

THE NEW JERSEY HIGHLANDS ACT:
IS IT “TAKING” TOO MUCH FROM LANDOWNERS?

BY: REBECCA TAYLOR

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“It was my retirement plan.” Richard Guidi said about his property in Green Township, New Jersey. “I don’t know how I can afford to retire now.”¹ Richard Guidi has lived in New Jersey for his entire life. He has been a high school gym teacher at the local high school and a football coach, but for even longer, Dick Guidi has been a farmer. For more than thirty years, he has been supplying many in the northwestern corner of New Jersey with seasonal, fresh fruits, vegetables, and annual flowers.² He has run as many as seven fruit stands across Sussex County, New Jersey and has supplied local grocery stores and restaurants.³ On his farm, he grows everything from corn, tomatoes and zucchini to marigolds, petunias, and impatiens.⁴ In his later years, Dick Guidi had planned on selling much of his land to developers, who are known in the area for paying top dollar, and using the proceeds to retire and spend time with his nine grandchildren.⁵ Unfortunately for Dick Guidi, his farm in Green Township falls into the Highlands Region which is now governed by the Highlands Water Protection and Planning Act [hereinafter the Highlands Act or the Act].⁶ The Highlands Act has regulations which make it nearly impossible for him to sell his property to anyone with plans to anything except continue to farm.⁷ This causes the value of his property to plummet in an area that is quickly slipping away from its agricultural roots, and has forced him to seek new

¹ Telephone Interview with Richard Guidi, Owner, Fresh Farms, in Green Township, N.J. (Feb. 7, 2009).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See N.J. STAT. ANN. §§ 13:20-1*et seq.* (West 2004).

⁷ See *Id.*

ways to afford retirement. Even if Dick Guidi were not looking to sell his land to developers but just wanted to build a few new greenhouses in order to grow his flower business, he would still be subject to various provisions and permit requirements under the Highlands Act.

This paper discusses New Jersey's Highlands Water and Protection Planning Act and addresses the legal issues raised by the Act, focusing on the constitutional takings issues brought up by the landowner's inability to use his land in any way he sees fit. This paper will first lay out the reasons for the Highlands Act, what the Act seeks to protect and how the provisions in the act provide for such protection through specific permitting programs and waiver procedures. Next, this paper will address the transfer of rights program in the act which seeks to mitigate the government interference with private property rights. Finally, this paper will cover whether or not these provisions are sufficient to compensate for any possible takings claims.

I. The Highlands Water Protection and Planning Act

a. The Region

The Highlands Region extends from Connecticut through New York, New Jersey, and Pennsylvania.⁸ The Highlands are comprised of a series of discontinuous, steep-sided ridges and narrow valleys.⁹ The area has a north-east to south-west orientation, are often heavily forested, and are dotted with reservoirs and lakes.¹⁰ There are many rivers

⁸ USDA Forest Service, The Highlands- About the Highlands.
<http://www.na.fs.fed.us/highlands/about/index.shtm>(last visited Apr. 18, 2009).

⁹ *Id.*

¹⁰ *Id.*

which originate or run through the region, including the Hudson, Delaware, Schyulkill, and Susquehanna Rivers.¹¹

The New Jersey portion of this region is an area covering 1,343 square miles of land in the northwest section of the state.¹² The region crosses portions of seven of the states twenty-one counties including Hunterdon, Somerset, Sussex, Warren, Morris, Passaic and Bergen.¹³ Within these seven counties there are eighty-eight municipalities affected by the Highlands Act.¹⁴ There are about 110,000 acres of agricultural lands which are actively used within the New Jersey Highlands Region.¹⁵

b. Why the Highlands Act was implemented

The Highlands Water Protection and Planning Act was enacted in order to protect sources of drinking water, preserve the existing quality of life in the area, preserve natural resources and to control sprawl in the region.¹⁶ The New Jersey Legislature has declared the Highlands Region to be an important source of drinking water for the state. It is only thirteen percent of the land area of the state but provides drinking water for half of the population.¹⁷ The Highlands provides about 379 million gallons of drinking water each day to over five million New Jersey residents.¹⁸ The New Jersey Highlands Council has

¹¹ *Id.*

¹² New Jersey Highlands Council, Highlands Act & Maps, <http://www.highlands.state.nj.us/njhighlands/actmaps/> (last visited Apr. 18, 2009).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ N.J. STAT. ANN. §13:20-10 (West 2004).

¹⁷ §13:20-2.

¹⁸ New Jersey Highlands Council, *supra* note 9.

declared that maintaining this water source is critical to the economic viability of the entire state.¹⁹

The Legislature has found the New Jersey Highlands Region to be an important portion of the state to maintain for the quality of life of its residents.²⁰ There is a desirable quality of life in the Highlands Region, much of which is covered in forests or farmland and the Legislature has declared that the area should be regulated in order to ensure the maintenance of the quality of life which currently exists.²¹ Furthermore, there is an increasing risk of over-development in the region.²² Between 1995 and 2000, the Highlands Region lost 17,000 acres of forest and 8,000 acres of farmland to development.²³ The rate of growth has continued with the loss of approximately 3,000 acres every year.²⁴

Not only is the rate of land lost to development a quality of life issue but the Highlands Region is also an area known for its abundance of natural resources. Beyond the drinking water previously discussed, there is clean air, contiguous forest land, wetlands and ample habitat for various flora and fauna.²⁵ The area also provides recreation areas for many of the state's residents and over seventy percent of the lands are

¹⁹ *Id.*

²⁰ N.J. STAT. ANN. §13:20-2 (West 2004).

²¹ *Id.*

²² New Jersey Highlands Council, Highlands Act & Maps, <http://www.highlands.state.nj.us/njhighlands/actmaps/> (last visited Apr. 18, 2009).

²³ *Id.*

²⁴ *Id.*

²⁵ N.J. STAT. ANN. §13:20-2 (West 2004).

considered environmentally sensitive.²⁶ The New Jersey Highlands Region has been designated as a Special Resource Area in the State Development and Redevelopment plan.²⁷ While growth in the region has been regulated by each of the eighty-eight municipalities, the Legislature felt that this was not providing sufficient protection to this area.²⁸

c. What the Highlands Act includes in order to reach its conservational goals

The Highlands Water Protection and Planning Act was created by the Highlands Task Force Action Plan and submitted to the Governor and the Legislature in 2004.²⁹ The act itself is quite comprehensive and explains the exact boundaries of the New Jersey Highlands region which is to be affected by this piece of legislation. It first creates the Highlands water Protection and Planning Council.³⁰ The Act then lays out a list of goals which are to be achieved. The Act requires the Highlands Council to create a regional management plan which lists the specific ways to reach the goals.³¹ There is also a permitting procedure established which governs development in the region and a permitting review process for such a permit application.³² The permitting review process

²⁶ New Jersey Highlands Council, *supra* note 19.

²⁷ §13:20-2.

²⁸ New Jersey Highlands Council, Highlands Act & Maps, <http://www.highlands.state.nj.us/njhighlands/actmaps/> (last visited Apr. 18, 2009).

²⁹ 13C N.J. PRAC § 46.50 (2009).

³⁰ *See* N.J. STAT. ANN. §13:20-4 (West 2004).

³¹ §13:20-9.

³² §§13:20-28,33.

also includes exceptions to the permits and hardship waivers.³³ The Highlands Act then creates a transfer of development rights program which includes receiving zones for the transfer of developmental rights program.³⁴ The act also includes actions which can be taken against violators including injunctions, civil actions, and penalties.³⁵

The Highlands Water Protection and Planning Council is a public body and is a political subdivision of the state.³⁶ It consists of fifteen people. Eight must be residents of the counties included in the region.³⁷ There must be at least one person on the council from each county and this requirement is further broken down so that the counties with the densest populations have the most representation on the Council.³⁸ Five of the fifteen council members must be municipal officials who hold elected office at the time of the Governor's appointment and three are to be county officials who must also hold elective office at their time of appointment.³⁹ Each member of the council is to serve for a term of five years.⁴⁰ The Governor appoints a member as the chairperson and the council chooses a member as the executive director.⁴¹ Currently, John Weingart of Hunterdon

³³ *Id.*

³⁴ § 13:20-13.

³⁵ *See* §§13:20-25,29, 35.

³⁶ N.J. STAT. ANN. §13:20-4 (West 2004).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ § 13:20-4.

⁴¹ *Id.*

County is the chairman of the Council.⁴² Minutes of every meeting are to be delivered to the Governor and the Governor retains veto power over any action the Council may take. If an action is vetoed the action will become void and have no force or effect.⁴³

The Act lays out a lengthy list of goals that are to be achieved through the implementation of this piece of legislation. The first and arguably most important goal of the Act is to “protect, restore and enhance the quality and quantity of surface and ground waters therein”.⁴⁴ Other important goals of the Highlands Act include: preserving contiguous forest areas, protecting natural, scenic, and other resources; promoting the conservation of water resources; promoting agricultural, horticultural and cultural uses which are compatible with the framework of protecting the Highlands environment; protecting and maintain the essential character of the Highlands Environment; and preserving farmland.⁴⁵

In order to preserve farmland, contiguous forest lands and protect the essential character of the region, the Highlands Act requires a permit for many different kinds of government and private activity. The Act first provides for all state and local government projects which disturb two or more acres of land to undergo review by the Highlands Council.⁴⁶ The Act includes provisions for agricultural and horticultural developments which are located in the prevention area and are subject to approval by the local specialty

⁴² New Jersey Highlands Council, Council Members, <http://www.highlands.state.nj.us/njhighlands/about/members/> (last visited Apr. 18, 2009).

⁴³ §13:20-4.

⁴⁴ N.J. STAT. ANN. §13:20-10 (West 2004).

⁴⁵ *Id.*

⁴⁶ §13:20-16.

committee.⁴⁷ “Agricultural impervious cover” as defined in the Act means agricultural or horticultural buildings, structures or facilities with or without flooring, residential buildings, and paved areas but shall not mean temporary coverings.⁴⁸ For an agricultural or horticultural development in the preservation area that would result in the net increase of three percent or more of the area of the farm to have agricultural impervious cover then the owner must submit a farm conservation plan which has to be reviewed and approved by the local soil conservation district.⁴⁹ Furthermore, if the agricultural or horticulture development will result in an increase of agricultural impervious cover by nine percent or more of the net area of the farm management unit then there is a resource management systems plan which must be prepared by the owner or operator of the farm and submitted to the local soil conservation district for review and approval.⁵⁰ The farm conservation and resource management systems plans required by the Highlands Act must be prepared on science-based standards and is required to be consistent with the goals and purposes laid out in the Highlands Act.⁵¹

Another way this act looks to achieve its conservational goals is by requiring that all major Highlands development in the preservation area must obtain Highlands Preservation Approval from the Department of Environmental Protection of New Jersey.^{52,53} Such approval requires compliance with any and all related regulatory

⁴⁷ §13:20-29.

⁴⁸ N.J. STAT. ANN. §13:20-3 (West 2004).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ §13:20-29.

⁵² *Id.*

programs such as the “Freshwater Wetlands Protection Act”, the “Water Pollution Control Act”, and the “Water Quality Planning Act”.⁵⁴ Furthermore, the Act lays out a prohibition of major development within 300 feet of open water and a 300 foot buffer adjacent to all open waters so long as this buffer doesn’t affect the planning areas within the Highlands Region.⁵⁵ The Highlands Preservation Area approval also requires that the quality of the water within the preservation area be maintained, restored or enhanced, that the diversion of 50,000 gallons of water or more per day require a permit, that there be a zero net fill for flood hazard areas, and that there be a prohibition on impervious surfaces like a paved lot on greater than three percent of the land area of a lot.⁵⁶ The Act looks to achieve its numerous conservational goals by prohibiting development provided that no other feasible alternative exists for linear development on steep slopes and a prohibition of development that disturbs forests.⁵⁷

d. The Highlands Act permitting review provisions

⁵³ See §13:20-3 (defining “major Highlands development” as (1) any non-residential development in the preservation area; (2) any residential development in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more; (3) any activity undertaken or engaged in the preservation area that is not a development but results in the ultimate disturbance of one-quarter acre or more; or (4) any capital or other project of a State entity or local government unit in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more. Major Highlands development shall not mean an agricultural or horticultural development or agricultural or horticultural use in the preservation area.)

⁵⁴ § 13:20-30.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

Up to this point, we have discussed various activities which now require special permits under the Act. This section will explain how the permitting review process is performed which allows for activities which would otherwise be prohibited by this act.

The Highlands Act requires that the New Jersey Department of Environmental Protection establish a permitting review program which can provide a coordinated review of any major Highlands development in the preservation area.⁵⁸ The permit review program is also required to consolidate the related aspects of all other relevant regulatory programs such as the “Freshwater Wetlands Protection Act”, “The Endangered and Nongame Species Conservation Act” and the “Water Pollution Control Act”.⁵⁹ This review program includes a waiver of any provision of the permitting review given on a case-by-case basis if it can be determined that it’s necessary to protect public health and safety.⁶⁰ There are also waivers for any of the provisions for redevelopment in some previously developed areas which are in the preservation area and a waiver to avoid an unconstitutional taking of property without just compensation.⁶¹ These waivers are to be considered only on a case-by-case basis.⁶²

A landowner who proposes construction or alteration which can be considered major Highlands development in the preservation area under this act must file an application for a Highlands permitting review with the Department of Environmental

⁵⁸ § 13:20-33.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See id.*

Protection.⁶³ The Act establishes the ability for the Department of Environmental Protection to charge fees necessary to meet the costs associated with the processing, review and enforcement of any application which is submitted for review.⁶⁴ These fees are all to be placed in an “Environmental Services Fund” which is separate from other state funds and is to be used only for the previously stated associated costs.⁶⁵ The Commissioner of Environmental Protection is charged with reviewing applications for permits.⁶⁶ The review is to include any information presented at public hearing or submitted during a comment period or the application review period.⁶⁷

There are seven main factors which a proposed major Highlands development must meet in order for the proposal to be approved and a permit to be issued.⁶⁸ These main factors required for approval are that the development

(1) would have de minimis impact on water resources and would not cause or contribute to a significant degradation of surface or ground waters . . . (2) would cause minimal feasible interference with the natural functioning of animal, plant and other natural resources at the site and within the surrounding areas . . . (3) will result in minimum feasible alteration or impairment of the aquatic ecosystem including existing contour, vegetation, fish and wildlife resources and aquatic circulation of freshwater wetland; (4) will not jeopardize continued existence of species listed pursuant to “The Endangered and Nongame Species Conservation Act” or the “Endangered Plant Species List Act”, or which appear on the federal endangered or threatened species list, and will not result in the likelihood of

⁶³ N.J. STAT. ANN. §13:20-33 (West 2004).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ §13:20-34.

⁶⁷ *Id.*

⁶⁸ *See Id.*

the destruction or adverse modification of habitat for any rare, threatened, or endangered species of animal or plant; (5) is located or constructed so as to neither endanger human life or property nor otherwise impair the public health, safety and welfare; (6) would result in minimal practicable degradation of unique or irreplaceable land types, historical or archeological areas, and existing public scenic attributes at the site and within the surrounding area; and (7) meets all other applicable department standards, rules, regulations and State laws.⁶⁹

These factors which must be met in order to approve an application for a permit are broad and expansive. Much of the language used in the list of requirements for permit approval can be interpreted differently by different people or even by different Department of Environmental Protection Commissioners. Words like “de minimis”, “minimal” and “interference” are not defined within the Highlands Act.⁷⁰ What the landowner or farmer perceived as a “de minimis” disturbance to surface or groundwater is likely to be different from what the Commissioner of the Department of Environmental Protection perceives as each seeks the ends to different means and as such each will have a different perspective.

While the requirements for the approval of a permit for a major Highlands development may be broad and expansive, there are exceptions for permit approval which are provided for within the Act.⁷¹ The construction of a single family dwelling on a lot in existence before the enactment date of this act provided that the construction does not disturb an acre or more of land or increase the impervious surface by a quarter acre or more, or a major Highlands development received before this act is to take effect are

⁶⁹ *Id.*

⁷⁰ *See* N.J. STAT. ANN. §§ 13:20-3 (West 2004).

⁷¹ N.J. STAT. ANN. §13:20-28 (West 2004).

exempted from the permit approval process.⁷² There are other exceptions which are listed in the Act and do not require approval for their completion. These include: an improvement to a single family dwelling; an improvement to a place of worship or a school or a hospital; the routine maintenance and operations of public utilities; the reactivation of rail lines and rail beds that are already in existence; and a major Highlands development which is outside the preservation zone and in a planning area.⁷³ These exceptions all allow for the continued operations of existing structures which are already in place such as churches and public utilities. The Act also does not halt all construction so that landowners who owned the land before the Act came into place can still construct single family dwellings but only for their own use or for the use of an immediate family member.⁷⁴

e. Transfer of developmental rights in the Highlands Act

The transfer of developmental rights (hereinafter TDR) is an extremely important section of the Highlands Water Protection and Planning Act. In it, the Legislature charges the Highlands Council with using the regional master plan to establish a TDR program for the Highlands.⁷⁵ This program is to be compatible with the “State Transfer of Developmental Rights Act”.⁷⁶ The Highlands Council was charged with the task of

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ N.J. STAT. ANN. §13:20-13 (West 2004).

⁷⁶ *Id.* (The State Transfer of Developmental Rights Act, which is explain in more detail later in the paper, is an act which establishes requirements and norms for any municipality that wishes to create such a program.)

identifying areas within the preservation area which are to be sending zones as well as areas within the planning areas which are appropriate for development and are to be designated as voluntary receiving zones.⁷⁷ The Highlands Act gives the Highlands Council the right to determine the initial value of the developmental right which is to be transferred from the preservation area into a receiving zone within the planning area.⁷⁸

f. Enforcement procedures for the violation of the Highlands Act

The Highlands Act lays out extensive qualifications for construction and land disturbance on 1,343 square miles.⁷⁹ Such a broad piece of legislature cannot be enforced without “teeth”, meaning that there must be a way to enforce the conservational goals set out in the Act. The Highlands Act provides for several ways in which to enforce its conservational measures including injunctions and penalties for violations.⁸⁰

The Highlands council may institute an action or proceeding in Superior Court for injunctive relief for any violation of the Act.⁸¹ The Council can also seek injunctive relief for the violation of any rule or regulation added to this Act and any violation of the required regional master plan.⁸² Any decision made or action taken by the Highlands Council pursuant to the Highlands Act is to be considered a final agency action subject to

⁷⁷ §13:20-13(b)(c).

⁷⁸ §13:20-13(h).

⁷⁹ USDA Forest Service, The Highlands- About the Highlands.
<http://www.na.fs.fed.us/highlands/about/index.shtm> (last visited Apr. 18, 2009).

⁸⁰ N.J. STAT. ANN §§13:20-25,26,29(West 2004).

⁸¹ §13:20-25.

⁸² *Id.*

judicial review in the Appellate Division of the Superior Court of New Jersey.⁸³ Such measures give the Council the authority to actually enforce what the Legislature has planned.

Besides injunctive relief sought by the Highlands Council, The New Jersey Department of Agriculture or the local soil conservation district may introduce a civil action in Superior Court for injunctive relief to prohibit violations against agricultural and horticultural developments in the preservation which do not comply with the assessment and orders of these agencies.⁸⁴

When the Commissioner of the Department of Environmental Protection finds that a person has violated the rules and regulations which establish the environmental standards for the preservation area the Commissioner may seek any one of a number of possible remedies.⁸⁵ The Commissioner of the Department of Environmental Protection can issue an order requiring compliance, bring a civil action, levy a civil administrative penalty, bring an action for a civil penalty or petition the State Attorney General to bring a criminal action.⁸⁶ When the Commissioner finds a person in violation of the Act the Commissioner may issue an order which specifies what the violation was and what actions need to be taken to bring the violator into compliance.⁸⁷ The Act also lists

⁸³ §13:20-26.

⁸⁴ §13:20-29.

⁸⁵ §13:20-35; *See* §§13:20-32,33,34.

⁸⁶ §13:20-35.

⁸⁷ §13:20-35(b) (which specifically dictates the actions the commissioner may take in order to notify the violator. This order should include: (1) specifying the provision or provisions of law, rule, regulation, permit, approval, or authorization of which the person is in violation; (2) citing the action which constituted the violation; (3) requiring compliance with the provision or provisions violated; (4) requiring the restoration of the area which is the site of violation; and (5) providing notice to the person of the right to a hearing on the matters contained in the order).

various penalties which may be levied for different types of violations as well as increasing fines for recurring violations.⁸⁸ In the section of the Act most specifically concerned with enforcement and compliance, the Legislature grants the Department of Environmental protection the authority to enter any property or premises in order to test for and determine compliance with the Act.⁸⁹

II. Transfer of Developmental Rights

a. Explanation of transfers of developmental rights

TDRs are a simple on paper but much more complicated when actually implemented as part of a complex preservation and conservation plan like the Highlands Act. A TDR is the moving of the right to develop from one piece of property to another.⁹⁰ This movement of development potential is most often used to move this right to develop from farmland or environmentally sensitive or environmentally stressed areas to areas that have been deemed as better able to sustain growth.⁹¹ The idea is that some areas are better able to handle development than others. Places which are better able to handle the development should be where new development is focused. Such planning also reduces sprawl and creates more organized development structures

⁸⁸ See §13:20-35.

⁸⁹ N.J. STAT. ANN. §13:20-35(k)(West 2004).

⁹⁰ Lauren A. Beetle, *Are Transferable Development Rights a Viable Solution to New Jersey's Land Use Problems?: An Evaluation of TDR Programs within the Garden State*, 34 Rutgers L.J. 513, 515 (2003).

⁹¹ *Id.* at 515.

TDR programs are based on the assumption that physical possession of a parcel of land can be separated from the right to develop.⁹² They are also based on the assumption that title to real property is not a single right but is actually a bundle of rights; a bundle which can be split and exist separately.⁹³ In this way, the part of the “bundle” which contains a landowner’s right to develop, can be separated and moved. A TDR program works through a system of development credits and most successful TDRs, including the one included in the Highlands Act, create a transferable developments right bank.⁹⁴ A TDR bank increases the marketability of development credits.⁹⁵ A bank can set minimum purchase prices, guarantee loans using TDRs as collateral and purchase the development credits outright.⁹⁶

A TDR program allows the landowner to sell part of his property rights to the “bank” and still maintain physical ownership of the land and to use that land in the same manner that he did before selling off just one piece of his bundle of property rights. As an example, before the Highlands Act came into being Dick Guidi could have sold his farm to a developer, moved from his land, and the developer could have moved in a built an entire neighborhood of houses. With the Highlands Act in place, Dick Guidi can still sell his land, but the buyer will be bound by the same rules. But he can now sell just his

⁹² Beetle, *supra* note 89 at 515.

⁹³ *Id.*

⁹⁴ Beetle, *supra* note 89 at 516-517; *see also* N.J. STAT. ANN. 13:20-13(West 2004).

⁹⁵ Beetle, *supra* note 89 at 517.

⁹⁶ *Id.* citing Sarah S. Stevenson, *Banking on TDRs: The Government’s Role as Banker of Transferable Development Rights*, 73 N.Y.U. L. Rev. 1329, 1331-32 (1998).

right to develop his land to the TDR bank and continue to farm his land as he has for over thirty years.

b. New Jersey's TDR programs

New Jersey has four TDR programs: the one established by the Highlands act; the Highland Act's predecessor, the Pinelands Protection Act; as well as two municipality-enacted TDR programs in Burlington, County.⁹⁷ The concept was first introduced to the legislature in 1977 and in 1989 a law was enacted which allowed for Burlington County to establish the first TDR program in New Jersey.⁹⁸ This program sought to buy development rights from landowners in the area of the state which became protected under the Pinelands Protection Act.⁹⁹ The Pinelands Protection Act was enacted in 1979 and while much older than the Highlands Act, they are extremely similar in purpose. Where the Highlands Act seeks to preserve important lands in the northern part of the state, the Pinelands Protection Act was implemented to preserve environmentally sensitive land in the southern end of the state in the New Jersey Pine Barrens.¹⁰⁰ Burlington County was chosen as the receiving zone for the trial program because it had already been purchasing development rights under the Pinelands Regional Development Program.¹⁰¹ This pilot program was deemed a success and the State Transfer of

⁹⁷ Beatle, *supra* note 89 at 531; N.J. STAT. ANN. §13:20-13 (West 2004).

⁹⁸ *Supra* note 91.

⁹⁹ N.J. STAT. ANN. §§13:18A-1 *et. seq.* (West 2004)(The Pinelands Protection Act was enacted to preserve the unique habitat found in the southern part of the state after it became apparent that this sandy, pine-filled region was especially susceptible to degradation. This act also sought to put an end to the haphazard development in the area which was more taxing on the natural resources than planned development would be).

¹⁰⁰ *See id.*; *supra* note 8.

¹⁰¹ *Supra* note 91.

Development Rights Act was created.¹⁰² In doing so, the New Jersey State Legislature deemed it appropriate and in the public's interest to allow all municipalities in the state to implement TDR programs.¹⁰³

The State Transfer of Development Rights Act governs the TDR and TDR bank established by the Highlands Act.¹⁰⁴ The TDR Act lays out the requirements for establishing such a program in the state as well as the characteristics that sending and receiving areas should possess.¹⁰⁵ It requires that sending zones must be composed of lands which are agricultural land, woodlands, threatened or endangered species habitat, land substantially improved so as to provide a unique aesthetic, or be other lands which should remain at low densities for reasons of inadequate infrastructure.¹⁰⁶ The development of receiving zones is only limited by the realistic possibilities of development.¹⁰⁷ The area which is set to receive the development rights is to be an area which is suitable for development and the potential for development must already be feasible so that the transferable development potential is not unnecessarily delayed.¹⁰⁸ The TDR Act also sets out how a TDR bank is to be set up and governed.¹⁰⁹ Through

¹⁰² N.J. STAT. ANN. §40:55D-138 (West 2004).

¹⁰³ *Id.*

¹⁰⁴ N.J. STAT. ANN. §13:20-13(West 2004).

¹⁰⁵ N.J. STAT. ANN. §§40:55D-140,141(West 2004).

¹⁰⁶ *Id.* At 144.

¹⁰⁷ *Id.* At 145.

¹⁰⁸ *Id.*

¹⁰⁹ §40:55D-158.

trial programs, New Jersey has created a somewhat standardized program to transfer development rights.

c. The constitutionality of TDR programs

TDRs are necessary to provide compensation to landowners when state laws take away the right to develop their land. By changing the way in which property rights are generally perceived and taking power which municipalities have historically possessed, TDRs raise several different legal issues.¹¹⁰ The most important among these is the constitutional takings issue.

Challenges to TDR programs often come into court as a Fifth Amendment takings claim.¹¹¹ So an analysis of the constitutionality of TDR must begin with a discussion of what is and what is not a “taking” according to both the United States Supreme Court and the New Jersey Supreme Court.

A “taking” can be most easily claimed when it is in the form of a physical invasion of property.¹¹² When the interruption of property rights occurs in the less invasive form of a governmental public program which is instituted to aid the public as a whole, the determination as to whether or not a taking has occurred is harder to

¹¹⁰ See generally N.J. STAT. ANN. §§40:55D-137 et. seq.(West 2004).

¹¹¹ Beatle, *supra* note 89 at 518 *citing* U.S. CONST. amend. V. (the Fifth Amendment of the Federal Constitution states that “no person. . . shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.” It is also important to note for procedural purposes that the Fifth Amendment is made applicable to the states through the Fourteenth Amendment).

¹¹² See *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 124 (1978), *citing e.g.* U.S. v. Causby, 328 U.S. 256 (1946).

determine.¹¹³ This type of taking is called a “regulatory taking”. Courts have long recognized that states and cities may enact land-use restrictions or controls to enhance the quality of life by preserving the character and desirable aesthetic features of a city.¹¹⁴ In *Penn Central v. N.Y.C.*, the Grand Central Terminal owner filed suit after the New York City Landmarks Preservation Committee refused to approve plans for the construction of a 50-story office building over the terminal.¹¹⁵ The terminal owner alleged that the Committee’s refusal was a taking of property without just compensation.¹¹⁶ The Supreme Court held that in deciding whether a particular governmental action has effected a taking, the court must focus both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole.¹¹⁷ Establishing a taking simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is unsound.¹¹⁸ While there is no black letter law to follow when it comes to establishing a regulatory taking, *Penn Central* establishes a loose balancing test between the property interest of the land owner and the interests of the community as a whole.¹¹⁹

¹¹³ See *Penn. Cent. Transp. Co. v. New York*, 436 U.S. at 124.

¹¹⁴ *Id.* At 129; citing see *New Orleans v. Dukes*, 427 U.S. 297(1976); *Young v. Amer. Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Vill. Of Belle Terre v. Boraas*, 416 U.S. 1, 9-10 (1974); *Berman v. Parker*, 348 U.S. 26, 33 (1954); *Welch v. Swasey*, 214 U.S. 91, 108 (1909).

¹¹⁵ See *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 116 (1978).

¹¹⁶ *Id.* at 123.

¹¹⁷ *Id.* at 130.

¹¹⁸ *Id.* at 130.

¹¹⁹ See *Id.* at 124-125.

Both the Fifth Amendment of the United States Constitution and the New Jersey Constitution apply to New Jersey citizens and while the language surrounding takings law is similar, the analysis of when a taking has occurred is sometimes different between the two supreme courts.¹²⁰ In a 1963 case concerning an early environmental regulation, the New Jersey Supreme Court held that a township zoning ordinance which restricted the use of swampland constituted a taking of private land for public use without just compensation and was therefore unconstitutional.¹²¹ The Court stated that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. We are in danger of forgetting that strong public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for change.”¹²²

In Gardner v. N.J. Pinelands Commission, the State Supreme Court found that there was not a taking in a situation very similar to ones which have arisen as a result of the Highlands Act.¹²³ In this case, a N.J. farmer claimed an unconstitutional taking after the Pinelands Protection Act limited the use of her property to agricultural purposes.¹²⁴ The Court explained that because the Pinelands region is such a unique habitat that it was in the best interest of the state to preserve the region and so the protection provided to the Pinelands by the Pinelands Protection Act is an important and legitimate public

¹²⁰ U.S. CONST. amend. IV.; N.J. CONST. art. 1, §20.

¹²¹ *Morris County Land Improvement Co. v. Twp of Parsippany-Troy Hills*, 40 N.J. 539 (N.J. 1963).

¹²² *Id.* at 555

¹²³ *See Gardner v. N.J. Pinelands Comm’n*, 125 N.J. 193 (N.J. 1991).

¹²⁴ *Id.* at 197.

interest.¹²⁵ Since the public interest outweighs the loss suffered by a private landowner there was no taking.¹²⁶ The Court in *Gardner* gives a somewhat less murky idea as to what will constitute a taking.¹²⁷ Still relying on a balance between public and private interests, the New Jersey Court requires a fact-sensitive examination of the regulatory scheme which focuses on whether the scheme substantially advances a legitimate public purpose and whether it excessively interferes with property rights and interests.¹²⁸

Both the United States Supreme Court and the New Jersey Supreme Court will enforce zoning laws which are enacted for legitimate reasons and will benefit the public as a whole.¹²⁹ The New Jersey Supreme Court begins its analysis with an examination of the authority which allows the municipalities or the state to pass the restrictive ordinance before reaching the issue of a taking.¹³⁰ The U.S. Supreme Court skips the analysis of the legislative authority and goes right to the issue of property rights.¹³¹ This difference in analysis might make the New Jersey Courts more deferential to zoning ordinances because it recognizes the authority of the Legislature to make such laws and in this way,

¹²⁵ *Id.* at 205-206.

¹²⁶ *See id.* at 205-206

¹²⁷ *See id.* at 205.

¹²⁸ *See Gardner v. N.J. Pinelands Comm'n*, 125 N.J. 193 (N.J. 1991).

¹²⁹ *Agins v. Tiburon*, 447 U.S. 255,260(1980); *see also Penn Cent. Transp. Co. v. New York*, 438 U.S. 104, 116 (1978); *Gardner v. N.J. Pinelands Comm'n*, 125 N.J. 193 (N.J. 1991); *Morris County Land Improvement Co. v. Twp of Parsippany-Troy Hills*, 40 N.J. 539 (N.J. 1963).

¹³⁰ Cory Kestner, Comment, *SCOTUS+SCONJ+TDRS= New Jersey Highlands Act Litigation Outcomes: Will it All Add Up to a Fair Outcome for Property Owners?*, 18 FORDHAM ENVTL. L. REV. 399, 413 (2007).

¹³¹ Kestner, *supra* note 130.

the plaintiff making the takings claim might have a larger hurdle to overcome in order to establish a taking.¹³²

If a landowner can establish that a regulatory taking has occurred, the next legal concern becomes whether a TDR program can provide “just compensation”. No court has accepted a per se doctrine denying that a taking has occurred simply because a restrictive zoning ordinance includes a TDR program for compensation.¹³³ There is, however, case law to suggest that transferred rights which provide compensation will be considered as part of the “just compensation” required when a taking has occurred.¹³⁴

In *Penn Central*, the Supreme Court said that the terminal owner had not been denied all use of the pre-existing development rights because their ability to use those rights had not been taken away but made transferable to several different parcels near the Terminal.¹³⁵ The court in this case found that these transferred rights were valuable.¹³⁶ By calling the transferred development rights “valuable” the Court seems to be suggesting that TDR programs could provide compensation for a taking even though there was no taking found in *Penn Central*. The Supreme Court was still far from rubber-stamping the TDR program saying:

“ while these rights may well not have constituted “just compensation” if a “taking” has occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for

¹³² *Id.*

¹³³ *Id.* At 414.

¹³⁴ see *Penn Cent. Transp. Co. v. New York*, 438 U.S. 104 (1978); *Fred. French Investing Co v. New York*, 39 N.Y. 2d 587, 596 (N.Y. 1976).

¹³⁵ *Penn Cent. Transp. Co. v. New York*, 438 U.S. at 137.

¹³⁶ *Id.*

that reason, are to be taken into account in considering the impact of regulation.”¹³⁷

This issue of TDR as compensation was also addressed in *Fred French Investing Co v. N.Y.* In this case, the adequacy of compensation was questioned because compensation in the form of development rights is not a fixed amount and is subject to the market for these rights and if the market determines the value than there is no guarantee that the landowner will receive compensation equivalent to the landowner’s loss.¹³⁸ In *Fred French Investing Co.*, the TDR was deemed unconstitutional because of this uncertainty in value.¹³⁹ What distinguishes this case from the issues raised by the Highlands Act is that the TDR program in the Highlands is created by the act itself and the Act establishes a bank which sets values and creates a market for the severed property rights. One scholar believes that “the validity and utility of TDR programs will turn on the question of the economic benefits of the severed development rights” and “if TDRs are to have any value, that value must be created by regulatory regime.”¹⁴⁰ If the author of this article is correct, than the TDR program created by the Highlands act does have value and is more likely to be looked favorably upon by the court system. Courts

¹³⁷ *Penn Cent. Transp. Co. v. New York*, 438 U.S. at 137 citing *Cf. Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1963).

¹³⁸ Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1101, 1110-1111 (1975).

¹³⁹ *Fred. French Investing Co v. New York*, 39 N.Y. 2d at 598

¹⁴⁰ James E. Holloway & Donald C. Guy, *The Utility and Validity of TDRs Under the Takings Clause and the Role of TDRs in the Takings Equation Under Legal Theory*, 11 PENN ST. ENVTL. L. REV. 45, 98 (2002).

will be more likely to consider the TDR as part of the compensation in the Highlands Act if it can be shown that the TDR bank in the Act creates or at least stabilizes a market for the development rights.

III. Do the regulations in the Highlands Act constitute an unconstitutional taking of private property

The Highlands Water Protection and Planning Act has met with a great deal of opposition in the northern region of the state.¹⁴¹ Developers, farmers and landowners feel they are being asked to shoulder a disproportionate share of the costs to protect the water quality solely because they bought their land before the Act was passed.¹⁴² Suits have been filed in regards to various components of the Highlands Act but only one concerning the constitutionality of the act has reached the Supreme Court of New Jersey.¹⁴³

¹⁴¹ Ken Belson, *In New Jersey, Development Conflicts with a Watershed*, N.Y. Times, Jan. 15, 2007.

¹⁴² *Id.*

¹⁴³ *OFP, L.L.C. v. State*, 197 N.J. 418 (N.J. 2008) (the New Jersey Supreme Court ruled that the landowner had not suffered an uncompensated taking.); *Pio Costa Enters. V. State*, No.A-3125-06T1, 2008 N.J. Super. LEXIS 1276 (N.J. Super. Ct. App. Div. Aug. 8, 2008) (plaintiff questions inclusion of his property in the preservation area.); *ABD Indep., Inc. v. Twp of Independence*, No. A-5264-06T1, 2008 N.J. Super. LEXIS 861 (N.J. Super. Ct. App. Div. July 31, 2008) (plaintiff appeals a tax decisions claiming that the tax on his land is too high in light of the restrictions placed on development due the Highlands Act.); *In re Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38-1 et seq.*, 401 N.J. Super. 587 (N.J. Super. Ct. App. Div. 2008) (the N.J. Farm Bureau challenged the interim rules established for the Highlands Act in regards to septic density standards.); *N. Byram Concerned Citizens v. N.J. Dep't of Env'tl. Prot.*, 2008 WL 2309815 (N.J. Super. Ct. App. Div. June 6, 2008) (plaintiffs object to a road reconstruction and widening project's exemption from the Highlands Act).

OFP, L.L.C. is the owner of ninety-three acres of land in Washington Township.¹⁴⁴ In 1999, the OFP received preliminary approval to build a subdivision on this tract, but before all of the administrative procedures necessary to receive final permission from all interested parties, the Highlands Act was introduced into the Legislature.¹⁴⁵ Because approval was still pending when the bill was introduced, OFP's planned development fell under the newly enacted Highlands Act.¹⁴⁶ OFP filed suit asserting "that the Act 'operates as a bar to development as otherwise permitted by law and results in a taking of OFP's property without compensation.' In violation of the Fifth Amendment . . . and Article I, paragraph 20, of the New Jersey Constitution."¹⁴⁷ The Superior Court upheld the constitutionality of the Highlands Act and the Supreme Court of the State affirmed.¹⁴⁸ The Court said that where a regulation places limitation on land it is harder to determine if a taking has occurred and to do so there must be an evaluation of a complex set of factors including: the regulations economic effect on the landowner the extent that the regulation interferes with reasonable expectations and the character of the government actions.¹⁴⁹ Determining that a

¹⁴⁴ *OFP, L.L.C. v. State*, 395 N.J. Super 571, 577 (N.J. Super. Ct. App. Div. 2007) (for clarity's sake, the reader should know that the New Jersey Supreme Court did not publish a complete opinion in this case. The Court agreed with the Superior Courts reasoning and deferred to such. For this reason, the New Jersey Superior Court decision is the one most often cited in this piece).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 578.

¹⁴⁷ *Id.* at 578-579.

¹⁴⁸ *OFP, L.L.C. v. State*, 197 N.J. 418 (N.J. 2008).

¹⁴⁹ *OFP, L.L.C. v. State*, 395 N.J. Super 571,581 (N.J. Super. Ct. App. Div. 2007) *citing Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

regulatory taking must be decided on a case by case basis, a landowner cannot establish a takings claim without the land-use authority being given an opportunity to decide and explain the reach of a challenged regulation.¹⁵⁰ *OFP* did not exhaust the administrative remedies available under the Highlands Act and so they did not the DEP the opportunity to “exercise their full discretion in considering development plans for the property, including the opportunity to grant any . . . waivers allowed”.¹⁵¹ Because the administrative procedures had not been exhausted and thus the DEP had not had a chance to exercise its full discretion, a regulatory taking was not established.¹⁵²

The Supreme Court of New Jersey upheld the constitutionality of the Highlands Act in *OFP*.¹⁵³ However, it did so on the technicality of administrative procedure. It is unlikely, that this will be the last time that the New Jersey courts hear a case questioning the constitutionality of the Highlands Act, in regards to a regulatory taking. While, the suits which have been filed concerning the Act have nearly all been upheld in favor of the Act and its regulating bodies, not all have asserted a takings claims.¹⁵⁴ Should a case be filed with the New Jersey courts

¹⁵⁰ *See id.* At 581.

¹⁵¹ *Id.* at 582,579.

¹⁵² *See id* at 582.

¹⁵³ *OFP, L.L.C. v. State, 197 N.J. 418 (N.J. 2008).*

¹⁵⁴ *OFP, L.L.C. v. State, 197 N.J. 418 (N.J. 2008)*; *Pio Costa Enters. V. State*, No.A-3125-06T1, 2008 N.J. Super. LEXIS 1276 (N.J. Super. Ct. App. Div. Aug. 8, 2008); *ABD Indep., Inc. v. Twp of Independence*, No. A-5264-06T1, 2008 N.J. Super. LEXIS 861(N.J. Super. Ct. App. Div. July 31, 2008); *In re Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38-1 et seq.*, 401 N.J. Super. 587 (N.J. Super. Ct. App. Div. 2008); *N. Byram Concerned Citizens v. N.J. Dep’t of Env’tl. Prot.*, 2008 WL 2309815 (N.J. Super. Ct. App. Div. June 6, 2008).

that do not have any administrative issues and the plaintiff can prove that he has exhausted all administrative remedies offered to him; the Court would be forced to take a closer look at the constitutional issues.

Taking a closer look at the constitutional issues behind establishing whether or not a taking has occurred would require balancing the private loss and the public good. Under the Highlands Act, the loss to a landowner is clear. The owner will not be able to build much more on his land than a single family home. He will be subject to reviews and permitting procedures each time he wants to build almost any kind of permanent structure or implement any large scale change in land use. The owner will also not be able to sell his land to developers as the Highlands Act forbids such development. For many, like Dick Guidi, their land is their biggest investment. Instead of money in the bank, their money is in their land. On the other hand, the benefits of preserving an environment like the Highlands are plentiful. It is an area of well over one thousand square miles filled with farmland, contiguous forests, lakes, rivers, streams and valleys.¹⁵⁵ The region provides water to millions of New Jersey residents, which means that millions of the state's residents would be affected by the degradation of the Highlands Region, if development continues at the rate at which it has been growing.¹⁵⁶ The Court will need to decide whether the financial burdens on the

¹⁵⁵ See New Jersey Highlands Council, *Highlands Act & Maps*, <http://www.highlands.state.nj.us/njhighlands/actmaps/> (last visited Apr. 18, 2009).

¹⁵⁶ Forest Service, *The Highlands- About the Highlands*, <http://www.na.fs.fed.us/highlands/about/index.shtm> (last visited Apr. 18, 2009).

individual landowner can outweigh the benefits of preserving an area that has been deemed critical to the economic viability of the entire state.¹⁵⁷

It seems unlikely that a takings claim would resolve in favor of the landowner under the Highlands Act. Even without the administrative procedural deficiencies that weighed heavily in the *OFP* case, the court was clear that the determination as to whether or not a taking had occurred depended on a list of factors including the economic effect on the landowner, the extent to which the regulation interferes with reasonable expectations and the character of the government action.¹⁵⁸ There is a definite economic effect on the landowner under the Highlands Act, and while the effect may be great, the landowner will not be completely stopped from using his land. Dick Guidi, for example, is free to go on farming his land as he has for years. While future plans may have to be altered, there is little to no immediate economic deficit suffered by the landowner. As for reasonable expectations, it is not unreasonable for a property owner to expect to be able to use his property in any way he chooses. However, it is far more reasonable to expect to be able to continue to use ones property in the same manner as previous years and therefore not all reasonable expectations of use have been changed by the Act. In regards to the character of the government action, this is the element listed by the courts in previous cases that will most way in favor of the State and the constitutionality of the Highlands Act. The

¹⁵⁷ *Id.*

¹⁵⁸ *OFP, L.L.C. v. State*, 395 N.J. Super 571,581 (N.J. Super. Ct. App. Div. 2007) citing *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001); see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

government created the Highlands Act not in order to build new government buildings or other such projects but to conserve. Not only was the Highlands Act created to conserve but also to protect an important source of freshwater. The government's actions in this case are of the highest character and likely to weigh strongly in the state's favor in a takings case. Besides these factors there is a TDR program in place which is supposed to provide compensation to the landowner and so even if the Court were to declare that a taking had occurred, the Court would still be able to find that there had been compensation for such a taking.

IV. Conclusion

The United States Constitution and the New Jersey Constitution both afford New Jersey citizens protection from the deprivation of life, liberty or property without the due process of law.¹⁵⁹ While this phrase may sound simple, the analysis of it is more than complex. The Highlands Act was created in order to preserve a unique and important ecological part of New Jersey. In doing so, this act created so many rules, regulations, and procedures as to limit how individual landowners in the Region may use their land. A TDR program attempts to mitigate the loss suffered by some landowners. Only one case has made it to the New Jersey Supreme Court regarding the constitutionality of the Act and the Court held the Act to be constitutional and it is not likely to be the last.¹⁶⁰ However, given the requirements necessary to prove a taking, it is unlikely that

¹⁵⁹ U.S. CONST. amend. IV.; N.J. CONST. art. 1, §20.

¹⁶⁰ *OFP, L.L.C. v. State*, 197 N.J. 418 (N.J. 2008).

such a claim will prevail. Unfortunately for Dick Guidi, it seems most likely that he will have to pursue another venue for financing his retirement as the Highlands Act precludes him from selling to developers. If the constitutionality of the Act stands, he then has two possibilities left to him. He can apply for a hardship waiver or he can look into the TDR Bank and consider selling his development rights for his farm to one of the receiving zones and receive some financial incentive which he can put towards his retirement.