Highlands Council and shall consider the Regional Master Plan before approving, rejecting, or approving with conditions a Petition for Substantive Certification. Accordingly, the Highlands Council agrees that action by the Council on Hampton's Petition for Plan Conformance is appropriate at this time such that COAH may formally review Hampton's Fair Share Plan and Housing Element.

The Highlands Council's resolution approving the Petition for Plan Conformance considers, among other things, the consistency of Hampton's proposed master plan elements, including the Housing

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Element, and Highlands Area Land Use Ordinance with the goals and policies of the RMP. While the Highlands Council examines consistency with the RMP and does not formally approve Hampton's Housing Element and Fair Share Plan in terms of compliance with the Fair Housing Act, the Council's approval of the Petition may assist the Law Division and COAH in making the final determination of whether any new development proposed to fulfill the obligations are realistic based on the capacity of the land to support it, and therefore constitutional under the Mount Laurel Doctrine. Moreover, the Council's approval is conditioned on submission of the final Housing Element and Fair Share Plan to COAH, and may be amended, if necessary, to incorporate the Law Division's final decision on Hampton's action to invalidate the 1991 Final Judgment on Compliance. This condition also incorporates any on-going changes as may be necessary to retain compliance with future amendments to the Fair Housing Act and any other changes in the applicable laws, rules, or regulations that govern the provision of affordable housing.

2. **Comment:** Hampton Borough submitted comments regarding the Hampton Farm property to specify that the 1991 Final Judgment on Compliance for this site addressed Hampton Borough's rehabilitation obligation of 27 units and COAH's existing rules require a 2 unit rehabilitation obligation. Accordingly, Hampton maintains that while the site is presently not needed to address the Borough's rehabilitation obligation, it may be helpful to address other third round obligations and that while premature the Borough may in the future petition the Highlands Council to utilize this site for affordable housing obligations.

Response: The Highlands Council acknowledges Hampton's reduction in its fair share rehabilitation obligations since the 1991 Final Judgment on Compliance. In addition, the Council acknowledges the recent Appellate Division decision that invalidated a portion of COAH's Third Round Rules but did not invalidate the rehabilitation portion of the rules. The Highlands Council encourages continued dialogue between each of the Highlands municipalities and the Council to address any future changes in affordable housing law or policy that may occur after approval of a Petition for Plan Conformance. The Council notes that the planning undertaken throughout Plan Conformance consists of capacity-based planning in order to identify real opportunities for development, redevelopment and economic growth that do not undermine the natural resource value of the Highlands Region pursuant to the Highlands Act and the RMP. Capacity-based planning is entirely consistent with the Mount Laurel Doctrine, and helps municipalities like Hampton continue to identify realistic opportunities for affordable housing.

3. **Comment:** Hampton commented that the 1988 Settlement Agreement specified that the 300-unit development shall be built on the Hampton Farm site south of Valley Road, the portion of the Property in the Highlands Preservation Area. Hampton also commented that of the 300 residential units proposed, there are no affordable units to be built on this site.

Response: The Highlands Council acknowledges and agrees with Hampton Borough's representations regarding the terms of the 1988 Settlement Agreement for development of 300 market rate units in the Preservation Area that has no inclusionary housing. A detailed analysis of the inconsistency of the 1988 proposed development in the Preservation Area was provided by the Highlands Council to COAH and is incorporated herein by reference.

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4. **Comment:** Hampton Borough also requested that the Highlands Council give deference to the Law Division matter as an application to vacate the Settlement Agreement on the Hampton Farm site is pending before the Law Division. Hampton Borough anticipates that any ordinance applicable to the Hampton Farm property would only become effective if the Law Division approves the Borough's request to vacate the 1991 Judgment. A hearing on the matter is scheduled for January 7, 2011.

Response: As noted above, the Resolution approving Hampton Borough's Petition for Plan Conformance is issued with conditions, including the condition that Hampton Borough obtain approval of the adopted Housing Element and Fair Share Plan through COAH's process for substantive certification pursuant to the Fair Housing Act. The Housing Element and Fair Share Plan may still be amended, if necessary, to address COAH's review and the Law Division's final decision on Hampton's action regarding the 1991 Final Judgment on Compliance. The Highlands Council anticipates that a final decision by the Court on whether to invalidate the 1988 settlement agreement will occur prior to Hampton's actual adoption of the approved master plan amendments and implementing regulations. Under the Highlands Act, Hampton Borough's proposed master plan amendments and the Highlands Area Land Use Ordinance, while approved by the Highlands Council, must still be approved at the local level in accordance with the procedural mechanisms of the Municipal Land Use Law. Adoption of the Highlands Area Land Use Ordinance even under a conservative estimate will likely not occur until the late Spring or Summer of 2011. Given that the Law Division hearing is scheduled for January 2011, the Council's conditional approval of the Petition may move forward without undermining the Court's jurisdiction, and if necessary, Hampton may amend the approved Highlands Area Land Use Ordinance before final adoption at the local level in accordance with the Court's final judgment.

PUBLIC COMMENT/RESPONSE SUMMARY

1. **Comment:** Julia Somers submitted a letter in support of the Borough's Petition for Plan Conformance.

Response: The Highlands Council acknowledges and thanks the Highlands Coalition for its support of Hampton Borough's Petition for Plan Conformance.

2. **Comment:** Guliet Hirsch, Esq. submitted comments and documents on behalf of Hampton Farm, LLC. Hampton Farm asks the Highlands Council to defer action on Hampton Borough's Petition for Plan Conformance until the Law Division rules on the 1991 Final Judgment on Compliance which is scheduled for January 2011.

Response: The litigation between Haberman, as the predecessor to Hampton Farm, and Hampton Borough relates to Hampton Farm's proposed development of 300 market rate units in the Preservation Area in exchange for a payment in lieu to be paid to Hampton Borough to satisfy a court-ordered 27-unit rehabilitation obligation. The Council was advised that the return date for a hearing before the Law Division on the motion is scheduled for January 7, 2011. The Highlands

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Council's final determination on a Petition for Plan Conformance may proceed simultaneously with the Law Division proceeding since the Highlands Council's resolution for approval of the petition is conditioned on COAH's approval of the Borough's adopted Housing Element and Fair Share Plan through COAH's process for substantive certification or, if appropriate, through approval of these plans by the Law Division of the Superior Court. Thus, Hampton is able to amend its housing element, fair share plan or implementing regulation, if necessary, to comply with COAH's review of the Borough's affordable housing plans or the Court's decision on Hampton Borough's action to invalidate the 1991 Final Judgment on Compliance.

3. **Comment:** Hampton Farm objects to the process for public review and comment on the Hampton Borough's Petition for Plan Conformance. Hampton Farm contends that there is a very limited amount of time to submit an objection to a Petition for Plan Conformance and a limited time for the Council to respond to the objection. Hampton Farm requests an additional 30 days to supplement Hampton Farm's objection and for Highlands Council to response to those supplemental objections.

Response: The request for an additional 30 days to comment on the Petition for Plan Conformance is unnecessary given the procedural history of Hampton Borough's Petition. The Plan Conformance process is a very open and public process in order to fully engage the municipalities and public in the Highlands regional planning process. While the Council finds that a three week public comment period for consideration of the Highlands Council's Draft Consistency Review and Recommendation Report for approval of Hampton Borough's Petition for Plan Conformance is ample time to prepare thoughtful and reasoned objections, the public comment period on the draft recommendation is but one aspect of the Council's open and transparent conformance process leading up to a final agency determination.

As with all the municipal petitions, development of Hampton Borough's Petition for Plan Conformance has been conducted through a very transparent, public process over the past two years. Between June and September, 2009, the Highlands Council released model documents for the Highlands Element of Municipal Master Plans and the Highlands Land Use Ordinance, in support of the Council's 2008 Plan Conformance Guidelines. These three documents provide municipalities and the public with detailed information regarding requirements for Plan Conformance. Hampton Borough, as with many other municipalities, used these model documents in a public process of developing its Petition for Plan Conformance.

On August 7, 2009, the Highlands Council released the Hampton Municipal Build-Out Report for public review, a report that thoroughly examined potential scenarios for future development and/or redevelopment within Hampton Borough. During its noticed public meeting of November 24, 2009, the Hampton Borough Council adopted two resolutions indicating its intent to conform its master plan and development regulations with the Regional Master Plan; the first with respect to the Preservation Area, the second relating to the Planning Area. Hampton Borough formally submitted its Petition for Plan Conformance to the Highlands Council on December 8, 2009. The Petition was deemed administratively complete for review by the Highlands Council on February 8, 2010. On February 18, 2010, the Highlands Council posted Hampton Borough's Resolutions on its website, thus notifying any interested parties of Hampton Borough's intent to conform for the entire

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municipality. Over the next six months, Hampton Borough prepared and submitted to the Highlands Council a draft Highlands Environmental Resource Inventory, Master Plan Highlands Element, a Highlands Area Land Use Ordinance. Hampton Borough also prepared a Self Assessment and Implementation Schedule that identified changes to the municipal planning program that remain necessary before achieving Basic Plan Conformance and a timeframe anticipated for completion of individual planning programs to fully conform to the RMP. On June 6, 2010, Hampton Borough adopted a Housing Element and Fair Share Plan and submitted them to the Highlands Council. The Highlands Council provided COAH with comments on Hampton Borough's adopted Housing Element and Fair Share Plan on June 28, 2010. Thereafter, Hampton Farms submitted objections to COAH on August 27, 2010 proposing the development of the Planning Area portion of the site. On September 7, 2010, Hampton Farm sent a letter to the Highlands Council objecting to Hampton Borough's final Housing Element and Fair Share Plan for failure to include Hampton Farm's prior round site. The Highlands Council provided a response to these issues dated September 23, 2010. Lastly, the Highlands Council posted the housing plans on the website for public review, along with the Final Draft Consistency Review and Recommendations Report, on October 13, 2010.

The Highlands Council has also provided a Plan Conformance tracking sheet on its website, which allows any member of the public to track the progress of a Petition for Plan Conformance, from the date of submittal through final disposition by the Highlands Council. All Petition materials are available for public inspection in the offices of the Highlands Council, from the day a Petition is deemed complete. Therefore, the public has had ample opportunity to be aware of and review various components of the Petition for Plan Conformance over an extended period of time.

4. **Comment:** Hampton Farm claims that the Planning Area portion of Hampton Farm does not contain legitimate environmental resources which should preclude the development of the 300-unit development contemplated in the 1988 Settlement Agreement and Court approved zoning and that the Borough improperly removed the site from its affordable housing plan and failed to request a map adjustment for the site to assure the viability of the project.

Response: Hampton Farms submitted objections to COAH on August 27, 2010 proposing the development of the Planning Area portion of the site. The objections included the proposed relocation of the development of the 300 market rate units from Block 24, Lot 2 in the Preservation Area to Block 23, Lot 1 in the Planning Area. The September 23, 2010 letter from the Highlands Council to COAH evaluating the suitability of Block 23, Lot 1 in the Planning Area to support the 300-unit residential development is incorporated herein by reference.

Hampton Farm's property is designated under the RMP and land use capability mapping as Protection Zone, Conservation Zone and Conservation Environmentally Constrained Subzone. The property has no water and sewer infrastructure, and is not in an approved sewer service area. The property consists of active farming on and around the property, has important farmland soils and is a high priority for State acquisition through the State's Farmland Preservation Program. The property is located in a water deficit area meaning the current consumptive and depletive uses of water exceed the water availability as defined by the RMP. It is bordered to the north by the federally designated Wild and Scenic Musconetcong River with 300-foot open water protection buffers on the Property,

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and is adjacent to permanently preserved open space. It is mapped as providing critical habitat for threatened and endangered species. The property is also entirely underlain with carbonate rock, which introduces the need for soils investigation and potential for dangerous conditions such as sinkholes.

Hampton Borough has chosen to conform its master plan and development regulations to the policies of the RMP for the entire municipality. The environmental resource protection standards will therefore apply to Hampton Farm's entire property after Hampton Borough adopts the Council-approved revisions to the master plan, Highlands Area Land Use Ordinance and other related development regulations at the local level. While the density of development currently proposed for the Hampton Farm property (whether in the Preservation Area or Planning Area) is inconsistent with the policies of the RMP, the Council recognizes that some development may take place in the Planning Area portion of property in a way that could be found consistent with the RMP, Hampton's proposed Highlands Area Land Use Ordinance and the Mount Laurel doctrine. For example, the expansion of public water and waste water systems in the Protection Zone and Conservation Zone – Environmentally Constrained Subzone is generally prohibited by the RMP; however it may be approved if the development can meet the standards for cluster development which includes an 80% open space set aside. Moreover, the RMP provides a process for seeking an amendment to the Highlands land use capability mapping through a petition for a Map Adjustment with priority given for creation of meaningful opportunities for affordable housing. Hampton Borough may request a Map Adjustment at any time during or after the initial Plan Conformance process if the Borough concludes that the development of Hampton Farm's property is required to satisfy its Mount Laurel obligations. Discussions should continue between Hampton Borough, Hampton Farm and the Highlands Council to monitor the situation and pursue such a course, if proven necessary.

5. **Comment:** Hampton Farm maintains that Hampton Borough failed to follow the statutory requirement in the Highlands Act at N.J.S.A. 13:20-15a to file an adopted ordinance advising the Highlands Council of the intent to petition for conformance for the entire municipality.

Response: The Highlands Council specifically requires the adoption of such an ordinance, which applies only to the Planning Area, as a condition of approval. See Section D.1.a of this Report, and the Highlands Implementation Plan and Schedule.

6. **Comment:** Hampton Farm maintains that Hampton Borough failed to adopt a final master plan and development regulations prior to filing a petition for Plan Conformance in violation of the Highlands Act provision at N.J.S.A. 13:20-15a.

Response: The Highlands Act, in N.J.S.A. 13:20-13:20-14 and N.J.S.A. 13:20-13:20-15, require municipalities to submit revisions to master plans and development regulations prior to Council review. The Highlands Act then authorizes the Council to approve, reject or approve with conditions those revisions. The Act expressly anticipates conditions for Council review and approval, which are then satisfied at the local level through final adoption of amendments to master plan or development regulations pursuant to the procedural requirements of the Municipal Land Use Law. The RMP requires that a Petition for Plan Conformance include "proposed revisions to the municipal or

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county planning documents that are necessary to conform to the RMP.” (RMP at p.368.) Hampton Borough has done so. Accordingly, the Highlands Council requires adoption of the final master plan and development regulations as a condition of the approval of the Petition for Plan Conformance.

7. **Comment:** Hampton Farm maintains that the Highlands Council failed to adopt regulations that set forth the framework that governs review and approval of municipal Petitions for Plan Conformance.

Response: The RMP itself contains the framework for the Council’s consideration of a Petition for Plan Conformance. (See RMP, Chapter 6, Implementation). The Highlands Council adopted the RMP pursuant to the legislative procedures for adoption of a regional master plan expressly set forth in the Highlands Act. Even exceeding the express procedures of the Highlands Act in N.J.S.A. 13:20-8, the Highlands Council held 11 public hearings to take testimony on the various drafts of the RMP, 10 of which were scattered throughout the seven Highlands counties and 1 in Trenton. The two RMP drafts were subject to extensive public comment periods, with the first comment period lasting 160 days and the second lasting 90 days. Numerous Highlands Council meetings were held exclusively for public discussion on various iterations of the draft RMP. The Council prepared and released written responses to the more than 2,000 comments received during the public comment periods on the various RMP drafts. The Council adopted the RMP along with the Plan Conformance Guidelines at a public meeting on July 24, 2008. The Plan Conformance Guidelines provide the detailed guidance to help towns comply with the procedural framework set forth in the RMP. Hampton Borough complied with the procedures set forth in the RMP and the Plan Conformance Guidelines to prepare and file the Petition for Plan Conformance. The Council’s approval of Hampton Borough’s Petition for Plan Conformance is based entirely on the requirements of the RMP as described in the Council’s Resolution.

8. **Comment:** Hampton Farm maintains that the Freshwater Wetlands Protection Act pre-empts the Highlands RMP prohibitions against development in the 300-foot protection buffers surrounding freshwater wetlands located in the Planning Area.

Response: The Highlands Act specifically amended the Freshwater Wetlands Protection Act for the Preservation Area through N.J.S.A. 13:9B-5.1 – “Notwithstanding the provisions of P.L.1987, c. 156 (C.13:9B-1 et seq.), or any rule or regulation adopted pursuant thereto, to the contrary, major Highlands development as defined in section 3 of P.L.2004, c. 120 (C.13:20-3) that includes a regulated activity as defined in section 3 of P.L.1987, c. 156 (C.13:9B-3) in a freshwater wetland or freshwater wetland transition area located in the Highlands preservation area as defined in section 3 of P.L.2004, c. 120 (C.13:20-3) shall also be regulated pursuant to sections 32 through 37 of P.L.2004, c. 120 (C.13:20-30 through 13:20-35).

The Highlands Act also defined Highlands Open Waters in section 3 of P.L.2004, c. 120 (C.13:20-3) as “All springs, streams including intermittent streams, **wetlands**, and bodies of surface water, whether natural or artificial, located wholly or partially within the boundaries of the Highlands Region, but not including swimming pools.” (emphasis added) This definition applies to both the Preservation Area and the Planning Area. The Highlands Act, at N.J.S.A. 13:20-11, required the Council to include in the development of the RMP a resource assessment to determine the amount

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of development that would continue to maintain the ecological values of surface and ground water and to include a smart growth component to determine undeveloped areas of the Planning Area not significantly constrained by wetlands and other resources. Therefore, the Legislature clearly intended wetlands in the Highlands Region to be protected in concert with other categories of waters under the general definition of Highlands Open Waters. The RMP provides for 300-foot buffers around all Highlands Open Waters in the Highlands Region. This issue was raised during the comment period on the adoption of the RMP in 2008 and the Highlands Council similarly responded to this issue at that time.

9. **Comment:** Hampton Farm maintains that the Highlands RMP prohibits the Highlands Council from approving Hampton Borough’s Petition since the Petition fails to include a final municipal adopted Water Use and Conservation Management Plan or Critical Habitat Management Program.

Response: The Highlands Council is authorized under N.J.S.A. 13:20-14 and -15 to approve with conditions petitions for Plan Conformance.

10. **Comment:** Hampton Farm maintains that the Highlands Council has failed to satisfy its constitutional obligation to take affirmative steps to require Highlands municipalities to provide for realistic opportunities for affordable housing in the Highlands Region.

Response: Initially, the Highlands Council notes that the objection seems to challenge the Highlands Council’s adoption of the RMP, and not application of the policies to Hampton Borough’s Petition for Plan Conformance. The Highlands Council’s adoption of the RMP is considered final agency action subject to judicial review in the Appellate Division, pursuant to N.J.S.A. 13:20-26, and this issue is presently pending review.

Notwithstanding, the Highlands Council developed the RMP with specific policies and objectives to ensure consistency with the Mount Laurel doctrine. Not only does the RMP mandate that every conforming municipality, whether under COAH jurisdiction or not, develop a Housing Element and Fair Share Plan to provide a realistic opportunity for the fair share of affordable housing obligations, the RMP also requires that the approved plans rely on the land-based, resource-based and utility-based capacity constraints of the RMP to ensure actual fulfillment of a municipality’s Fair Share Obligations. (RMP at 200, Policy 6O7). The RMP requires “that conforming municipalities update and adopt a housing element, fair share plan, and implementing ordinance(s) to reflect current conditions and resource protection requirements of the RMP.” Id., Policy 6O8. The RMP also requires that conforming municipalities shall, consistent with the Fair Housing Act at N.J.S.A. 52:27D-313, either petition COAH for a substantive certification of its housing element and ordinances or institute an action in Superior Court for declaratory judgment granting it repose (RMP at 338). The RMP takes the voluntary nature of the FHA, where municipalities can choose not to meet their constitutional obligation, and mandates that conforming municipalities petition COAH or file with the Superior Court.

The Highlands Council, unlike the New Jersey Meadowlands Commission, does not have preemptive zoning and regulatory authority for development in the Highlands Region under the Highlands Act.

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The RMP serves as a complement to local land use decisions and the Council has no authority to zone at the municipal level. N.J.S.A. 13:20-14,-15. The actions of the Highlands Council constitute affirmative steps to ensure affordable housing is built in the Highlands Region. The RMP mandates a conforming municipality to develop or update a Housing Element and Fair Share Plan based on the capacity constraints of the RMP and file a revised Housing Plan and Fair Share Plan with COAH or the Superior Court consistent with the FHA. The Highlands Council has also offered substantial technical and financial assistance to each of the Highlands municipalities to support these efforts. The Highlands Council has clearly taken affirmative steps to ensure affordable housing in the Highlands Region while protecting the Highlands environment from the impacts of sprawl development consistent with the Highlands Act, the Fair Housing Act and the Mount Laurel doctrine.

- 11. Comment:** Hampton Farm maintains that the Highlands RMP is unconstitutional because it fails to set forth standards that may be viewed as a meaningful attempt to assure production of affordable housing in the Highlands Region. The RMP consists of a standardless, numberless approach to development of affordable housing, limits new development to 1.9% of the entire Highlands Region, and fails to identify or coordinate regional affordable housing opportunities pursuant to recent amendments to the Fair Housing Act of 1985, all of which demonstrate a prima facie case of exclusionary zoning.

Response: Initially, the Highlands Council notes that the objection seems to challenge the actual standards of the Highlands Regional Master Plan, not application of those standards in Hampton Borough. Final agency action is subject to judicial review in the Appellate Division pursuant to N.J.S.A. 13:20-26, and similar issues are presently pending review.

Notwithstanding, the resource protection requirements of the Highlands Act, the RMP and NJDEP's regulatory program for the Preservation Area will inevitably limit development, including affordable housing development. The Mount Laurel doctrine and FHA, however, do not require development of affordable housing at the expense of the environment. Mount Laurel recognized that affordable housing, like every other type of development, is restricted to areas where it is environmentally appropriate. The Highlands Act specifically cites the need for special protections for the water and land resources of the Highlands Region as a major cause for its adoption. The RMP limits, but does provide for development, redevelopment, and infill development in appropriate areas within the Highlands Region. Each and every opportunity for such development includes without limitation, the opportunity to provide affordable housing.

The RMP's Existing Community Zone, or areas encouraged for growth, constitute 23% of the total land in the Highlands Region. Of the approximately 860,000 acres in the entire Highlands Region, the Protection Zone includes 476,661 acres or approximately 55% of the Highlands Region, the Conservation Zone includes 184,280 acres or nearly 22% of the Region, and the Existing Community Zone includes 198,417 acres or over 23% of the Region. See RMP at 112, Table 3.3: Land Use Capability Zone Map – Acres and Percentages by Zone.

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Moreover, the RMP does not restrict the permitted zoning uses of land and property within the Region; it merely seeks to channel development to appropriate locations, supported by adequate infrastructure and carrying capacity. The RMP includes policies that prioritize applications that include affordable housing with regard to use of water and extension of water and wastewater infrastructure.

Another mechanism by which affordable housing may be constructed in the Highlands Region is use of the Highlands Act exemptions. The RMP provides an analysis of relevant exemptions (RMP, p.126):

The Highlands Council conducted an analysis of four of the most important exemptions to landowners. Two of the exemptions permit the construction of a single family dwelling on an undeveloped parcel that lawfully existed as of August 10, 2004, the enactment date of the Highlands Act. The third allows for the reconstruction and limited expansion of any building or structure for any reason within 125 percent of the original footprint, provided that the reconstruction does not increase the impervious surface by one-quarter acre or more. The fourth exemption permits an improvement to a single family dwelling in existence on August 10, 2004, including but not limited to an addition, garage, shed, driveway, porch, deck, patio, swimming pool, or septic system. Single family dwellings include group homes, community residences, and other alternative living arrangements that may be suitable for creation of affordable housing opportunities. The analysis reveals that tens of thousands of acres throughout the Region could potentially be developed under these four exemptions and should be investigated by each of the municipalities to determine the actual potential for such development focusing on existing site conditions, ownership issues, zoning and other factors.

- 12. Comment:** Hampton Farm maintains that Hampton Borough's Fair Share Plan depends on a substantial amount of unidentified developer's fees and other funding to develop accessory apartments and a municipally-sponsored 100% affordable housing development in satisfaction of its affordable housing obligations.

Response: The Highlands Council's review of a Housing Element and Fair Share Plan is limited to the capacity of land to support those opportunities for affordable housing proposed in a fair share plan based on the natural resource protection standards of the RMP. Whether the financial mechanisms chosen by Hampton Borough to fully satisfy its fair share obligations is consistent with the Fair Housing Act and the Mount Laurel Doctrine is a matter for COAH or the Law Division to review Hampton Borough's adopted Housing Element and Fair Share Plan for substantive certification or declaratory relief.

- 13. Comment:** Hampton Farm maintains that the Highlands Council's build out methodology to determine Hampton's fair share obligations fails to take into consideration the 35 residentially-zoned parcels in the preservation area that may be eligible for a Highlands exemption for construction of single-family residences.

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Response: The Highlands Municipal Build-Out Report is designed to provide an analysis of the anticipated development through the successful implementation of the Highlands Act and the RMP. While the Highlands Act provides the ability for landowners to construct single family dwellings on vacant parcels, the Highlands Act also provides incentives, including pre-Highlands Act appraisal analysis, for such landowners to participate in the State’s Green Acres program, the Farmland Preservation program and the Highlands Transfer of Development Rights program. Accordingly, successful build-out under the goals of the Highlands Act and the RMP may result in the preservation of the land without application of these potential exemptions. The Highlands Council cannot predict whether landowners will choose to exercise their rights under Highlands Act exemptions, nor within what timeframe such activity may occur. In addition, environmental constraints may limit or eliminate the reasonable potential for development of some parcels. Therefore, while exemptions offer a wide range of potential development opportunity, they cannot be definitively quantified. The Highlands Council will work with the municipalities during and after Plan Conformance that wish to explore use of eligible exemptions to assist in full satisfaction of their Mount Laurel obligations.

- 14. Comment:** Hampton Farm maintains that the Hampton Farm site is a court-approved prior round affordable housing site and therefore exempt from the Highlands Act and the Highlands RMP pursuant to N.J.S.A. 13:20-23b.

Response: Hampton Farm improperly interprets N.J.S.A. 13:20-23b as an exemption for its property from the resource protection standards of the Highlands Act, the RMP, and NJDEP’s regulatory program. N.J.S.A. 13:20-23b states that “[n]othing in this act shall affect protections provided through a grant of substantive certification or a judgment of repose granted prior to the date of enactment of this act.” The “protections” offered through a judgment of repose is limited to a municipality’s relief from future exposure to a builder’s remedy lawsuit for a certain period of time. Municipalities may always seek approval from the court to amend their court-approved compliance plans and remove prior round sites due to a significant change in fact, law or policy as long as the amended plans continue to satisfy the constitutional obligation to provide for their fair share of affordable housing opportunities. N.J.S.A. 13:20-23b is therefore not an exemption for prior round affordable housing sites.

Instead, the only exemption directly related to affordable housing projects in the Highlands Act is found under the Act’s express exemption provision, N.J.S.A. 13:20-28a(17). N.J.S.A. 13:20-28a(17) specifically provides:

a major Highlands development located within an area designated as Planning Area 1 (Metropolitan) or Planning Area 2 (Suburban) as designated pursuant to the [the State Planning Act] 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.

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[N.J.S.A. 13:20-28a(17)].

The exemption expressly applies to affordable housing projects that are in a court-approved settlement agreement and designated as PA1 or PA2 in the State Development and Redevelopment Plan (SDRP). PA1 and PA2 are areas the State considers appropriate for growth – areas with existing utility and transportation infrastructure, limited environmental and agricultural features, and can support a choice and variety of housing. When read together with N.J.S.A. 13:20-23b, the Legislature clearly intended to exempt only a very limited number of affordable housing projects that may actually provide affordable housing while stringently protecting the significant natural and agricultural resources of the Highlands Region. Given the prevalence of natural and agricultural resources, Hampton Farm’s property is designated as Rural Environmentally Sensitive Planning Area, or PA4B, under the SDRP. Hampton Farm is therefore ineligible to apply for this exemption and not an affordable housing project the Legislature intended to exempt from the Act, the RMP, or NJDEP’s regulatory authority.

- 15. Comment:** Kevin Walsh, Esq. submitted comments and documents on behalf of the Fair Share Housing Center (FSHC) contending that Hampton Borough’s Housing Element and Fair Share Plan improperly relied upon COAH’s waiver of its regulations for Highlands municipalities and use of Highlands Municipal Build-Out Report to adjust the Borough’s affordable housing obligation. FSHC incorporates their briefs in an action filed in the Appellate Division against the State wherein FSHC raised these same issues.

Response: The adjustment of Hampton Borough’s fair share obligations based on conformance with the RMP was issued by COAH as a waiver from COAH’s regulations and is considered final agency action by COAH. FSHC has filed litigation in the Appellate Division challenging COAH’s actions related to the adjustment of fair share obligations for conforming Highlands municipalities. FSHC raises the same issues through this comment. The State’s responses to the claims in the Appellate Division matter are incorporated herein by reference.

In addition, the recent Appellate Division decision invalidating portions of COAH’s regulations will have substantial implications on the Fair Share Obligations for every municipality statewide. The Highlands Council concluded that Hampton Borough’s Petition for Plan Conformance be approved conditioned upon achieving and retaining compliance with the Fair Housing Act, as demonstrated by approvals of its Housing Element and Fair Share Plan from either COAH or the Law Division of New Jersey Superior Court. This condition incorporates any on-going changes as may be necessary to retain compliance with future amendments to the Fair Housing Act and any other changes in the applicable laws, rules, or regulations that govern the provision of affordable housing.

- 16. Comment:** FSHC contends that Hampton Borough may not properly use the Highlands Council’s instructions for Module 2 and Module 3 to adjust Hampton Borough’s fair share obligations since those modules were not adopted through rulemaking. FSHC incorporates their briefs filed on this matter with the Appellate Division.

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Response: Hampton Borough properly utilized the instructions to complete the Highlands Plan Conformance modules as these instructions simply provided the Borough with the process to prepare a Petition for Plan Conformance consistent with the RMP. The validity of the Module 3 Instructions is presently under consideration by the Appellate Division in a matter filed by the FSHC. The State's response to the claim contained in briefs filed in that matter is incorporated herein by reference. The Module 2 and Module 3 instructions are not rules, but are part of the 2009 Plan Conformance Grant Program designed to help conforming municipalities receive reimbursement for costs associated with the process of conforming to the RMP. The scopes of work in the Module 2 and Module 3 instructions are based entirely on the RMP and COAH's regulations and do not themselves set forth new policy.

17. **Comment:** FSHC objects to the use of the Highlands Municipal Build-Out Report for Hampton Borough to reduce the number of Hampton Borough's Growth Share Obligation from 24 units to 7 units. FSHC contends that the build-out report does not take into account the Borough's potential developable land including Hampton Farm's property in the Planning Area that constitutes 98% of undeveloped land in the Borough. Moreover, FSHC maintains that the build-out report relies substantially, if not exclusively, on information provided by Hampton Borough itself, and does not take into consideration redevelopment opportunities as required by COAH regulations. Lastly, FSHC notes that that it reserves the right to review and challenge the data used in the Highlands Municipal Build-Out Report.

Response: The Highlands Municipal Build-Out Report for Hampton Borough and the data supporting the report have been available for public review on the Council's website since July 24, 2009. The pending conformance process is the opportunity for the public to submit comments on the data used in the Report.

With respect to FSHC's claim that the report was prepared based on information provided by Hampton who was motivated to submit information to reduce affordable housing obligation, such a claim is without merit. In fact, all Highlands Municipal Build-Out Reports are products of the Highlands Council based almost exclusively on data prepared by the Highlands Council. The reports are prepared by the Highlands Council, in consultation with the municipality, based upon the restrictions of the Highlands Act, the RMP and the NJDEP Highlands Rules at N.J.A.C. 7:38. The Highlands Municipal Build-Out Reports specifically responds to the Highlands Act mandate for the contents of the Regional Master Plan to include a resource assessment to determine "the amount and type of human development and activity which the ecosystem of the Highlands region can sustain while still maintaining the overall ecological values thereof..." While the Highlands Municipal Build-Out Report is a product of the Council, it is a part of the municipal Petition and the public has an opportunity to provide comments on the Highlands Municipal Build-Out Report during the Petition review process.

Prior to interacting with any municipality in the preparation of the reports, the Highlands Council compiled an extensive geodatabase including information from tax records, 2005 zoning, NJDEP sewer service areas and utility capacity data, public water system service areas collected by the Highlands Council, and Highlands Resources mapping from the RMP. Hampton Borough was then

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invited to submit changes based on verifiable information. The Highlands Council staff checked any recommended changes and then generated the Highlands Municipal Build-Out Report based on the data and conformance with the Highlands Act and the RMP. This is the same process used for 75 other such reports, and is described within the reports themselves.

The preparation of a Highlands Municipal Build-Out Report is a specific requirement of the RMP to perform an analysis of the natural resource protection and utility capacity policies of the RMP. It is a planning tool developed by the Highlands Council that organizes and applies the RMP policies at the municipal level to identify areas with land-based, infra-structure-based, and resource-based capacity to grow. Applying those RMP policies to Hampton Borough resulted in the identification of land capable of sustaining new development, redevelopment and economic growth opportunities. Results regarding public water supply utility capacity, net water availability, developable vacant and oversized lots, environmentally constrained lands, septic system yields, and the lack of wastewater utility capacity are all described in detail within the Highlands Municipal Build-Out Report.

In regards to FSHC's claim that the Highlands Municipal Build-Out Reports did not consider the potential for redevelopment, the reports actually do incorporate approved redevelopment projects for various Highlands municipalities where the municipality was able to include sufficient information based on final approved plans. This information was recorded in the database by the municipality and evaluated by the Highlands Council. Hampton Borough did not have any final approved redevelopment plans at the time of analysis. Moreover, during the Plan Conformance process, the Highlands Council and municipalities work together to identify areas with existing infrastructure, disturbed land, contaminated areas, and/or areas with degraded or otherwise insignificant environmental features that may be appropriate for Center Designation, redevelopment or infill opportunities consistent with the RMP policies. Hampton Borough lacks any wastewater utility, which greatly constrains the potential for redevelopment beyond the footprint and intensity of existing land uses.

Additionally, the reduction of fair share obligations based on the results of Hampton's build-out report was pursuant to COAH's methodology adopted under the Third Round regulations and related administrative actions to take into consideration municipal conformance with the policies of the RMP, as required under N.J.S.A. 13:20-23. As noted above, the Third Round methodology was recently overturned, and municipal fair share obligations may be revised as a result of any future amendments to the Fair Housing Act or implementing regulations.

- 18. Comment:** FSHC maintains that there is no opportunity for the public to challenge the results of the Highlands Municipal Build-Out Reports and the application of the build out results to determine municipal fair share obligations. FSHC requests clarification on this issue as the Highlands Council submitted a response to an objection filed by FSHC with COAH.

Response: As described in the comment and response above, FSHC may and has submitted public comments raising concerns with the Highlands Municipal Build-Out Report for Hampton Borough. Accordingly, the public certainly has an opportunity to raise concerns regarding the Highlands Municipal Build-Out Reports through the Council's review of a municipal Petition for Plan

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Conformance. With respect to FSHC's request for clarification, the Highlands Council simply advised COAH that the issue of the validity of adjusting fair share obligations based on the results of the Highlands Municipal Build-Out Reports is the exact issue currently and appropriately under consideration by the Appellate Division of the Superior Court and thus that issue should not be adjudicated in two separate forums.