

New Jersey Law Journal

VOL. CXCI—NO.8—INDEX 538

FEBRUARY 25, 2008

ESTABLISHED 1878

Environmental Law

Establishing a Compensable Taking Under the Highlands Act

Exhausting administrative remedies and perfecting a ripe takings claim is complex

By David Steinberger

Through the Highlands Water Protection and Planning Act, the state legislature created an approximate 400,000-acre “Preservation Area” in which “Major Highlands Development” is significantly curtailed. Major Highlands Development includes any nonresidential development in the preservation area or certain residential development in the preservation area. Among the many development limitations are prohibitions against development within 300 feet of most water bodies, development on steep slopes and a limit of 3 percent impervious cover on the property. Colloquially, most landowners in the Preservation Area who may have otherwise intended to develop their property would claim that the government has “taken” their property and that they deserve either compensation from the government or the right to develop their property. However, getting money or an approval from the

state will not be a simple task.

The Fifth and Fourteenth Amendments to the United States Constitution prohibit the states from taking private property without paying the landowner just compensation. By now, it is black-letter law that the government, through its regulations, may take private property. Provided the regulation in question is a valid exercise of the government’s police powers, if there has been a taking, just compensation is required.

The existing case law regarding such inverse condemnation cases is very complex and the decisions are often inconsistent. As many courts have noted, the resolution of such cases often requires a fact-specific analysis, such that there really are few bright lines. There are two classes of inverse condemnation cases. In the first, the regulation deprives the landowner of all economically beneficial or productive uses of the property. This is a categorical taking. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The second class involves the situation in which the regulation significantly limits the utility of the property, but that limitation falls short of a categorical taking. In this latter situation, a court might

nonetheless find that a taking has occurred by weighing the factors set forth in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

There are many key inquiries involved in analyzing inverse condemnation cases. The first is whether the case is ripe. Did the claimant exhaust all of its administrative remedies in seeking approval for the development of its property? Second, which class of taking is involved? Does the governmental regulation deprive the landowner of all economically viable uses of the property? If yes, then there has been a taking under *Lucas*. Alternatively, if the regulation results in something less than a complete deprivation of all economically viable uses, there may still be a taking.

The most difficult initial hurdle for a property owner affected by the Highlands Act will be to perfect a ripe takings claim. As the United States Supreme Court has stated, the ripeness requirement is necessary because “a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of the challenged regulation.” *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In other words, “the governmental entity charged with implementing the regulations has [to] reach[] a final decision regarding the application of the regulations to the property at issue.”

It was the failure to satisfy the ripeness requirement that led the Appellate Division to dismiss a Highlands Act takings claim in *OFFP, LLC v. New Jersey Dept. of*

Steinberger is a member of the environmental law department of Cole, Schotz, Meisel, Forman & Leonard of Hackensack.

Environmental Protection, 395 N.J. Super. 571 (A.D. 2007), cert. granted, 193 N.J. 277 (2007). In that case, the Appellate Division held, among other things, that the informal assertions by the NJDEP that the property might be undevelopable were insufficient, and that a formal application to the NJDEP was required for OFP to exhaust its administrative remedies.

Exhausting administrative remedies and perfecting a ripe takings claim under the Highlands Act will prove to be a monumental undertaking. There are two ways to proceed. The easiest way to avoid a takings is to design a project to satisfy the requirements of one of the Highlands Act exemptions set forth at N.J.A.C. 7:38-2.3. Otherwise, the developer must consider a waiver application as set forth at N.J.A.C. 7:38-6.4 and 6.8.

The most "user friendly" exemptions are (1) the construction of a single-family residence, for the landowner's own family member, on a lot owned by the individual on August 10, 2004, N.J.A.C. 7:38-2.3(a)(1); (2) the construction of a single-family residence on a lot in existence on August 10, 2004, as long as the construction does not disturb more than one acre or increase impervious cover by one-quarter acre or more, N.J.A.C. 7:38-2.3(a)(2); and (3) the reconstruction of any building or structure for any purpose provided the reconstruction falls within 125 percent of the footprint of the lawfully existing structure and does not add more than one-quarter acre or more of impervious cover, N.J.A.C. 7:38-2.3(a)(4). One question for resolution in the future will be whether a landowner can both undertake one of the Highlands Act exemptions (i.e., a single-family residence) and still assert a successful "partial" takings claim for the undevelopable remainder of the landowner's property. Or, will the availability of an exemption always nullify a takings claim? This is a significant issue, because putting a single-family home on a 100-acre lot cannot reasonably satisfy a developer's investment-backed expectations regarding the prop-

erty. The Highlands Act waiver provisions are far more onerous than the exemptions. The first step is to request a preapplication meeting with the NJDEP. N.J.A.C. 7:38-6.4(c). The second step in the waiver process requires actually submitting of a Highlands Preservation Area Approval (HPAA) application together with a waiver request. N.J.A.C. 7:38-6.4(c). This application will, of course, require the property owner to put together a fully engineered state plan. Only after the NJDEP issues its decision on the HPAA application, based upon the strict application of the regulations, will the NJDEP entertain the waiver request. N.J.A.C. 7:38-6.8(b) and (g)

The third step is then to "satisfactorily demonstrate" to the NJDEP that (1) no alternatives exist to the proposed major Highlands development; (2) that the applicant has made a good-faith effort to utilize the proposed Highlands Act transfer of development rights program; (3) the applicant has offered the property for sale, at or below the "specific fair market value," to all landowners within 200 feet of the site, as well as "land conservancies, environmental organizations, and the Highlands Council and all other governmental agencies on a list provided by the" NJDEP; and (4) "that no reasonable offer based upon the minimum beneficial, economically viable use for the property has been received." In demonstrating compliance with items (3) and (4) above, amongst other documentation, the applicant must provide the NJDEP with a copy of the fair-market value appraisal of the property, copies of all offer letters sent and any responses to those letters and proof that the Highlands Council "has considered and rejected the offer." N.J.A.C. 7:38-6.8(g)(4).

Only after those exhaustive and expensive steps have been taken will the NJDEP consider granting a waiver to avoid the taking. In determining whether to grant the waiver, and thus allow some development, the NJDEP will consider the following factors:

- The investments the property owner made in the property, and whether those

investments were reasonable. In determining whether those investments were reasonable, the NJDEP will consider whether, at the time of land acquisition, development was possible under then-existing laws and the costs actually incurred by the landowner in pursuit of the development where such costs were reasonable and necessary, N.J.A.C. 7:38-6.8(d);

- "The minimum viable and economically beneficial use of the property as a whole" In making this determination, "a use shall not be excluded from consideration merely because it does not result in a profit, reduces the marketability of the property as a whole, or does not allow the property owner to recoup all investments identified" by the landowner, N.J.A.C. 7:38-6.8(e); and

- The environmental impacts resulting from the minimum viable and economically beneficial use for the property, and whether those impacts are consistent with the goals of the Highlands Act, N.J.A.C. 7:38-6.8(f).

As can be clearly seen, the process necessary for an applicant to exhaust its administrative remedies is, quite simply, exhausting. A major problem with the NJDEP's takings waiver regulations is the NJDEP's analysis of the "minimum beneficial economically viable use of the property as a whole." In analyzing those minimum beneficial economically viable uses of the whole property, the NJDEP must consider uses that do not result in a profit for the landowner, reduce the marketability of the property or even preclude the landowner from recovering its investments. In almost all cases, it would seem likely that such a minimally beneficial, economically viable use of the property would include a single-family residence, which is exempt under the Highlands Act. As such, it is at least possible that the NJDEP might not issue any waivers. If that happens, the courts will ultimately hear the takings cases anyway. Additionally, if no waivers are issued under the current regulations, then it would be wise for some litigant to challenge the waiver regulations as being unreasonable. ■