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### MEMORANDUM

To: Natural Resources Committee of the  
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 11, 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>

### 1.0 PROJECT DESCRIPTION

This 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.

In June of 2005, NJDEP determined 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 project site was part of a 1991 settlement of a builder's remedy lawsuit. The selected alternative for wastewater treatment from the proposed project is to convey the effluent through the Township of Wayne Sanitary System to the Township's Mountain View Wastewater Treatment Facility. The treatment of wastewater by Mountain View Wastewater Treatment Facility is part of a court judgment "Order of Final Judgment" by the Superior Court of the State of New Jersey entered into in 2001. The projected wastewater flow from this development is 66,555 GPD gallons per day, according to the WQMP amendment application. Therefore, water use will be greater to address outdoor uses during the growing season, though the application used a lower value. Because no proposed sewer service area was identified in the application, the staff has used the development footprint as a reasonable interpretation of the sewer service area.

The proposed project site encompasses 84.5 acres and the proposed development consists of 77 four-bedroom single family homes, 104 three-bedroom townhouses and apartment-style homes, 28 affordable units (24 two-bedroom and four one-bedroom) a clubhouse, local roads, and associated infrastructure.

The Existing Community Zone (ECZ) and Protection Zone (PZ) of the Land Use Capability Zone Map bisect the project site. The development footprint is almost entirely within the PZ. Therefore, it was determined that bifurcating the zone-specific policies to different sections of the site was not necessary, and the proposed development was reviewed against PZ policies. Although the lots do not fully utilize the project site (approximately 16 acres are proposed for preservation), this layout does not yield an 80 percent preservation ratio and therefore does not qualify as cluster development based on the Highlands Final Draft Regional Master Plan.

The applicant prepared an Executive Order (EO109) Compliance Document per NJDEP regulations for WQMP Amendments. The Compliance Document addresses environmental site constraints for the proposed development. The applicant prepared a Comprehensive Conservation Plan (CCP) for the site that addresses critical habitat and conservation areas, which will be conserved under the umbrella of a proposed Conservation Easement. The applicant has received a jurisdictional boundary Letter of Interpretation for onsite wetlands.

The Pinnacle Tract WQMP amendment review is the result of an analysis of infrastructure capacity and the extent of environmentally sensitive resources. The findings and recommendations below are based upon the goal, policies, and objective and policies set forth in the Final Draft Highlands Regional Master Plan.

## 2.0 FINDINGS AND RECOMMENDATIONS

### Findings

The Highlands Council staff has identified instances where the Pinnacle Tract proposed development and sewer service area are inconsistent with the Goals, Requirements, and Policies of the Final Draft RMP. These conflicts are discussed below:

#### Environmentally Sensitive Lands within the Proposed Sewer Service Area

During the review of the proposed service area and development footprint, the Highlands Council staff identified Highlands Open Water Protection Areas and Riparian Areas located within the development footprint. The Open Water Protection Areas are associated with 300-foot buffers surrounding the Haycock Brook, Pond Brook (C1), and onsite wetlands. Riparian Areas are associated with hydric soils along Haycock Brook. NJDEP classified the onsite wetlands as Exceptional Resource Value due to presence of documented habitat for Barred Owl (State threatened). Under NJDEP's Freshwater Wetlands Act Rules, wetlands with habitat for threatened and endangered species require a standard transition area of 150 feet. To accommodate the proposed development footprint, the applicant has prepared a Wetlands Transition Area Averaging Plan that proposes to reduce the transition area from 150 feet to 100 feet, and then to further reduce to 75 feet in some areas and expand to 125 feet in other areas, through a Transitional Area Waiver-Averaging Plan. The applicant indicates in the EO109 Compliance Document that NJDEP was of the opinion that this transition area modification, coupled with preservation of other open space on the property would not significantly reduce the function of these wetlands and their transition areas as corridors for the movement of Barred Owl. For a more precise determination of Open Water Protection Area encroachment, staff utilized the applicant's electronic data for NJDEP-jurisdictional wetlands delineated for the site.

The entire site is mapped as habitat for Barred Owl (Landscape Rank 3, Highlands Conservation Rank 2). The applicant's EO109 Compliance Document states that NJDEP has agreed with a report from Maser Consulting, P.A. that the property is likely functioning as a corridor for Barred Owl, and not as breeding or nesting habitat. The applicant hired Maser Consulting to perform a Barred Owl study of the property from May-August 2002. The result of their investigation concluded that Barred Owl is not present due to lack of a response to vocalization recordings. The document concludes that the site contains "marginal" habitat for Barred Owl use because it does contain vegetative community characteristics that support Barred Owl habitat, but does include locational factors like lack of appropriate forest and wetland size, presence of human disturbance, and presence of known predators. The applicant's Comprehensive Conservation Plan (CCP) identifies Barred Owl critical habitat areas onsite as the palustrine forested wetlands and adjacent buffers along the western portion of the site, and four upland deciduous hardwood forest sites to be set aside for conservation purposes. These areas are proposed to be preserved in perpetuity through conservation easements. The Pinnacle Communities Homeowner's Association is proposed to serve as the management authority of the CCP Area and will chair an oversight committee that will authorize activities permitted to take place on the property administered through the CCP. The CCP also outlines plans to establish a monitoring program for Barred Owl.

It should be noted the NJDEP-Land Use Regulation Program has regulatory authority over T&E habitat only as it pertains to the Freshwater Wetlands Protection Act Rules, thereby limiting their

jurisdictional scope to the habitat located within and adjacent to the onsite wetlands. The Highlands Council review identified the entire site as Barred Owl habitat, and therefore consistency with RMP policies is assessed for all onsite habitat, not just that located within and adjacent to the onsite wetlands. Barred Owls require contiguous, old-growth wetland forests with upland forest buffers and typically shun human activity by avoiding residential, industrial, or commercial areas (Beans and Niles, 2003). Any disturbance to the mapped habitat for Barred Owl on the entire site will result in forest fragmentation, which would be inconsistent with the policy statement prohibiting the alteration or disturbance of critical wildlife habitat. The Highlands Council's review of the CCP indicates that any disturbance to the site would potentially result in the destruction of Barred Owl habitat.

Approximately 100% of the site contains forested lands that are outside the Forest Resource Area. The northern portion of the site is classified as low integrity forested subwatershed while the southern portion of the site is classified as high integrity. The applicant is proposing to designate 16 acres of forest (~20% of property) as conservation areas as part of the CCP. Onsite deforestation is inconsistent with the Final Draft RMP policy that limits permissible uses within forest lands in High and Moderate Integrity Forest Watersheds to maintenance of pre-existing uses and permits minimal removal of woody vegetation from forested lands, subject to an approved Forest Management Plan or development that utilizes low impact development best management practices and an approved forest mitigation plan.

#### Water Quality Limitations for the Proposed Development

The proposed site development is located within prime ground water recharge areas. The proposed development footprint is inconsistent with the Final Draft RMP policy that prohibits uses of land within a Prime Ground Water Recharge Area of the Protection Zone, and in addition prohibits uses that may reduce recharge volumes or other uses that may impair water quality within or draining to a Prime Ground Water Recharge Area.

In addition, the site is located in a subwatershed (Ramapo River [below Crystal Lake bridge]) identified as nonattainment for surface water pH and dissolved oxygen. A total phosphorus TMDL has been proposed for this subwatershed. The RMP requires that all development be consistent with a NJDEP-adopted TMDL.

#### Capacity Limitations for the Proposed Development

The Highlands Act prohibits the extension of water and wastewater utilities into the Preservation Area and limits extension into the Protection Zone. Therefore, the proposed expansion of utilities into those areas is inconsistent with the Highlands Act and RMP. Specifically, the expansion of public water systems into the Protection Zone is prohibited unless for public health and safety, to serve a redevelopment area, for cluster development, or for minimum practical use of the site. None of these conditions applies in this instance. However, the application of these policies is affected by another RMP policy that prohibits extension of these utilities into the Preservation Area, with some exceptions. One of these exceptions is for development that is exempt from the Highlands Act, which applies to this project. It is also noted that the three subwatersheds have extensive areas of Existing Community Zone within them, where the priority for capacity is TDR

receiving areas. Use of that water for a Protection Zone project would be inconsistent with policies prioritizing water capacity allocation for the Existing Community Zone.

The WQMP amendment includes extension of an adjacent public water utility owned by the Oxford Water Department. The Oxford Water Department is supplied by ground water from wells located in two of the site's three HUC14s. All three source water subwatersheds are in deficit of net water availability. Any exacerbation of that deficit is inconsistent with the RMP unless 125% mitigation is provided in the deficit subwatersheds. Even then, the amount of conditional water availability is insufficient for the project's proposed water demand (66,255 GPD). If the applicant were permitted to use conditional water availability from all of the three source watersheds, the 27,600 GPD conditionally available for depletive uses is still less than half of what is proposed in the WQMP amendment. Therefore, the projected water demand must be reduced to a maximum of 27,600 GPD. The use of the three subwatersheds' conditional water availability would in effect "retire" all water availability in those areas, thus preventing future withdrawals.

The treatment of wastewater by Mountain View Wastewater Treatment Facility in the Township of Wayne has been ordered by the Superior Court of the State of New Jersey.

### Recommendations

The review of the proposed WQMP amendment reveals several inconsistencies with the Final Draft RMP. Inconsistencies include alteration of Highlands Open Water protection areas and riparian areas, critical habitat, forests, prime ground water recharge areas, and expansion of water and wastewater into those areas. Although this project has been deemed exempt from the Highlands Act and the Regional Master Plan, the Highlands Council is authorized to provide a recommendation to NJDEP in accordance with N.J.A.C. 7:38-1.1(k).

The Highlands Council staff provides the following specific recommendations for consideration by the Natural Resources Committee. In summary, it is recommended that NJDEP **not approve** the application unless it is modified to address the following inconsistencies. Given that this project is exempt from the Highlands Act, the inconsistencies listed below are limited to those matters that are addressed by Executive Order 109 and NJDEP's WQMP rules at N.J.A.C. 7:15, which do not include consideration of prime ground water recharge areas:

1. Highlands Open Waters: Encroachment into the 300-foot protection buffers/riparian areas is inconsistent with the objectives of the Final Draft RMP. The proposed construction of stormwater outfalls within the riparian area of the C1 tributary (Pond Brook), would be inconsistent with RMP policies prohibiting land uses that would alter or be detrimental to the water quality of a Highlands Open Water. Similarly, alteration of natural vegetation in the site's riparian corridors would alter or be detrimental to the T&E habitat would be inconsistent with RMP policies prohibiting land uses that would alter or be detrimental to habitat quality of a Riparian Area.
2. Critical Habitat: Despite NJDEP's determination of the site functioning as a migration corridor for Barred Owl, but not breeding or nesting habitat, the Highlands Council recommends that any disturbance to the mapped habitat for Barred Owl will result in forest fragmentation, which would be inconsistent with the policy statement prohibiting the

alteration or disturbance of critical wildlife habitat. These areas should be protected from damage or destruction resulting from indirect impact of development activities.

3. Water Availability: The proposed water use is inconsistent with the RMP both because it exceeds the 27,600 gpd in conditionally available water for the three subwatersheds, and does not provide 125% mitigation of the depletive water uses. In addition, the project is inconsistent with the RMP prohibition on extending water systems and wastewater service areas in the Preservation Area or Protection Zone, and due to a prohibition on increased consumption/depletive uses in current deficit areas.