

**FOR CONSIDERATION AT THE DECEMBER 16, 2010 MEETING OF THE
NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL
Petition for Plan Conformance – Final Consistency Review and Recommendations Report**

APPENDIX B

PUBLIC COMMENTS/HIGHLANDS COUNCIL RESPONSES

Petition for Plan Conformance

Township of Mahwah, Bergen County

Public Comment Period: November 17, 2010 – December 3, 2010

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PUBLIC COMMENTS RECEIVED

Written comments regarding Mahwah Township's Petition for Plan Conformance were accepted by the Highlands Council through the close of the Public Comment period on December 3, 2010. Comments were provided by the following individuals/entities:

1. Kevin Walsh, Esq. on behalf of the Fair Share Housing Center (FSHC)

The comments are summarized in the section that follows with Highlands Council responses provided below, for each.

MUNICIPAL COMMENT/RESPONSE SUMMARY

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. 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 in the applicable laws, rules, or regulations that govern the provision of affordable housing.

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 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

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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 Mahwah Township's third round fair share obligations from 783 units to 72 units.

Response: Mahwah Township's reduction in its third round Fair Share Obligation is based upon the Highlands Municipal Build-Out report 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 Highlands Regional Master Plan, and the NJDEP 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..." 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 Mahwah Township resulted in the identification of land capable of sustaining new development, redevelopment and economic growth opportunities. In the case of Mahwah Township, 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's 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.

- 4. 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: FSHC may and has submitted public comments raising concerns with the Highlands Municipal Build-Out Report. 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

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Petition for Plan 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.