

Real Estate Alert

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Recently Passed *Highlands Water Protection and Planning Act* Severely Impacts Property Owners in the Highlands Area

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On August 10, 2004, former Gov. James E. McGreevey signed the *Highlands Water Protection and Planning Act* (HWPPA) into law. As open space in the state rapidly diminishes, the HWPPA serves to protect the Highlands Region by restricting development throughout a large portion of northern New Jersey. The HWPPA became effective immediately upon its signing by the governor, although the regulatory framework will not be in place for some time.

The Highlands Region

The Highlands Region is a 1,250 square mile area stretching from Hunterdon through Somerset, Morris, Warren, Sussex, Passaic and Bergen counties, covering portions of 88 municipalities. Over time, public and private water supply companies have acquired substantial holdings of land in this area for watershed and reservoir purposes. Currently, about half of New Jersey's drinking water comes from the Highlands area, serving over 5 million people.

The Highlands Region also provides other natural resources such as clean air, contiguous forest lands, wetlands, and plant and wildlife habitats. Additionally, the Highlands Region contains sites of historic significance and offers many outdoor recreational opportunities, as well as supplying over 100,000 acres of active farmland.

The HWPPA divides the Highlands Region into two distinct areas: the Preservation Area and the Planning Area. A map of the Highlands Region (which designates these areas) is included at the end of this alert and may be found at www.state.nj.us/dep/highlands/highlands_map.pdf.

The Preservation Area

Approximately 400,000 acres are designated as the "Preservation Area." Other than a single family home, nearly all proposed development in this area would require a Highlands permit. Contrary to the long-established tradition of home rule in New Jersey, municipalities in the Preservation Area must modify their land use ordinances to conform to the regional master plan to be established by the Highlands Council. However, municipalities in the Preservation Area are eligible to receive state aid to offset any decrease in property tax revenues which may result from the HWPPA. Moreover, landowners in the Planning Area may receive payment under a program established to facilitate transfer of development rights from properties located in the Planning Area to those located in other areas that have been targeted for growth.

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The Planning Area

The act designates the remaining 400,000 acres within the Highlands Region as the “Planning Area.” Although the legislation originally set out to strongly suppress growth in this area, concerns over economic growth and housing supply led to the adoption of more lenient development regulations.

The goals of HWPPA with respect to the Planning Area are similar to that of the Preservation Area, but also include the support of compatible residential, commercial, and industrial development in areas presently serving such purposes, as well as the maintenance of a reliable transportation system that is consistent with “smart growth” ideology.

Municipalities in the Planning Area will be encouraged, but not required, to revise their land use ordinances in conformance with the regional master plan to be established by the Highlands Council.

The Highlands Council

To implement the objectives of the HWPPA, a 15-member Highlands Council will be formed. The council must have a minimum of eight elected officials. Morris County, because of its population, gets two appointees, while Bergen, Passaic, Sussex, Warren, Hunterdon and Somerset counties each receive one. The other seven members are citizens of the state, with one recommended by the speaker and another recommended by the president of the Senate. Each member is to serve a five-year term, with no compensation.

The Highlands Council will have extensive powers, including the responsibility of appointing administrative staff and drafting a regional master plan. The Highlands Council must formally adopt the regional master plan within 18 months of its first meeting and the plan must be updated at least once every six years.

The HWPPA provides interim standards for development, which will apply until the Highlands council adopts rules and regulations. These interim standards require that nearly every type of development obtain specific approval from the New Jersey Department of Environmental Protection (DEP). The DEP is currently considering dozens of requests for waivers from the standards contained in the HWPPA, but has not yet issued a decision.

The Highlands Council’s authority also includes identifying environmental and farmland preservation priorities within the Preservation Area, designating critical areas within the Planning Area, advising the Department of Environmental Protection on Highlands water resources regulations, and supporting a Highlands Transfer of Development Rights (TDR) program. Essentially, a TDR program serves to protect property value by relocating the right to build from an area where development is prohibited, typically due to environmental concerns, to a location where development is encouraged. The Highlands Council’s determination of what development will be permitted in the Preservation Area, and its designation of receiving districts in the Planning Area, are likely to produce extensive controversy and litigation.

Impacts on Landowners

The effect of the HWPPA on landowners depends on several factors:

1. the precise location of the land;
2. the purposes for which it has been used; and,
3. the landowner's intentions for future use.

As noted, any plan for significant development in the Preservation Area will require a permit from the DEP. The DEP's standards for reviewing a project include the following:

- Maintaining Highlands Open Waters Buffers
- Preserving Surface Water Quality
- Water Allocation
- Prohibitions on Filling Flood Hazard Areas
- A Maximum of 3% Impervious Surfaces for Each Lot
- Prohibition of Development on Steep Slopes
- Prohibition of Development of Upland Forested Areas

However, the HWPPA contains certain exemptions:

- the construction of a single family dwelling, for an individual's own use or the use of an immediate family member

- the construction of a single family dwelling provided that the construction does not result in the ultimate disturbance of one acre or more of land
- the reconstruction of any building or structure for any reason within 125 percent of the footprint of the lawfully existing impervious surfaces on the site
- any improvement to a single family dwelling, for example, an addition, garage, shed, driveway, porch, deck, patio, swimming pool, or septic system
- any improvement, for non-residential purposes, to a place of worship or association organized primarily for religious purposes, or a public or private school, or a hospital
- an activity conducted in accordance with an approved woodland management plan or the normal harvesting of forest products
- the construction or extension of trails with non-impervious surfaces
- the routine maintenance and operations, or repair of transportation or infrastructure systems, the construction of transportation safety projects, and bicycle and pedestrian facilities
- the routine maintenance and operations, repair, or upgrade of public utility lines,
- the reactivation of rail lines and rail beds existing on the date of enactment

- the remediation of any contaminated site
- any lands of a federal military installation existing on the date of enactment

Conclusion

The HWPPA has dramatically impacted the New Jersey real estate industry and other related businesses. The Act forces municipalities, landowners and developers to make decisions from an entirely new perspective. The rigorous task of complying with the Act’s requirements will undoubtedly place severe limits on those wanting to pursue development ventures in the Highlands Region. Any potential plans for construction in the area will face a challenging path to success. Because the Act produces such a dramatic decrease in property values, there is likely to be a series of legal challenges.

Recent decisions of the U.S. Supreme Court have balanced a state’s right to regulate development against the landowner’s constitutional right to receive compensation for the taking of private property for public uses, although the Court has not established a bright line rule. Whether the HWPPA will survive a constitutional challenge depends in large part upon the individual facts of the case, i.e., whether the HWPPA limits a landowner’s use of his property so severely that he is effectively deprived of its economic value.

If you have any questions or concerns about the Highlands Water Protection and Planning Act and how it may affect your property or plans for development, or if you have any questions about land use regulation in general, please contact Noel M. Spear, at (973) 597-2330, nspear@lowenstein.com, or Brooke Gillar, at (973) 422-6414 or bgillar@lowenstein.com.

New Jersey Highlands Planning and Preservation Areas

