

**FOR CONSIDERATION AT THE FEBRUARY 17, 2011 MEETING OF THE
NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL
Petition for Plan Conformance – Final Consistency Review and Recommendations Report**

PUBLIC COMMENTS RECEIVED

Written comments regarding the Township of Tewksbury's Petition for Plan Conformance were accepted by the Highlands Council through the close of the Public Comment period on February 4, 2011. Comments were provided by the following individuals/entities:

1. Kevin Walsh, Esq. on behalf of the Fair Share Housing Center (FSHC);
2. Hank Klumpp, Property Owner;
3. Robin Love, President, Resident's Alliance for Neighborhood Preservation, Inc.;
4. George C. Cassa, Alliance for Historic Hamlets;
5. Basil Hone and Frances Spann, Citizens to Save Tewksbury; and
6. Julia Somers, New Jersey Highlands Coalition.

MUNICIPAL COMMENT/RESPONSE SUMMARY

Comments Submitted by Kevin Walsh, Esq. on behalf of the Fair Share Housing Center (FSHC):

1. **Comment:** FSHC contends that the 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 affordable housing obligation calculated in COAH's rules. 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 the 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. However, that decision was stayed by the New Jersey Supreme Court on January 14, 2011. The Highlands Council has concluded that this 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

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

Response: This Petition properly utilized the instructions to complete the Highlands Plan Conformance modules as these instructions simply provided Highlands municipalities with the process to prepare a Petition for Plan Conformance consistent with the RMP. The validity of the Module 3 Instructions is presently under

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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.

- 3. Comment:** Fair Share Housing Center objects to the reduction of the Township of Tewksbury’s third round fair share obligations from 102 units to 85 units.

Response: The Township of Tewksbury’s reduction in its third round Fair Share Obligation is based upon the Highlands Municipal Build-Out report prepared by the Highlands Council. The Report was prepared by the Highlands Council, in consultation with the municipality, based upon the restrictions of the Highlands Act, the Highlands Regional Master Plan, and the NJDEP rules at N.J.A.C. 7:38. The Highlands Municipal Build-Out Report 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...” 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, infrastructure-based, and resource-based capacity to grow.

Applying those RMP policies to the Township of Tewksbury resulted in the identification of land capable of sustaining new development, redevelopment and economic growth opportunities. In the case of the Township of Tewksbury, the Municipal Build-Out Report reflected the municipality’s available wastewater utility capacity and available developable land located outside the Preservation Area which limited the amount of residential and non-residential development likely to occur. In addition to the results of the Highlands Municipal Build-Out Report, the methodology includes recent actual construction activity. The number of Certificates of Occupancy issued for both residential and non-residential construction from 2004 through the end of 2008 is included in the revised Fair Share Obligation. Together these give the Township a more accurate tool to plan for their Fair Share Obligation. However, these numbers are projections of future growth and do not necessarily predict the Township’s actual Fair Share Obligation. Ultimately, the Township will be required to supply affordable housing based on actual growth that has occurred, and will occur, in the municipality from 2004 through 2018. To ensure the Township continues to provide for its Fair Share Obligation, the Highlands Council resolution regarding the Township’s Petition for Plan Conformance includes as a proposed condition of approval, continued compliance with the Fair Housing Act as it may be amended or as COAH’s rules for the Third Round may be amended.

Comments submitted by Hank Klumpp, Property Owner.

- 1. Comment:** Questions the process for the establishment of the Preservation Area boundary. As it relates to Tewksbury Township Petition, Mr. Klumpp also claims that the Township was not part of the original map of the Highlands Region and that no scientific study supports the inclusion of his property in Tewksbury.

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Response: The delineation of the Preservation Area and Planning Area boundary was an action of the Legislature to identify the most important resource lands in the Highlands Region. The Highlands Council has no authority to modify the boundary. The establishment and boundaries of the Preservation Area were supported in two Appellate Court decisions: the decision of *OFF, L.L.C. v. State*, 395 N.J. Super. 571 (App. Div. 2007), *aff'd o.b.*, 197 N.J. 418 (2008), reiterated in *County of Warren v. State*, 409 N.J. Super. 495 (App. Div. 2009), *certif. denied*, 201 N.J. 153, *cert. denied*, 130 S.Ct. 3508 (2010). Mr. Klumpp was a plaintiff in the latter matter and thus is aware of the litigation where the scientific basis for the Highlands Act was challenged and rejected.

With respect to Tewksbury Township, the Township was first identified by the State of New Jersey in the “Highlands Region” mapping as a part of the 2001 New Jersey State Development and Redevelopment Plan. The 2001 State Plan identified ninety municipalities, including Tewksbury Township, within the Special Resource Area of the Highlands. See the 2001 State Plan at page 172 and Appendix G. The 2001 State Plan analyzed the significant resources of the Highlands and concluded that nearly 70 percent of the area is mapped as Environmentally Sensitive (Planning Area 4B or Planning Area 5). In addition, the 2004 Highlands Task Force Action Plan included Tewksbury Township as among the ninety municipalities in the Highlands. The Highlands Act was thereafter adopted to include eighty-eight municipalities including Tewksbury Township. An extensive scientific analysis was completed in the Highlands Regional Master Plan and any landowner in the Highlands can examine the results as it pertains to specific properties through the use of the Highlands interactive mapping on the Council website.

Lastly, extensive federal studies federal conducted by the United States Forest Service in 1992 and 2002 led to the federal Highlands Conservation Act signed by President Bush in 2004. This act authorized \$100 million for land preservation in the four state Highlands region and Tewksbury Township is included within the federal boundary (see the RMP at Figure 1.4 - Federal Highlands Conservation Act Boundary).

2. Comment: Mr. Klumpp questions the issue of landowner equity and lack of available compensation.

Response: The Highlands Act includes a provision for a “strong and significant commitment by the State to fund the acquisition of exceptional natural resource value lands.” The Regional Master Plan includes the mandated identification of Conservation Priority Areas and Agricultural Priority Areas to identify specific areas with the highest preservation priority, to serve as a focus for such efforts. The Highlands Council recently completed a report that quantifies the land preservation efforts that have been completed since the 2008 adoption of the RMP.

See http://www.highlands.state.nj.us/njhighlands/news/publ/land_pres_report_081910.pdf

The Report found that since July 2008, 7,690 acres have been added as preserved lands through the efforts of numerous partners and funding from federal, State, county, municipal, private and non-profit sources. The Highlands Region presently has a total of 290,214 preserved acres. This total amounts to the preservation of nearly 34% of the Highlands Region (nearly 46% of all undeveloped land as of 2002) and nearly 47% of the Preservation Area. These 290,214 acres are divided between 255,537 acres of open space lands and 34,677 acres of preserved farmland. It is likely that some additional lands have been preserved but not yet reported, increasing the total acreage.

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Funding for these initiatives has been accomplished through the existing funding stream of the Garden State Preservation Trust, a supplemental \$30 million appropriation for the Farmland Preservation Program, \$10 million in capital funding that was allocated to the Highlands Development Credit Bank, and federal funding through the 2004 federal Highlands Conservation Act which authorized \$100 million for land preservation in the four state region. The report concluded for the 7,690 acres preserved since 2008 that the State Farmland Preservation Program has paid an average of \$9,816 per acre for development rights on lands in the Preservation Area while lands in the Planning Area have received on average \$14,288 per acre. Under the Green Acres Program landowners have seen similar per acre values for fee simple purchases. For properties in the Preservation Area, properties have averaged \$10,265 per acre, while in the Planning Area properties have averaged \$19,957 per acre. Finally, under the Highlands TDR Program, for those Preservation Area properties that have received an allocation of HDCs, the average per acre land value is \$10,135.

The Highlands Council has approved a number of resolutions encouraging action by the Legislature and the Governor, over several administrations, to improve funding for acquisition of lands in fee simple and in easement, for acquisition of Highlands Development Credits, and for authorization of Highlands TDR Receiving Zones to be established anywhere in the state. Also, in November of 2009 New Jersey residents voted to approve the Green Acres, Water Supply and Floodplain Protection, and Farmland and Historic Preservation Bond Act of 2009. This Act authorizes the State to issue \$400 million in bonds for land preservation. While the monies accumulated through the bond sales are critical to the preservation efforts throughout the state, the Highlands Council has repeatedly recommended that a dedicated portion of these funds be directed to the Highlands Region to continue to build upon the substantial investments made to date and to uphold the commitment in the Highlands Act “to fund the acquisition of exceptional natural resource value lands”. The Highlands Act also included a number of important exemptions and waivers to address landowner equity issues.

In addition, the Highlands Council strongly supported the extension of the dual appraisal method of the Highlands Act. Specifically, the Highlands Regional Master Plan (RMP) included the following language in Policy 1H6: “To support legislation to extend the dual appraisal methodology used by the GSPT for lands in the Highlands Region beyond the June 30, 2009 expiration date to a minimum of five years beyond adoption of the RMP.” After the adoption of the RMP, the Highlands Council actively and consistently supported the extension and provided written letters of support and testimony before legislative committees. On September 9, 2010, Governor Christie signed P.L. 2010, c. 70 into public law, thereby extending the dual appraisal method from June 30, 2009 to June 30, 2014.

Comment Submitted by Robin Love, President, Resident’s Alliance for Neighborhood Preservation, Inc.

- 1. Comment:** A letter of support for the Township’s Petition for plan conformance was submitted, particularly supporting the removal of the Route 78 Sewer Service Area from Tewksbury Township’s Wastewater Management Plan as being consistent with the Township’s Petition and the RMP.

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Response: The Highlands Council acknowledges the Alliance for Neighborhood Preservation’s support for the Township’s Petition for Plan Conformance and will continue to work with the Township to develop a Wastewater Management Plan consistent with the Goals, Policies and Objectives of the RMP.

Comment Submitted by George C. Cassa, Alliance for Historic Hamlets.

1. Comment: A letter of support for the Township’s Petition for Plan Conformance was submitted, particularly supporting the removal of the Route 78 Sewer Service Area from Tewksbury Township’s Wastewater Management Plan as being consistent with the Township’s Petition and the RMP.

Response: The Highlands Council acknowledges the Alliance for Historic Hamlet’s support for the Township’s Petition for Plan Conformance and will continue to work with the Township to develop a Wastewater Management Plan consistent with the Goals, Policies and Objectives of the RMP.

Comment Submitted by Basil Hone and Frances Spann, Citizens to Save Tewksbury.

1. Comment: A letter of support for the Township’s Petition for Plan Conformance was submitted, particularly supporting the removal of the Route 78 Sewer Service Area from Tewksbury Township’s Wastewater Management Plan as being consistent with the Township’s Petition and the RMP.

Response: The Highlands Council acknowledges the Citizens to Save Tewksbury’s support for the Township’s Petition for Plan Conformance and will continue to work with the Township to develop a Wastewater Management Plan consistent with the Goals, Policies and Objectives of the RMP.

Comments Submitted by Julia Somers, New Jersey Highlands Coalition

1. Comment: The Coalition supports Tewksbury Township’s Petition for plan conformance.

Response: The Highlands Council acknowledges the New Jersey Highlands Coalition’s support for the Township’s Petition for plan conformance.

2. Comment: The New Jersey Highlands supports the recommendation that jurisdiction over Critical Habitat areas of the Highlands Region will rest in large part with the Highlands Council and the NJDEP.

Response: The Highlands Council acknowledges the New Jersey Highlands Coalitions’ support for the recommendation.

3. Comment: The New Jersey Highlands Coalition would like to confirm that, in the Planning Area, the RMP prohibits the creation or extension of public water supply systems and wastewater collection and

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treatment systems within the Protection Zone, the Conservation Zone and the Environmentally-Constrained Sub-Zones until or unless authorized by the Highlands Council.

Response: In the Planning Area – Protection Zone, Conservation Zone and Environmentally Constrained Sub-Zones, new, expanded or extended public water systems, wastewater collection and treatment systems, and community on-site treatment facilities are permitted only where approved by the Highlands Council and included within a NJDEP-approved Wastewater Management Plan. This restriction is included in the Highlands Area Land Use Ordinance Section 5.3.7.

4. Comment: The New Jersey Highlands Coalition notes that the Township has elected not to include a Historic, Cultural & Archaeological Resources Ordinance and supports the Township's future adoption of the Ordinance.

Response: The Highlands Council acknowledges the New Jersey Highlands Coalition's support of the adoption of the Ordinance. The Council will continue to work with the Township if they elect to adopt the Ordinance in the future.