

**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 C

PUBLIC COMMENTS/HIGHLANDS COUNCIL RESPONSES

Petition for Plan Conformance

Bethlehem Township, Hunterdon County

Public Comment Period: Nov. 17, 2010 – Dec. 3, 2010

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PUBLIC COMMENTS RECEIVED

Written comments regarding Bethlehem 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. Bethlehem Township - Municipal Comment
2. New Jersey Farm Bureau
3. Fair Share Housing Center

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

MUNICIPAL COMMENT/RESPONSE SUMMARY

Bethlehem submitted a formal written comment in the form of a letter from Clark Caton Hintz, the Township's planner. The letter, dated November 24, 2010, suggested language changes and requested modification of funding for items listed in the Draft Implementation and Plan Schedule.

1. **Comment:** Bethlehem Township has no lands in the Existing Community Zone in the Planning Area. Therefore, paragraph C of § 5.3.7 should be deleted in its entirety.

Response: Highlands Council staff has reviewed the pertinent section and believes the requested change is appropriate.

2. **Comment** § 7.7 Public Water Systems and § 7.8 Wastewater Collection and Treatment Systems should be deleted with the section numbers reserved for later use.

Response: Highlands Council staff has reviewed the pertinent section and believes the requested change is appropriate. Due to their location at the end of a major section, the subsections will be deleted rather than reserved for future insertions.

3. **Comment:** Regarding the Draft Highlands Implementation Plan and Schedule, Bethlehem Township requested reallocation of funds from Community Facilities Plan Element to the Green Building and Sustainability Element and to a Scenic Resource Management Plan.

Response: After discussions with the Township's planning consultant, Highlands Council staff agrees that the Green Building and Sustainability Element and Scenic Resource

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Petition for Plan Conformance – Final Consistency Review and Recommendations Report

Management Plan should become a higher priority for the Township. Highlands Council staff recommends the redistribution of the proposed funding.

4. **Comment:** Bethlehem also requested \$5,000 for the first phase of an Agriculture Retention and Viability Plan.

Response: Highlands Council recognizes that Bethlehem has achieved significant preservation of farmland. The retention and development of agriculture as an industry is important as well. Therefore, the Highlands Council staff recommends the funding request, with the release of funds contingent upon approval of a scope of work by the Executive Director. Highlands Council staff also recommends collaborating with the New Jersey Department of Agriculture for the work.

PUBLIC COMMENT/RESPONSE SUMMARY

1. **Comment:** § 3.3 Density Requirements. This planning overlay requires that municipalities apply the septic system standards of 1/88 acres in wooded areas and 1/25 acres in open lands. The NJ Farm Bureau suit against the NJDEP’s misuse of the Nitrate Dilution Model is still ongoing, so may yet result in an order from the Appellate Division for NJDEP to change the factors in this formula to those more scientifically supportable. What will the Highlands Council do to implement such a decision in all the counties and towns that have already changed their zoning density requirements?

Response: The Highlands Council acknowledges the comment; however, a response is not ripe as the matter is presently in litigation with oral arguments scheduled for March 2011.

2. **Comment:** § 6.1 Forest Resources. In some municipalities (e.g., Bethlehem Township and Califon Boro), the mapping of the Forest Resource Area (FRA) overlaps extensively with the delineated Agricultural Resource Area (ARA). Does this mean that landowners in the ARA also must live up to all the requirements of the FRA? Will this force all ARA land owners mapped in the FRA to be required to engage in forest management planning, many for the first time if their woodlands were heretofore defined as “appurtenant to the farm”? Does this mean that when a town like Bethlehem maps the whole town as the ARA farming could be developed anywhere in that area with appropriate soils regardless of the existing land use?

Response: Both resource areas were defined by the Regional Master Plan to include the most concentrated agricultural and forest resources in the Highlands Region, using a “density mapping” process. In that process, interstitial lands that are not agricultural or forested, as relevant, are included in the resource area. Where they overlap, regulated development activities must comply with both, to the extent applicable. Generally, the

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NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL**
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Highlands Land Use Ordinance provisions apply to agricultural lands in the Agricultural Resource Area, and forested lands in the Forest Resource Area, except regarding cluster development which is required for all sizable residential subdivision proposals in the Agricultural Resource Area. Specifically, the Highlands Land Use Ordinance does not require agricultural landowners to engage in forest management planning. In addition to all Highlands Act exemptions, the Highlands Area Land Use Ordinance provides an important exclusion for agricultural and horticultural use and development, as follows (see § 2.1.1): “Unless specifically indicated otherwise, and in that case only to the specific extent indicated, the provisions of this Ordinance shall not apply to Agricultural or Horticultural Use and Development (as defined at § 3.2).” The provisions that are “specifically indicated otherwise,” consist primarily of those discussed in the Highlands Area Land Use Ordinance at § 6.10, regarding agricultural development that exceeds the thresholds of new impervious surfaces established by the Highlands Act.

- 3. Comment:** § 6.1 Forest Resources. The confusing array of forestry plans required if a landowner needs to cut some trees – each of which could cost several thousands of dollars - appears to be designed to influence most landowners to do nothing, to forego action to improve the forest health and productivity.

Response: It is critically important to note that the provisions of this section, and in fact all provisions of the Highlands Land Use Ordinance, apply to development activities regulated under the Highlands Land Use Ordinance, not to exempt activities or those excluded under § 2.1. A regulated development must develop a Forest Impacts Report if it will affect certain forest resources, and Deforestation Impact Report if deforestation is intended. The Reports have the purpose of demonstrating a need for forest impacts. If impacts are unavoidable a Forest Mitigation Plan is required to ensure that such impacts are appropriately mitigated.

Actions to improve forest health and productivity are generally conducted under a Woodland Management Plan or are de minimus actions associated with existing land uses, not regulated under the Highlands Land Use Ordinance. Any activity conducted under the auspices of an approved Woodland Management Plan or the normal harvesting of forest products in accordance with a State Forester-approved Forest Management Plan is exempt from the provisions of § 6.1, and in fact, from the entirety of the Highlands Area Land Use Ordinance, pursuant to Highlands Act Exemption #7, as specifically called out in the Highlands Area Land Use Ordinance at § 2.4.

- 4. Comment:** § 6.1 Forest Resources: This section make no reference to the existence of approved Woodland Management Plans and requires a whole new set of plans or reports as the landowner tries to use the wooded land: Forest Management Plan, Forest Impacts Report, Deforestation Report, and a Forest Protection Plan. Each of these costs the

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NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL**
Petition for Plan Conformance – Final Consistency Review and Recommendations Report

landowner time and money, lessening farm viability and sustainability. In the interests of efficiency the plans should be interchangeable, all incorporated into fewer documents.

Response: Approved Woodland Management Plans are exempt from regulation under the Highlands Act, as specified in § 2.4 and discussed above. Please also see the responses to the other comments regarding § 6.1 above. A forest management plan has a completely different purpose than the other plans associated with a regulated development proposal.

5. **Comment:** § 6.2.5 B Highlands Open Waters Buffer Standards – Agricultural and Horticultural Land Uses. There is nothing said about farm operators being able to continue farm activities within the riparian buffer as per a recent agreement between NJDA and DEP. It should also be explained how a farmland owner can establish his ability to farm or exercise a Woodland Management Plan in wetlands and transition areas, stream corridors, and within the Highlands open waters buffer. Forest landowners need to know to which agency and according to what standards they must use to protect their ability to continue farming in these areas.

Response: In addition to all Highlands Act exemptions, the Highlands Area Land Use Ordinance provides an important exclusion for agricultural and horticultural use and development, as follows (see § 2.1.1): “Unless specifically indicated otherwise, and in that case only to the specific extent indicated, the provisions of this Ordinance shall not apply to Agricultural or Horticultural Use and Development (as defined at § 3.2).” The provisions that are “specifically indicated otherwise,” consist primarily of those discussed in the Highlands Area Land Use Ordinance at § 6.10, regarding agricultural development that exceeds the thresholds of new impervious surfaces established by the Highlands Act. As these exemptions and exclusions are addressed in Article 2, there is no need to repeat them in § 6.2.5 B or anywhere else in the Highlands Land Use Ordinance.

6. **Comment:** § 6.4.1 Critical Habitat Findings. There is no statutory authority for adding the long list of species considered “rare” to those needing protection of their habitat. This seems designed merely to increase significantly the number of acres under regulation and use restrictions. Our members have also found the Landscape Project maps in error or out of date with DEP admittedly making no changes to correct these problems even as they are proven. Therefore the farmland owner must develop an expensive wildlife survey when DEP might have already been notified of the same errors. Furthermore, the Township should be aware that designating an actively farmed area as “grassland bird habitat” when it is and will be devoted to a rotation of crops of little value to target bird species produces regulatory overload for the farmer and no real benefits for the birds. Such a designation implies that the municipality desires a loss of farmed acres producing crops that could add to farm income. Contrary to popular belief, experience shows practically no market for native grass hay and, over time it does require either crop rotation with legumes or application of fertilizer to produce any significant yield at all.

**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

Response: Please see response at #5 above, regarding the Highlands Area Land Use Ordinance exclusion for agricultural use and development at § 2.1.1. Regarding the impacts of development actions regulated by the Ordinance, the Highlands Act provides authority for the Regional Master Plan to address Critical Habitat for rare species.

7. **Comment:** § 6.9.3A (1) Agricultural and Horticultural Development. The list of farm activities to be permitted by the municipality does not include some of those in the RMP, especially in the agriculture program section (p. 289 of the RMP). This list must be expanded during development of the municipal Agriculture Retention and Farmland Preservation Master Plan Element and should be included in the development of the Economic Development Master Plan Element.

Response: The Regional Master Plan requirement that Agricultural and Horticultural uses be included among the permitted uses in a the Agricultural Resource Areas of the Region does not imply that all such uses must be permitted in every community containing an Agricultural Resource Area. As the commenter notes, the list may be expanded as further examination occurs in the development of the full Agriculture Retention and Farmland Preservation Master Plan Element for the municipality, however this task must be completed in the context of the community and the specific agricultural and horticultural uses and activities appropriate and sought for development within it. The Agriculture Retention and Farmland Preservation Master Plan Element should be developed in concert with and as a complement to the Sustainable Economic Development Plan Element.

8. **Comment:** § 6.10.3 Agricultural Development. This appears to give the municipality unwarranted discretion over determining in the ARA the Permitted and Accessory Uses, Bulk and Other Requirements, or the types of structures to be allowed. Though it is stated that this is not meant to conflict with the Right to Farm Act, the process of formally adopting this overlay to the municipal land use ordinance could provide an opportunity for a town to determine permitted uses that the farmland owners would be forced to challenge at great expense of time and money. Agriculture as a business depends upon flexibility in order to keep in touch with markets and remain viable and sustainable.

Response: Municipalities have certain discretion within the existing State statutes regarding agricultural developments. However, please see response at #5 above, regarding the Highlands Area Land Use Ordinance exclusion for agricultural use and development at § 2.1.1. § 6.10.3 applies only to those agricultural developments for which an exemption or exclusion does not apply.

9. **Comment:** § 7.1 Conservation Restrictions. We continue to oppose overuse of requirements for a conservation easement as a condition of some form of approval from the DEP, the Highlands Council, or Bethlehem Township. There is no statutory authority to

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NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL**
Petition for Plan Conformance – Final Consistency Review and Recommendations Report

require a permanent conservation restriction running in perpetuity with the land for “both the Preservation and the Planning Area; whether or not any disturbance of such Resources or Areas is proposed; and regardless of the type of application at issue” (e.g. zoning or building/construction permit requiring prior resource review and approval). This is a major impediment to a landowner’s willingness to make improvements or investments in a farm’s property, cuts out any flexibility of use options in the future, and for many buyers of farmland reduces their interest in acquiring the property.

Response: Please see response at #5 above, regarding the Highlands Area Land Use Ordinance exclusion for agricultural use and development at § 2.1.1. This provision applies to development proposals regulated under the Ordinance for parcels that include such resources.

- 10. Comment:** § 9.2.1 Highlands Act Exemptions. The ordinance allows applications for Highlands Exemptions to be processed by the municipality as a way to facilitate what should be a fairly straightforward review according to factual standards. Which exemptions will Bethlehem choose to take on? It is also not clear how a landowner could appeal what he considers a wrongful decision. There should be an appeal process free of municipal involvement to provide the fairest hearing for the landowner.

Response: Bethlehem Township has not determined which Planning Area exemptions will be assumed by the Township, and the Highlands Council will grant such authority only upon a determination that the Township’s authorized personnel are thoroughly trained. A landowner is always allowed to request an exemption determination from the Highlands Council.

- 11. Comment:** § 9.2.1 B 1. (a) Planning Area Exemptions. The Highlands Council must be aware that the DEP and the Highlands Act definitions of “family member” do not recognize the practice for estate distribution purposes of putting a farm in the name of a family corporation. Farmland owners are told by their financial advisors and by their insurance agents to take this step. Must every farm family that wants to exercise Exemption #1 have to change the legal status and deed language for a lot before they can qualify? This oversight by the Legislature must be overcome, or yet another new cost falls on the Highlands landowner. The process should use the Farmland Preservation and Green Acres easement purchase requirements as a model in which corporate ownership can enter into a contract as well as individual landowners.

Response: The Highlands Council cannot modify a definition from the Highlands Act. Determinations as to Exemption #1 will occur on the basis of the definitions provided within the Act and on the provision of sufficient information to demonstrate ownership as

**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

of the date of enactment of the Highlands Act, or evidence of the binding contracts of sale to purchase as indicated in Exemption #1 provisions.

- 12. Comment:** § 9.2.1B 1 (f). How does a woodland owner exercise his/her Woodland Management Exemption? Woodland Management Plans approved by the State Forester and the township assessor are in effect for 10 years with a schedule each year determined by the consulting forester of what's necessary to remain qualified for Farmland Assessment. Whether the reviewing agency is the DEP, the Highlands Council, or a municipality, this Plan must be accepted as the basis for the exemption, not a review of each individual forest management activity during the 10-year plan life. Preparation of just this plan and regular monitoring and updates by the foresters cost the landowner money to manage a resource that may provide no monetary payback even when the woodland is mature enough to harvest.

Response: Any activity conducted under the auspices of an approved Woodland Management Plan or the normal harvesting of forest products in accordance with a State Forester-approved Forest Management Plan is exempt from the provisions of § 6.1, and in fact, from the entirety of the Highlands Area Land Use Ordinance, pursuant to Highlands Act Exemption #7, as specifically called out in the Highlands Area Land Use Ordinance at § 2.4. No review is required by the Highlands Council of such plans. The processes and procedures applicable to municipal determinations regarding Exemption #7, and specifically, allowances for on-going activities authorized under approved woodland and forest management plans, will be covered during Highlands Council training sessions with municipal officials and the individuals serving as Municipal Exemption Designees.

- 13. Comment:** There is no consistency about whether the municipality is required to develop an Agricultural Retention and Farmland Preservation Master Plan Element. There should be some relationship to the amount of land in the Agricultural Resource Area (ARA) and whether that plan should be optional. All of Califon is in the ARA but no Agricultural Retention and Farmland Preservation Master Plan Element is listed on the Implementation Agenda. Glen Gardner shows plans to develop such a plan “by 2012+” when this plan could help farmland owners create a new productive agricultural future within the constraints of the RMP. It should be required for early in 2011, not put off indefinitely.

Response: The Highlands Council is required by the Highlands Act to reimburse municipalities for “all reasonable costs” incurred in conforming with the Regional Master Plan. The available funds must be allocated to clear priorities. Regarding Agricultural Retention and Farmland Preservation Master Plan Elements, the priority must be given to municipalities with extensive agricultural lands within an ARA, rather than to those with lands in an ARA but only limited portions of that in active agriculture. As requested by the Township, the Highlands Council is allocating funds to Bethlehem Township for the

**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

purposes of initiating development of an Agricultural Retention and Viability Plan, recognizing the large area of agricultural lands within the Township. From a regional perspective, allocation of such funds in municipalities such as Califon Borough, Glen Gardner Borough and Mahwah Township will have a lower priority.

- 14. Comment:** Kevin Walsh, Esq. submitted comments and documents on behalf of the Fair Share Housing Center (FSHC) contending 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.

- 15. 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

**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

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.

- 16. Comment:** Fair Share Housing Center objects to the reduction of Bethlehem Township's third round Fair Share Obligations from 42 units to 11 units.

Response: Bethlehem 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 Bethlehem Township resulted in the identification of land capable of sustaining new development, redevelopment and economic growth opportunities. In the case of Bethlehem Township, the Municipal Build-Out Report reflected the municipality's lack of an available public wastewater system, which significantly limits 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.

**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**

17. 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 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.