



State of New Jersey

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Public Comments and Staff Responses regarding Highlands TDR Program Deeds of Easement April 23, 2010

<u>Commentor</u>	<u>Comment</u>	<u>Response</u>
New Jersey Farm Bureau	The NJ Conservation Restriction and Historic Preservation Restriction Act should not serve as the basis for the conservation restrictions.	Staff had taken a broader approach to include other statutes that give State agencies the authority to enter into and hold deeds of easement. However, Staff believes that revising the language to refer to the Highlands Act and the Highlands RMP will allow for more flexibility.
	The current incentives provided under the “bonus” conservation restrictions are likely insufficient to encourage property owners to forego any applicable single family home exemption. Consequently, “the opportunity to receive bonus credits must be reexamined and a more equitable and productive (that is more protective) system designed as basic to new deed language.”	Staff notes that, where a property owner foregoes an applicable single-family dwelling exemption, there are limited uses remaining for the property under the provisions of the Highlands Act and the RMP. As such, staff is of the opinion that a third level of deed of easement is not necessary. Staff further notes that, the TDR Committee established the bonus aspect of the deed of easement where a property owner foregoes a single-family dwelling exemption. As currently contemplated, a 25% bonus to the base credit number (Net Yield) is provided to properties in the High Value Conservation or Agricultural Priority Areas; a 15% bonus is provided to those properties in the Moderate Value Conservation or Agricultural Priority Areas; and a 10% bonus is provided to those properties in a Low Value Conservation or Agricultural Priority Areas.
	The Highlands Council must specify	Staff notes that the determination of which

	<p>how it will determine which conservation restriction (ag vs. non-ag) applies to which properties.</p>	<p>deed of easement applies to which property is based upon the existing use of the property. If a property is currently in active agriculture and is farmland assessed, then the agricultural deed of easement will apply, even if only a portion of the property is dedicated to agriculture.</p>
	<p>There needs to be an expanded list of definitions.</p>	<p>Staff agrees with this comment and has revised the deeds of easement to include a definitions section.</p>
	<p>The 4th WHEREAS clause in each conservation restriction should say “significant natural and agricultural resources” to be consistent with the prior WHEREAS clause.</p>	<p>Staff agrees and has revised the deeds of easement accordingly.</p>
	<p>The paragraph concerning enforcement must be rewritten to clarify who has priority over enforcement. There should only be one agency.</p>	<p>Staff has revised the deeds of easement such that the Highlands Council will have the right to delegate enforcement authority to the appropriate State agency (NJDEP, SADC, Ag Dep’t) if it wishes to do so.</p>
	<p>Conservation restrictions dealing with ag properties should also list SADC or the County Agriculture Development Board as the Grantee so that these farms will receive enforcement identical to all other farms in NJ.</p>	<p>Staff notes that the State is the Grantee under each of the deeds of easement. With respect to enforcement, Staff has revised the deeds of easement such that the Highlands Council will have the right to delegate enforcement authority to the appropriate State agency (NJDEP, SADC, Ag Dep’t) if it wishes to do so.</p>
	<p>The provision requiring the Grantor paying “any costs incurred by Grantee in enforcing the terms of this conservation restriction” is unacceptable and should be deleted.</p>	<p>With respect to costs, Staff believes that the State should not have to bear the costs of enforcing a deed of easement where the property owner is violating the terms of the easement. If there is no violation, then the State should not be seeking cost reimbursement. Staff has revised the language of the deeds of easement to clarify this position.</p>
	<p>The conservation restrictions must clarify which ones are appropriate for forested property. Specifically, it must be clear that “woodlands appurtenant to the farm” for which no Woodland Management Plan is required are</p>	<p>The determination of which deed of easement applies to which property is based upon the existing use of the property. If a property is currently in active agriculture and is farmland assessed, then the agricultural deed of easement will apply, even if only a</p>

	“agriculture.”	portion of the property is dedicated to agriculture.
	Paragraph 12(a) would deny any prospective landowner the ability to take out loans or mortgages on the property. As such, this paragraph should be deleted or be much more narrowly defined.	Staff has revised this paragraph to make clear that the term “liens” is only referring to liens such as construction or mechanics liens and not encumbrances relating to having the property serve as collateral for loans.
	Paragraph 12(b) is unacceptable	Staff responds that the State may want the option to purchase if the property is adjacent to already preserved land which allows for public access. In this situation, maintaining the property in private ownership, albeit in a protected state, limits public access. This provision merely gives the State the option of purchasing at a sheriff's sale.
	Paragraph 14 should be deleted or amended so that the conservation restriction may not be easily amended.	Staff has revised this provision to only allow amendment in limited circumstances for the protection of public health and safety.
	Notice regarding the sale of property should only be required after the sale of the property not 30 days before. As drafted this may suggest to a property owner that the Grantee wants to exercise control over the property owner's ability to sell the property.	Staff notes that this provision is included to ensure that the buyer is fully aware that the property to be purchased is deed restricted and believes it should remain as currently drafted.
	The requirement that, where a single family home exemption is being retained, that it be “conducted in a manner as to minimize any potential adverse impact upon Highlands resources” should be deleted because it is inconsistent with the Highlands Act.	Staff agrees with this comment and has revised the deeds of easement accordingly.
	Under the “bonus” conservation restrictions, the language limiting existing uses to being continued, maintained and repaired, but not expanded is unacceptable, particularly farmers.	Staff notes that language of the deeds of easement reads: <i>Existing uses of land on the Property as identified on Schedule B may be continued, maintained and repaired, but may not be expanded nor shall any structural alteration be made except for agricultural or horticultural use, which use</i>

		<p><i>may be expanded but only upon the approval of the Highlands Council consistent with the Highlands Act and Regional Master Plan.</i></p> <p>Furthermore, please note that these restrictions with respect to existing uses specifically except ag/horticultural use and development.</p>
	The additional restrictions/requirements for the “bonus” conservation restrictions will hamper not only viable agriculture and forestry, but interfere with forest stewardship.	Staff notes that these additional restrictions/requirements do not apply to ag/ horticultural use and development (which include forest stewardship).
	If the language “any use designed to promote charitable conservancy or deeds of easement” is to be used in the conservation restrictions, the phrase must be defined and justified in the documents.	Staff notes that, because the reference to the Conservation Restriction and Historic Preservation Restriction Act has been deleted, this provision which refers to that statute has been deleted as well.
	The title of the “bonus” conservation restriction for ag/horticultural property should be “Conservation Restriction (For Agricultural or Horticultural Use and Development with Bonus Highlands Development Credit Allocation.”	Staff agrees with this comment and has revised the title accordingly.
	The language of paragraph 1 of this conservation restriction should be the same as that for the ag/horticultural conservation restriction where an exemption is retained.	Staff has revised the deeds of easement to ensure that language regarding agricultural/horticultural development is the same in both the standard and “bonus” documents.
Land Conservancy of New Jersey	References to the Executive Director should be deleted.	Staff notes that, because the reference to the Conservation Restriction and Historic Preservation Restriction Act has been deleted, references to the Executive Director have been removed. These references were consistent with that Act.
	There should be a definition section which defines all terms.	Staff agrees with this comment and has revised the deed of easement to include a definitions section.
	Paragraphs 3 a. iii. and v. should include all minerals, especially uranium	Staff has revised the deeds of easement such that this provision is no longer

	and iron are more likely to be found in the Highlands.	included.
	Paragraph 3 b. should be rewritten to state "The following are the only activities allowed on this conservation restriction:"	Staff has revised the deeds of easement such that this provision is no longer included.
	Paragraph 4 should be rewritten to state that the Grantor will give notice to all interest holders PRIOR to recordation. Significant legal problems may ensue if those with interests in the property are not informed about the CR until after it is recorded.	Staff agrees with this comment and has revised the deeds of easement accordingly.
	Paragraph 6 should be modified or eliminated. All easements should encourage and have a presumption of public access that can be eliminated if specifically requested by the landowner.	Staff notes that the basis for these easements is different than those utilized by conservation organizations. These deeds of easement are only intended to prohibit future development of the property and nothing more (except where a property owner foregoes an applicable single-family dwelling exemption in exchange for bonus allocation). Staff recommends no change.
	Paragraph 8 must be reworded to state that "The conservation restriction imposes only those restrictions on the property that are outlined in this document." The current wording of this paragraph would seem to void all of the obligations imposed on the Grantor in Paragraphs 2-12.	Staff agrees with this comment and has revised the deeds of easement accordingly.
	The conservation restriction must include a requirement for a Baseline Inventory of the easement that is developed by the Grantee and signed by the Grantor. Without baseline documentation, future easement violations will be impossible to enforce in court due to a lack of evidence about the existing conditions at the time of execution.	Staff notes that the Highlands Council already has baseline information regarding every parcel in the Highlands Region, including recent aerial photography. An aerial photograph of the property will be required to be included with the deed of easement as a component of Schedule B.
	The conservation restrictions should include a "Purpose" section which defines the reason the easement is being developed and include terms	Staff is already considering this and is awaiting comments from NJDEP and the Department of Law that will inform its decision whether or not to include a specific

	such as Conservation Values which are recognized by the IRS.	purpose section.
	The conservation restriction must include a Subdivision and Development section which clearly prohibits future development and subdivision of the property.	Staff notes that all future non-ag development is prohibited on a property under the deed of easement language, except for a retained single family dwelling exemption.
	The conservation restriction must include a Structures section which defines and specifically prohibits future structures from being built on the deed of easement.	Staff notes that all future non-ag development is prohibited on a property, including non-residential structures, under the deed of easement language, except for a retained single family dwelling exemption.
	The conservation restriction must include a Roads, Driveways and Impervious Cover section which defines and prohibits these activities.	Staff notes that all future non-ag development is prohibited on a property, including non-residential structures, under the deed of easement language, except for a retained single family dwelling exemption.
	The conservation restriction must include a Woodland Management section which defines this practice and allows Grantors the option of undertaking this under specific terms.	Staff notes that the revised and prior versions of the deeds of easement include the following language which, consistent with the Highlands Act, allows Woodlot Management: <i>All other non-development uses of the Property shall be permitted to the extent permissible under the Highlands Act and the Highlands Regional Master Plan, including an activity conducted in accordance with an approved woodland management plan pursuant to section 3 of P.L.1964, c.48 (C.54:4-23.3) or the normal harvesting of forest products in accordance with a forest management plan approved by the State Forester. (Emphasis added)</i>
	The conservation restriction must include a Remedies section which outlines and defines how the Grantee can enforce the conservation restriction.	Staff notes that the revised and prior versions of the deeds of easement include a paragraph with the following language regarding enforcement: <i>This Deed of easement shall be fully enforceable by the GRANTEE and the Highlands Council and, if the Property is located in the Highlands Preservation Area, by the New Jersey Department of</i>

		<p><i>Environmental Protection (the “Department”), which are specific beneficiaries of this Deed of easement, in an action in law or in equity or both. GRANTEE, the Highlands Council and the Department, and their respective agents shall be permitted access to, and to enter upon, the Property at all reasonable times but solely for the purpose of inspection in order to enforce and ensure compliance with the terms and conditions of this Deed of easement. GRANTEE, the Highlands Council and the Department agree to give GRANTOR twenty-four (24) hours advance notice of their intention to enter the Property, and further, to limit such times of entry to the daylight hours during regular business days of the week. GRANTOR agrees to reimburse GRANTEE for any costs incurred by GRANTEE in enforcing the terms of this Deed of easement against GRANTOR, including, without limitation, the reasonable costs of suit and attorneys’ fees. (Emphasis added)</i></p>
	<p>The conservation restriction must include Damages and Costs of Enforcement sections which outlines and defines how the Grantee can collect damages from Grantor for violations.</p>	<p>Please see prior comment.</p>
	<p>The conservation restriction must include a Development Rights section which specifically eliminates all Development Rights and prohibits future subdivision of the property.</p>	<p>Staff notes that all future non-ag development is prohibited on a property under the deed of easement language, except for a retained single family dwelling exemption.</p>
	<p>The conservation restriction must include a Title section. This is critical because it requires the owner to obtain mortgage subordination from a mortgage holder, without which the owner may have given away rights in land that he/she does not own or control, leaving the land still open to future development.</p>	<p>Staff notes that, as part of the HDC Certificate process, the property owner is required to submit an Affidavit of Title certifying that he/she holds legal title to the property or has obtained a letter from a mortgage holder accepting placement of the restriction on the property. This is the same certification utilized in the Pinelands Development Credit Program.</p>
	<p>The conservation restriction must</p>	<p>Staff notes that, such uses, where</p>

	include a Hazardous Substances section to define and specifically prohibit these on the conservation restriction.	inconsistent with the Highlands Act and the Regional Master Plan, are already prohibited by the language of the deed of easement regarding permitted uses. Staff has chosen not to set forth an exhaustive list of prohibited uses as the above captures all and avoids the concern of omission.
	The conservation resection must include an Amendment of Easement section which defines how the restrictions could be amended in the future.	Staff notes that previous versions of the deed of easement did include a broad amendment provision. However, based upon other public comments and those of other State agencies, the revised deeds of easement only allow amendment for purposes of protecting the public health and safety.
Environmental Defense Fund	EDF asks whether New Jersey “self insures” for goodness of title, and if so, do it go through the same due diligence/ underwriting process as 3 rd party insurers? EDF states that the State should be confident that owners who enter into these documents have good title, unencumbered by mortgages or other liens.	Staff notes that, as part of the HDC Certificate process, the property owner is required to submit an Affidavit of Title certifying that he/she holds legal title to the property or has obtained a letter from a mortgage holder accepting placement of the restriction on the property. This is the same certification utilized in the Pinelands Development Credit Program.
	EDF states that, with respect to the conservation restriction documents in which the exemption for construction of a single-family dwelling has been reserved, the first sentence should be modified to read: “GRANTOR has reserved an applicable Highlands Act exemption for the construction of no more than one (1) single-family dwelling in the Exemption Area depicted on Schedule C” (or similar wording).	Staff agrees that it should make explicit that only one (1) single family home is allowed where an applicable exemption is available. The revised deeds of easement reflect this clarification.
	EDF states that it understands that the contemplated “Schedule B” (which is referenced throughout all of the drafts) would consist of a grantor-certified list of all the existing uses of land on the Property. EDF notes that, even if the grantor certifies that Schedule B is accurate and can	Staff notes that Schedule B, as revised, requires both a narrative description of the existing uses of the property and an aerial photograph showing existing property uses. Property owners must obtain the aerial photograph from the Highlands Council’s Highlands Interactive Map located at:

	<p>reasonably be relied upon, such an approach to recording the current use of the property may be lacking in the specificity that would be needed to determine, on a future date, whether impermissible changes have been made since the date of the instrument. A survey, while more costly, would provide both third-party verification as to accuracy and could serve as a more robust and detailed document that could be easily referred to in the future when issues arise as to what the existing uses of land were at the time of certification. If, for reasons of administrative complexity or expense, Schedule B must take the form of a list rather than a diagram or, preferably, a survey, such list must include sufficient detail to ensure that a comparison of future uses to present uses will be reasonably feasible.</p>	<p>http://maps.njhighlands.us/hgis/default.asp</p>
	<p>EDF asks whether the non-payment of taxes and subsequent foreclosure would affect the enforcement of the restrictions set forth in the instrument.</p>	<p>Staff notes that the prohibitions and limitations in the deeds of easement run with the property and bind all future successors and assigns, including any governmental entity that forecloses on the property due to delinquent taxes.</p>
	<p>EDF notes that, while the Grantor agrees to pay any real estate taxes or any other assessments on the Property, the document is silent as to payment of other obligations that may arise with respect to the Property (e.g., mortgage payments). EDF asks whether it the case that these instruments would never be entered into unless the underlying property is owned free and clear of any underlying mortgage.</p>	<p>Staff notes that a property subject to the deed of easement may be pledged as collateral for a loan or other obligation subject to providing proper notice.</p>
	<p>EDF notes that any parties that could have the right to foreclose upon the property (whether jurisdictions with taxing authority, or creditors) should be expressly obligated promptly to send copies of notice of any</p>	<p>Staff notes that a property subject to the deed of easement may be pledged as collateral for a loan or other obligation subject to providing proper notice.</p>

	delinquency directly to the Grantee.	
	EDF states it is concerned about the breadth of the right to convert forested land to farmland. If at all possible, some limitation should be placed on the extent of such conversion.	This right exists under the Highlands Act as agricultural or horticultural development and use are allowed in the Preservation Area subject to the requirements of Section 29 of the Highlands Act.
	Drafting Comment 1. With respect to Paragraph 4(a) in the Bonus/Ag draft document, and Paragraph 3(a) in the Bonus/Non-Ag draft document, the “no” at the beginning of each roman numeral subparagraph should be deleted to avoid having a double negative (since there is a “not” in the opening language of (a)).	Staff has revised the deeds of easement as appropriate.
	Drafting Comment 2. In Paragraph 4(b) of the Bonus/Ag draft document, and Paragraph 3(b) of the Bonus/Non-Ag draft document, the term “Highlands Restricted Area” should be changed to “the Property” (“Highlands Restricted Area” is defined neither in the document nor in the statute).	Staff notes that the revised deeds of easement no longer include the term “Highlands Restricted Area.”
	The first mention of “Paragraph 1” should be changed so that it reads “Paragraphs 1, 2 and 3” in the Bonus/Non-Ag draft document, “Paragraphs 1, 2, 3 and 4” in the Bonus/Ag draft document, and “Paragraphs 1 and 2” in the exemption draft documents.	Staff has made this change in the revised deeds of easement as appropriate.
	The second mention of “Paragraph 1” should be changed so it reads “Paragraphs 1 and 2” in both exemption draft documents, “Paragraphs 2 and 3(b)” in the Bonus/Non-Ag draft document, and “Paragraph 3 and 4(b)” in the Bonus/Ag draft document.	Staff has made this change in the revised deeds of easement as appropriate.
	Drafting Comment 4. In Paragraph 7 of the Bonus/Ag draft document, references to “Paragraph 6” should be	Staff has made this change in the revised deeds of easement as appropriate.

	changed to "Paragraph 8"; in Paragraph 6 in the Bonus/Non-Ag draft document, references to "Paragraph 6" should be changed to "Paragraph 7".	
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