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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MERCER COUNTY

DOCKET NO.

Civil Action

COMPLAINT FOR A DECLARATORY JUDGMENT

COUNTY OF WARREN, a body politic and corporate of the State of New Jersey and DAVID SHOPE, an adult individual, HANK KLUMP, an adult individual, CHARLES SHOOP, an adult individual, ROBERT BEST, an adult individual, RUTH BEST, an adult individual, ANDREW DRYSDALE, an adult individual, LOIS DRYSDALE, an adult individual, JERRY W. KERN, an adult individual, and SANDRA KERN, an adult individual,

Plaintiffs,

v.

THE STATE OF NEW JERSEY, THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION AND THE NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL,

Defendants,

v.

THE NEW JERSEY HIGHLANDS COALITION and THE NEW JERSEY WATER SUPPLY AUTHORITY,

Interested Parties

Plaintiffs, County of Warren, whose Principal offices are located at 165 County Route 519 South, Belvidere, New Jersey 07823, David Shope who resides at 383 Penwell Rd., Port Murray, New Jersey, Hank Klump, who resides at 24 Longview Rd., Lebanon, New Jersey , Charles Shoop who resides at 9 Esna Drive, Hackettstown, New Jersey, Robert and Ruth Best, who reside at 1 Rustling Rd., Hackettstown, New Jersey, Andrew and Lois Drysdale who reside at 32 E - Fox Chase Rd., Chester, New Jersey, and Jerry W. and Sandra Kern who reside at 801 High Street, Alpha, New Jersey, by way of complaint for a declaratory judgment pursuant to N.J.S.A. 2A:16-50 (1) that the New Jersey Highlands Council is without authority to implement its statutory obligations without curative legislation, (2) that the State of New Jersey, through the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq. "the Act" has violated the equal protection rights of property owners in the preservation area who are not eligible for legislatively bargained exemptions, (3) that the impossibility of the voluntary statutory TDR Funding Mechanism and exhaustion of other funding mechanisms renders the Act arbitrary, capricious and unreasonable, and (4) that the Act violates the equal protection and due process rights of property owners since there is no rational basis for a preservation core area in the New Jersey portion of the four State Highlands

Region and the legislative boundaries were not scientifically adjusted, say:

PARTIES

1. The Plaintiff, THE COUNTY OF WARREN, is a body politic and corporate of the State of New Jersey and has its principal offices at 165 County Route 519 South, Belvidere, New Jersey 07823 which has been active in open space acquisition and preservation through its stewardship roles in State Green Acres and Farmland Preservation Programs and expenditure of dedicated open space taxes approved by the referendum. In this role, the County has been involved in the acquisition and preservation of 19,866 acres, 14,973 of which are located within the statutorily defined New Jersey Highlands Region. Both in its individual capacity and as a participant in the "Five Counties Coalition," the County was responsible for the regional planning within the Highlands Region prior to the adoption of the Act.

2. Plaintiff, DAVID SHOPE is a New Jersey resident owning 57 acres in the statutorily defined preservation area.

3. Plaintiff, CHARLES SHOOP is a New Jersey resident owning 100 acres in the statutorily defined preservation area.

4. Plaintiff, HANK KLUMP is a New Jersey resident owning 150 acres in the statutorily defined preservation area.

5. Plaintiffs, ROBERT and RUTH BEST are New Jersey residents owning 47 acres in the statutorily defined preservation area.

6. Plaintiffs, ANDREW and LOIS DRYSDALE are New Jersey residents owning 18.5 acres in the statutorily defined preservation area.

7. Plaintiffs, JERRY W. KERN and SANDRA KERN are New Jersey residents owning 62 acres in the statutorily defined preservation area.

8. Defendant, STATE of NEW JERSEY is a body politic of the United States of America and has the power and authority pursuant to the Constitution of the United States and the Constitution of the State of New Jersey to enact laws and promulgate rules and regulations controlling, among other things, the use of land located within the State of New Jersey. The Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq was adopted by the State legislature on June 11, 2004 and became retroactively effective to March 29, 2004 upon approval of Governor James E. McGreevey upon signing the Act on August 10, 2004.

9. Defendant, DEPARTMENT of ENVIRONMENTAL PROTECTION of the STATE of NEW JERSEY (DEP) is a principal Department in the Executive Branch of the New Jersey State Government charged with the responsibility of defining legal boundaries of the preservation and planning area prior to adoption of the Act,

preparation of environmental developmental standards incorporated into the Act, and the adoption of interim and regularly adopted regulations governing the development and use of property in the preservation area. The DEP is also charged with enforcement in the preservation area.

10. Defendant, HIGHLANDS WATER PROTECTION and PLANNING COUNCIL (Council) with offices at 100 North Road, Route 513, Chester, New Jersey, is a body politic and political subdivision of the State of New Jersey charged with a variety of statutory duties and obligations pursuant to the Act.

11. Interested Party, NEW JERSEY HIGHLANDS COALITION, a Non Profit Corporation with Offices located at Bamboo Brook, 170 Longview Road, Forest Hills, New Jersey 07931, was an active participant in the executive and legislative processes culminating in the adoption of the Act.

12. Interested Party, NEW JERSEY WATER SUPPLY AUTHORITY, a public body corporate and politic and an instrumentality of the State of New Jersey, with offices at P.O. Box 5196, Highway #31, Clinton, New Jersey 08809, was actively involved in the executive processes of the Highlands Task Force Established by the Executive Order of Governor James E. McGreevey on September 19, 2003.

STATEMENT OF FACTS

13. Governor James E. McGreevey issued EXECUTIVE ORDER NUMBER 70 "The Executive Order" on September 19, 2003 establishing the Highlands Task Force. The Executive Order was a response to the recommendations of the U.S. Forest Services' "New York-New Jersey Highlands Regional Study", as evidenced by the Executive Order's commendation of the leadership of the New Jersey Congressional Delegation for Introduction of the Highlands Stewardship Act, which was initially distributed by the Congressional Delegation on January 24, 2003 in anticipation of the completion of the US Forest Services Study.

14. The Executive Order also recognizes that members of the public and local officials have been actively seeking the preservation of the Highlands Region for decades, including the recent work of the "Five County Coalition".

15. The Five County Coalition was formed in 2002 by the Boards of Chosen Freeholders of Hunterdon, Morris, Somerset, Sussex and Warren Counties. Its mission was to share information and initiatives among the five supporting counties and to advance the cause of efficient and effective county government. In response to and in conjunction with Federal initiatives, the Five County Coalition and many of its constituent counties developed responses both as to the elements of the proposed Highlands Stewardship Act and proposals for implementation by the State of New Jersey.

16. Competing approaches on an appropriate response to the Forestry Service Study were developed by the Highlands Coalition. In its "Vision Highlands Project" the suggested action included form letters to the governor calling for the creation of a task force made up of local leaders, conservation leaders, and State Legislators to recommend a regional approach to ensure permanent protection of critical Watershed lands and of ground and surface water supplies while addressing taxation/equity issues in the Highlands. The Highlands Coalition Project also included action letters to the governor dealing with land conservation and additional regulatory protection issues.

17. In a memorandum dated June 5, 2003, the Office of the Governor was advised by the Commissioner of the Department of Community Affairs, the Commissioner of the Department of Environmental Protection, and the Secretary of Agriculture that the Highlands Coalition was advocating that Governor McGreevey issue an Executive Order appointing a Highlands task force. Following a meeting with the Coalition, they were proposing that a task force be formed incorporating all tasks enumerated by the Highlands Coalition, with the exception that the task force look at regional planning models that could be adopted for the Highlands. The concern was that mentioning this item specifically would result in adverse reactions to the task

force among some local officials and residents who would see the task force as a prelude to establishment of a "Pinelands commission type entity for the Highlands and would be counter productive to having the task force becoming an effective body."

18. The Executive Order also authorized the Task Force to call upon any agency of the State to assist it in the discharge of its duties. One such entity was the New Jersey Water Supply Authority, records of which provide a record of the Task Force process. This process, described by Governor McGreevey as a "winning approach" developed by the office of the Governor to freeze development in the Highlands, was to create a Study to justify treatment of the N.J. Highlands in the same manner as the New Jersey Pinelands. Governor McGreevey addressed the Task Force at its October 29, 2003 meeting as follows: "…I ask you to be bold" …"we will get this done - we have to get this done…" "Failure is not an option."

19. The Executive Order also mandated that the task force specifically solicit the input from the Five County Coalition. In early February 2004, members of the Five County Coalition met with the Governor's Deputy Policy Director as a follow up to the February 10, 2004 official presentation by the Five County Coalition to the Highlands Task Force. The first draft

of the map defining a core preservation area, which had not yet been reviewed by the Task Force, was presented.

20. The December 2002 U.S. Forest Service Study does not recommend environmental regulation of the New York/New Jersey Highlands through establishment of a preservation core area subject to vigorous environmental regulations restricting development. Utilizing GIS mapping and the latest information available, the Forestry Service conducted a conservation values assessment reviewing issues such as recreational resource value, agricultural resource value, biodiversity/habitat resource value, productive forest resources, and water quality resources. The composite resource value, which also involves subjective analysis, included 38% (542,456 acres) of the New York/New Jersey Highlands Region as exceptional conservation value of which 312,230 acres are in New Jersey.

21. The Federal Study notes: "These highest ranked areas include the central core of the Highlands stretching from Greenpond/Mace Mountains in the Southwest up to the Pequonnok Watershed, Sterling Forest, Harriman and Bear Mountain, and then across the Hudson River through the Great Neck Ridge/East Mountain Area to the Clarence Fahnstock State Park. There are several notable outlining areas including Forest ridges and farm valleys of the Musconetcong/Scott Mountain area in the southwest, the west end of the New Carlton Reservoir in New

York, and the Deepblue Hill/Pollen Mountain area in the Northeast". Analysis and review of this description using the USDA GIS data reveals a portion of a physiographic province, the Green Pond Outlier, as the approximate 60,000 acre central core containing approximately 37,000 acres classified as exceptional resource value. (Attachment Map "A")

22. A copy of a draft task force map dated 2-17-2004 entitled "Highlands Study Area with Concept Core Area" was obtained. (Attachment "B"). The map contains the notation: "This map depicts a conceptual core area. Additional GIS layer updating, digitalizing corrections, and refinements will be necessary for a final core area. Basis for delineation: natural drainage to reservoirs, head waters of the South and North Branch of the Raritan, largest remaining forest sections, open space connectivity and SDR PA5."

23. In accordance with the mandate by the Executive Order to issue a report within 180 days, the Highlands Task Force Action Plan containing recommendations to preserve the New Jersey Highlands was issued to Governor James E. McGreevey and the New Jersey Legislature in March 2004. Employees of the New Jersey Water Supply Authority were recognized in its acknowledgments for their assistance in the Highlands Task Force initiative. The Task Force Report does not state what scientific data was utilized in determining that the preservation area should

between 350,000 and 390,000 acres. The Task Force recommended that the Department of Environmental Protection identify the lands and establish the boundaries of the preservation area in accordance with methods and scientific standards contained in its recommendations. It also recommended that the legislature authorize the DEP to establish interim regulations governing steep slopes, impervious cover, septic installations, wastewater treatment extensions, avoidance, minimalization and mitigation requirements related to forest, buffers on fresh water wet-lands, water allocation threshold, and no-net fill relative to stream encroachment in the Highlands. No State approvals related to the development were to be issued following the effective date of the legislation until the regulations had been promulgated.

24. On or about March 29, 2004, Senate Bill S1 known as the "Highlands Water Protection and Planning Act" (Act) was introduced in the New Jersey Senate. The Act contained a delineation of the Highlands Region which was not consistent with the previous NJ-DEP geological survey delineations of the Highlands Region and the Highlands Region as defined by the US Forestry Service.

25. The delineation of the preservation boundary was drafted in numerous iterations and adjusted in a number of instances at the behest of municipal officials, environmental organizations,

and effected property owners. The legal description of the preservation area was further modified by legislative amendment prior to the Act's final adoption. (Statutory Map Attachment "C")

26. The Act went beyond the recommendation of the Highlands Task Force by specifying environmental development standards applicable to properties requiring a Highlands Preservation Area Approval pending promulgation of regulations on an interim basis 270 days of the Act's enactment. The statute provided that these interim rules and regulations were to be in effect for a period not to exceed one year after the date of filing, but then noted that the rules and regulations should there after be adopted, amended or readopted in accordance with the Administrative Procedure Act.

27. No scientific basis was provided for the standards at the time the legislation was adopted.

28. The Act was subject to extensive amendments; among the most significant being the Senate amendment dated 5-14-04. While intended to modify some of the harshest aspects of the proposed Act, the effect of the amendment is to place the entire burden of the Act on the owners of large land parcels who are not eligible for the legislatively bargained exemptions. All legislative exemptions proposed in the 5-14-04 amendment were incorporated into the final version of the Act with the

exception of #18 which provided:"any major Highlands development located within the boundaries of the industrial park or commercial area located within a municipality located entirely within the preservation area, *provided* that such industrial park or commercial area has been designated by a municipal economic developmental commission prior to the enactment of the Act." The Amendment's sponsor noted in his Committee comments on the Act that the provision was intended to provide relief for an existing Ringwood industrial park, and that the provision had been excluded from the exemptions since the local elected officials did not support the same.

29. The issue of protection of property owner equity appears throughout the Act and in commentary on various amendments. Stated in the Act's purposes, the Act notes that the State should take action to delineate within the New Jersey Highlands a preservation area of "exceptional natural resource value that includes water shed protection and other environmentally sensitive lands. It goes on to state: "The new regional planning approach and the more stringent environmental regulatory standards should be accompanied as a matter of wise public policy and fairness to property owners, by a strong and significant commitment by the State to fund the acquisition of exceptional natural resource value lands; and that in the light of the various pressures now arrayed against the New Jersey

Highlands, these new approaches should be implemented as soon as possible."

30. While the Act purportedly protects the equity interests of farmers and property owners by requiring payment of pre-Act values for property obtained through Green Acres, Farmland Preservation, and Garden State Preservation Trust, these programs were not expanded. The legislative fiscal estimate for Assembly # 2655 (The Assembly version of the Act) indicates that the bill will annually dedicate twelve million dollars for 10 years and five million dollars thereafter from realty transfer fees to (1) compensate Towns adversely effected by decreased property values; (2) support watershed moratorium offset aid; (3) award local grants; (4) make five annual allocations of 1.8 million dollars to Highlands Communities to offset property tax increases. It also notes that the Highlands Water Protection and Planning Council was established to develop a regional master plan, help manage the regulatory provision of the bill, create a transfer of development rights program, and provide financial assistance when needed. The Office of Legislative Services also estimated that annual state appropriations of 3 - 4 million dollars may be required to support the Council operating budget. More funds may also be needed for start up cost, development of the regional master plan, and TDR developmental expenses.

31. The statutory funding mechanism selected was implementation of a special transfer of development rights program. Pursuant to N.J.S.A. 13:20-13, the Highlands Council was directed to identify areas within the planning are that are appropriate for development as voluntary receiving zones within 18 months of the enactment of the Act. The legislation explicitly provides that the Highlands Council was not required to wait to create the Transfer of Development Rights Program until the first regional Master Plan has been prepared. The TDR program was amended through the legislative process from requiring a designation of receiving zones in each planning area municipality to a goal of identifying 4% of the planning area as voluntary receiving areas. Financial incentives included grants of up to $250,000 to complete the process to incorporate TDR receiving zones and authority to impose a $15,000 per residential unit impact fee.

32. The Highlands Council was charged with the responsibility of adopting a regional master plan within 18 months of the date of its first meeting. In addition to the general responsibilities for implementation of a transfer of development rights program, the Highlands Council was mandated to identify potential voluntary receiving zones in the planning area for the transfer of development rights as part of the Master Plan Smart Growth Component.

33. The TDR program was represented to the legislature as a legitimate funding source. The Secretary of Agriculture in his testimony before the Senate Committee, stated: "The other thing that needs to be noted, is equity protection, is a big issue for farmers - that you have, in your considering in this bill a date of January 1 of 04, of this year, as the start time for zoning and regulation. …Making sure there is a viable TDR program that is consistent with the legislation that the legislature passed, as well as the governor signed a couple of weeks ago—making sure there is a viable TDR program. Again, TDR is one thing, or purchase of development rights is one thing. Making sure there is a viable TDR program so there is economically sustainable credits that can be transferred within the Highlands will be something else to consider…"

34. The Act provides specific time periods within which municipalities and counties located wholly or partially within the preservation area are obligated to bring their master plans and municipal ordinances into conformance with Master Plan recommendations. The initial statutory period of conformance within 6 to 12 months of the adoption of the Master Plan was amended to permit conformance to be between 9 and 15 months to provide additional time for municipal action. In addition to identifying potential receiving zones, the Act mandates that the Master Plan shall, as part of the smart growth component,

"…issue model minimum standards for municipal and county master planning and development regulations outside of the preservation area, including density standards for center based development to encourage, where appropriate, the adoption set standards."

35. The Act was approved by the Legislature on June 11, 2004 after Governor McGreevey linked adoption with the parallel law making it easier for developers to build with "fast tracking".

36. The Highlands Council held its initial organizational meeting on December 16, 2004 thereby establishing a statutory deadline for the Highlands Council to adopt its Master Plan by June, 2006.

37. In order to assess the scientific basis for the Highlands region and preservation area boundaries and the development standards, the Board of Chosen Freeholders of Warren County retained the services of an expert hydro-geologist. Based on publicly available graphic information system (GIS) databases and maps used by the NJ DEP, the US Forest Service, the New Jersey Geological Survey, and others, it was determined that water resource protection and preservation was not a primary goal of the Act. The findings and associated mappings were presented by the Freeholders to the Highlands Council at a meeting of the Highlands Council.

38. In accordance with the Act, the NJ DEP adopted special rules for the preservation area effective May 9, 2005 which were intended to serve as "interim" rules until such time as the final rule proposal takes effect. The interim rule allowed for a 45 day consultation period with other agencies and also invited public comment. Comments on the interim regulations were submitted by the Warren and Hunterdon Counties on June 20, 2005. Included in the comment were questions relating to the legitimacy of the limitation of impervious surface standards, open water buffers, and septic system minimum lot size requirements. In additions to incorporating the statutory development standards, the proposed interim regulations required minimum lot sizes of 88 acres for properties with greater than 50% forest and 25 acres for properties which were less than 50% forest. The interim regulations were published for readoption and adoption of the amendments in the New Jersey Register on December 19, 2006.

39. The County of Warren and the County of Hunterdon participated in the rule making process pursuant to the Administrative Procedure Act submitting extensive comments addressing legal, scientific, planning, and economic aspects of the rule proposal. Notice of the Agency's adoption of the proposed regulations and its responses to comments appear in the December 19, 2006 New Jersey Register. In addition to

establishing part of the record in any judicial appeal of the regulations, the Agency responses to comments constitutes part of the record relevant to the issues alleged herein.

DEP RULE RESPONSES

40. In response to comments that landowners should be able to recoup some of their equity caused by imposition by the DEP of the 88 acre and 25 acre density standards, the Agency responded: "Regarding the concern that proposed septic densities would 'limit construction of any kind', the Highlands Act establishes exemptions such that no parcel of land in existence prior to the passage of the Act is rendered non-developable, and provides for construction of at least one single family dwelling, regardless of lot size. In addition, the Highlands Act contemplates that some property owners will be interested in selling their land or development rights for preservation purposes. To that end, the Act requires that the Green Acres Program, State Agricultural Development Committee, (SADC), local government unit, or a qualifying tax exempt non-profit organization seeking to acquire land to be preserved in the Highlands obtain two appraisals (one representing pre-Highlands values and one representing current value). The agencies seeking to purchase the land are required to inform the land owner of both values and to negotiate using the higher of the two. A third provision intended to alleviate hardship

for landowners in the Highlands is the requirement that the Highlands Council establish a transfer of development rights program for the Highlands region. This program can provide another source of revenue to landowners with land upon which development has been restricted."

41. In response to the comment that there was no water resource related scientific justification for the 3% impervious limit, the Agency responded: "The 3% impervious surface limit is established for the Highlands Act at N.J.S.A. 13:20-32h. Impervious surface is also defined in the Highlands Act at N.J.S.A. 13:20-3 to include "Porous paver blocks, gravel and crushed stone". There are scientific justifications for such limits and a substantial volume of literature that documents that increasing percentages of impervious surface on a basin wide scale are strongly correlated to the degradation of water quality." The scientific literature was not identified.

42. In response to the comment that there was no scientific basis for a 300 foot buffer from Highlands "open waters", which include intermittent streams, the DEP responded: "The Highlands Act at N.J.S.A. 13:20-32a mandates that rules prohibit major Highlands development within 300 feet of any Highlands open waters. There is extensive scientific literature evaluating buffer widths. These studies reveal that widths may vary depending upon the function they are intended

to provide. These functions include sediment removal, stream bank stabilization; nutrient removal; contaminant removal; flood storage; wildlife habitat; aethstetics; and recreation and education. Because of the environmentally sensitive nature of the Highland's Preservation Area, adequate buffers adjacent to Highlands open waters would be desired to protect all these functions. Narrow buffers (100 feet or less) may help with stream bank stabilization but will not be adequate for nutrient and contaminant removal or wildlife habitat. A study by the Environmental Law Institute concluded that a buffer of at least 325 feet (100 meters) is necessary to achieve water quality protection (Environmental Law Institute. 2003. "Conservation Thresholds for Land Use Planners." Washington, D.C. 55 pages). Consequently it is likely that such literature was used to determine that 300 foot buffers are necessary and appropriate to adequate protect Highlands open waters."

43. In response to the comment that the DEP delete the requirement for submission of applications to consider transfer of development rights, the DEP determined to simply not enforce the regulation and commented: "When the future Transfer of Development Rights (TDR) Program to be created by the Highlands Council (See N.J.S.A. 13:20-13) establishes a value for land, it might be appropriate to use TDRs to preserve land instead of allowing an impact to the historic future. The Department will

not require the owner to demonstrate that he or she has attempted to use the TDR program until the program is in place.

44. In response to a comment that a goal of the Highlands Act was to protect the equity of land owners, the Agency responded: "Neither Federal nor State Law guarantees a property owner the maximum "development potential" of property or payment if that maximum use is not achieved. If a zoning or land use regulation deprives a land owner of all beneficial use of the property, the law requires "just" compensation, not compensation for the maximum "development potential". What is just compensation for a single lot owner will likely be less then what is compensated for an owner of a larger property. Compensation under the Highlands Act may take the form of cash or comparable development opportunity, such as transfer of development rights (TDR) in an other, less environmentally sensitive area. In either event, all property owners in the preservation area are entitled to just compensation if their property is left with no beneficial use following completion of the HPAA Application process.

45. In response to a comment that the regulations referred to as a transfer developments program that does not exist and has no chance of existing when the proposed regulations are planned to become law, the Agency responded: "The use of a Transfer of Development Rights (TDR) Program to alleviate claims of taking

without just compensation is entirely consistent with the Highlands Act which specifically requires the creation of such program by the Highlands Council. The Department acknowledges that until such time as the TDR Program is active, the Department will not require applicants to demonstrate that they have attempted used such program."

46. In response to a comment that TDR requirements should be removed because they do not exist, the Agency responded: "The timing of the Departments regulations and the Regional Master Plan (RPM), as dictated by the Act, makes it impossible for the Department to wait completion of the RMP and Transfer of Development Program before promulgating these Rules. The Department must view the Act in its entirety and pre-suppose that all provisions of the Act will be implemented as directed by the New Jersey Legislature. Therefore, the Department believes it is appropriate to reference the Transfer of Development Right Program contained in the Act. However, in the absence of the developed TDR Program, the Department's rule contained adequate alternative provisions to be used by an applicant to successfully apply for and receive a Highlands approval."

47. In response to the comment that effective implementation of TDRs is expected to take years with the market's acceptance of

same being too speculative for creditable consideration at this time, the Department responded:

"It is the Departments understanding that Transfer of Development Rights (TDR's) Program will be implemented shortly after the Highlands Council adopts the Regional Master Plan which the Department understands is expected to take place by December of 2006. The market will depend upon how the credits are assigned and the availability of receiving districts and that information is currently being discussed by the Highlands Council and the public."

48. In response to the comment that the statutory structures to protect the equity interest of large lot owners was inadequate since funding for the Green Acres and Farmland Preservation Programs will soon be exhausted and that the TDR program is ephemeral the Agency responded:

"The Green Acres and Farmland Preservation Programs were given funding by the State Legislature to purchase land and development rights specifically in the Highlands: 20 million dollars is appropriated for Green Acres Land Acquisition and 15 million for State Farmland Preservation Program. To date, this funding is not exhausted. It is the Departments understanding that transfer of development rights (TDR's) programs will be implemented shortly after the Highlands Council adopts the Regional Master Plan, which the Department understands is

expected to take place by December of 2006. The availability of receiving districts and the assignment of credits is currently being discussed by the Highlands Council and the public"

49. In response to comments that 82% of the value of New Jersey Agricultural Land reflects future development rights, the Department responded:

"The Department did not consider the development potential of property as a function of agricultural use since all property owners have an interest in this topic regardless of occupation".

50. Concerning the delineation of the preservation area, the agency responded

"The boundary of the Highlands Preservation Area was prescribed by the Highlands Act in order to delineate an area of exceptional value that includes watershed protection and other environmentally sensitive lands. The preservation area designation was based upon a recommendation from the March 2004 Action Plan of the Highlands Task Force, which was based upon natural resource data assembled by the United Stated Forest Service, Rutgers-The State University, and the New Jersey Water Supply Authority."

HIGHLANDS COUNCIL STATUTORY IMPLEMENTATION

51. The Highlands Council did not identify TDR sending and voluntarily receiving zones within 18 months of the date of enactment of the Highlands Act. Instead, the Highlands Council enacted a resolution indicating that the data and information being assembled for the Regional Master Plan for resource assessment and smart growth component needed to be completed before receiving zones could be established. Instead, the resolution adopted narrative criteria for sending and voluntary receiving zones.

52. On April 20, 2006, the Highlands Council adopted a resolution ratifying its decision of April 6, 2006 to follow a comprehensive schedule for the adoption of the Regional Master Plan before the end of December, 2006. The Council was advised that failure to comply with statutory mandates for adoption of the Master Plan and TDR Program rendered any future action ultra vires and that curative legislation was required.

53. Pursuant to the Master Plan adoption schedule, various components of the Master Plan were released as white papers by Council staff for review and discussion. The October 3, 2006 policy consideration dealing with establishment of the Highlands TDR program noted the following staff recommendations: "As is evident from the above discussion, further work is required to establish an implimentable Highlands TDR Program. It is anticipated that the following

tasks will be completed within 6 months of the Regional Master Plan: Implement a Voluntary TDR Receiving Zone Feasibility Grant Program, approval of conservation deed restrictions, establish Highlands TDR Bank including the appointment of a five member Board of Directors and the adoption of Bi-Laws, establish resource value factor, completion of real estate analysis, establish real estate market factors, establish end use factors, establish minimum HDC price, and approval of HDC certificate."

54. The staff also made the following recommendations for legislative proposals: (1) The Highlands Council should explore amending the Highlands Act to permit any municipality in the State to participate in the Highlands TDR Program by becoming a receiving zone. If this proposal became law, it would allow communities in markets such as Hudson and Ocean Counties to establish receiving zones and HDCs. Along with such authorization, the proposal would allow municipalities to participate in the Highlands TDR program to assess impact fees. (2) To authorize any development transfer bank established by the Highlands Council to guarantee loans secured by HDCs as collateral.

55. During interaction with Highlands Council staff, various Council Members expressed their disbelief that municipalities would voluntarily accept additional growth in return for an

impact fee of $15,000 per residential unit, given the fact that the cost of educating a student for one year is approximately this amount. Council staff also indicated that the Highlands TDR Program is the largest ever attempted in the United States.

56. In the cash flow time table's policies white paper, staff estimated that it will, at a minimum, cost roughly $100,000 per municipality or County for revisions of Master Plans, Zoning Ordinances, other development regulations, and general administrative costs to conform with the Regional Master Plan. The White Papers indicate that all municipalities with portions of Highlands Preservation Area will conform by March 2008, or 15 months after the adoption of the RMP. All seven counties with portions of Highlands Preservation Area will conform by March 2008, or 15 months after adoption of the RMP. Starting fiscal year of 2009, all planning area towns will begin opting in to the conformance process at the rate of 9 towns per year through fiscal year 2012.

57. On November 30, 2006 the Highlands Council adopted a resolution authorizing the release of a Draft Regional Master Plan. A 60 day public comment period was initially extended by the Highlands Council to March 2, 2006. The comment period was further extended twice to April 2, 2007 and May 11, 2007.

58. While the Highlands Council Chairman hopes that the Regional Master Plan will be adopted sometime before September

30, 2007 and implementation of a "first phase" of the transfer of development rights program should occur sometime between October and the end of November, 2007, the detailed discussion in his certification submitted in OFP, LLC. vs. State of New Jersey, Docket No.: A-3190-05TI contains substantial variables rendering it uncertain when the statutory tasks of creating a TDR Program and adopting a Regional Master Plan will be completed.

59. Pursuant to N.J.S.A. 13:20-11 6b, the Smart Growth component of the Master Plan is required to "Identify potential voluntary receiving zones in the planning area for the transfer of development rights, to the appropriate expansion of infrastructure or the modified uses of existing infrastructure." Instead, the Draft Master Plan proposes to establish a "frame work" for the Highlands TDR program. As noted in the Draft Master Plan: "Another significant consideration is the fact that any receiving zones in the Highlands TDR program are strictly voluntary. The ability to develop with TDR credits in receiving zones establishes the demand for those credits. Without receiving zones, the market based TDR program will not succeed. The Highlands Council simply does not have the authority to mandate specific receiving zones which municipalities must accommodate; the

Highlands Council may only recommend areas that are appropriate which the municipalities are under no obligation to accept."

"…Identification of receiving zones tends to be more difficult. In addition to determining whether a potential receiving zone has the ecological integrity and infrastructure capacity to accept increased development, there is often the political challenge of over coming reluctance to accept additional growth. Through careful planning and public input, however, these challenges may be overcome."

60. Included as part of the statutory requirements for the Regional Master Plan is a Land Use Capability Map which is to provide for a comprehensive evaluation of both resource constraints and development opportunities. (Attachment "D") Over 50 indicators were used to characterize the Highlands Region and assign the most appropriate overlay zone. While the methodology behind the overlay zones and the subjective application of individual indicators are purportedly contained in technical reports, the Council has repeatedly asserted that this analysis would be done "blind to the line" (ie: the preservation area boundaries). A review of the Land Capability Map indicates that with the exception of existing developed areas and several Town Center designations, virtually the entire planning area is in either a protection zone or a conservation zone. The protection zone is defined as high

resource value lands that are important to maintaining water quality, quantity and other significant ecological processes. The conservation zone, which contains significant agricultural lands and environmental features, is also to be preserved whenever possible.

61. This blind to the line analysis establishes that there is no scientific resource based assessment to justify the preservation boundaries.

FIRST COUNT ULTRA- VIRES ACTION

62. Plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs as if fully set forth at length in this count.

63. The Highlands Council is without authority to adopt the Master Plan or implement the TDR Program since it has not completed these tasks in accordance with statutory mandates.

64. The Act contains specific deadlines for implementation of a Master Plan and development of a transfer of development rights program. The failure of the Highlands Council to comply with statutory mandates frustrates the legislative scheme and purposes of the Act.

WHEREFORE, the plaintiffs seek judgment as follows:

1. Declaring the Highlands Council's self-extension of the statutory deadline established by N.J.S.A. 13:20-8 to adopt

a regional master plan within 18 months of its first meeting to be ultra vires.

2. Declaring that compliance with the statutory deadline in N.J.S.A. 13-20-8 is an essential term of the legislation which is non-severable from the Highlands Act.

3. Declaring that the Highlands Act is invalid.

4. Declaring that this decision shall be stayed for six months to permit the State Legislature to enact curative legislation.

5. Award of such other relief as the Court may deem equitable and just.

SECOND COUNT EQUAL PROTECTION: STATUTORY EXEMPTIONS

65. The plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs as if fully set forth in this count.

66. The establishment of a series of legislatively bargained exemptions places the entire burden of imposing development restrictions on the owners of larger parcels of land that are not eligible for the exemptions. The application of the exemptions unlawfully treats properties and owners of properties in the preservation area differently than other property owners similarly situated in violation of the equal protection guaranty inherent in Article One, Paragraph One of the State Constitution.

WHEREFORE, the Plaintiffs seek judgment as follows:

1. Declaring that N.J.S.A. 13:20-28 establishing exemptions from the Highlands Act is arbitrary, capricious and unreasonable and violates the equal protection guarantee of Act I paragraph 1 of the New Jersey Constitution.

2. Declaring that N.J.S.A. 13:20-28 is essential to and non-severable from the Highlands Act.

3. Declaring that the Highlands Act is invalid.

4. Declaring that this decision shall be stayed for six months to permit the State Legislature to enact curative legislation.

5. Award of such other relief as the Court may deem equitable and just.

THIRD COUNT: FAILURE OF FUNDING

67. The plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs as if fully set forth in this count.

68. The Transfer of Development Rights Program was intended by the Legislature to be a meaningful and viable source of funding to compensate property owners for lost equity in the preservation area. The specific finding of the Legislature was that the new regional planning approach and more stringent environmental regulatory standards should be accompanied, as a matter of wise public policy and fairness to property owners, by

a strong and significant commitment by the State to fund the Acquisition.

69. DEP comment responses to the Highlands regulations confirm that TDRs are intended to be a source of compensation.

70. Highland's Council staff White Papers and the Draft Master Plan demonstrate that a TDR program will not be in place for years, and will be unsuccessful, even if recommended legislation extending receiving zones to the entire State is adopted since it is voluntary with inadequate incentives and is too massive in scope.

71. The Highlands Council recognized the failure of the funding mechanisms in its Resolution authorizing the release of the Draft Master Plan as follows: "Call upon the Executive and Legislative branches to take the necessary steps to effectuate the fairness and just compensation provisions of the Highlands Act to provide a strong and significant commitment by the State to fund acquisition of exceptional natural resource value lands consistent with the goals provisions of the regional Master Plan."

WHEREFORE, the plaintiffs seek judgment as follows:

1. Declaring that N.J.S.A. 13:20-13 which directs the Highland Council to establish or Transfer of Development Rights Program, is arbitrary, capricious and unreasonable since it is not a viable funding source.

2. Declaring that N.J.S.A. 13:20-13 is essential to and non-severable from the Highlands Act.

3. Declaring that the Highlands Act is invalid.

4. Declaring that this decision shall be stayed for six months to permit the State Legislature to enact curative legislation.

5. Award of such other relief as the Court may deem equitable and just.

FOURTH COUNT: EQUAL PROTECTION AND DUE PROCESS: SCIENTIFIC ISSUES

72. The plaintiffs repeat and reallege the allegations set forth in the preceding paragraphs as if fully set forth herein. The Highlands Task Force was created by Executive Order of Governor McGreevey as part of what he has described as a "winning approach" to freeze development in the Highlands. The findings of the Highlands Task Force were manipulated through the legal fiction of a core area to justify a methodology of treating the New Jersey Highlands in the same manner as the New Jersey Pinelands.

73. The New Jersey Pinelands preservation area is linked by common hydrogeologic features involving water sensitive constraints with the million acre federally owned core area: the Pinelands National Reserve. The Pinelands protection area, where growth is controlled by the Pinelands Commission, contains

different hydrogeological conditions which provide a legitimate scientific basis for the Pineland's preservation boundaries.

74. The Highlands legislative boundaries were adjusted at the behest of municipalities, environmental interests, and property owners both initially by the DEP prior to the Act's introduction and subsequently through legislative amendments.

75. The preservation area boundaries are arbitrary, capricious and unreasonable and are not justified or rationally related to a legitimate government interest, and are an invalid exercise of the State's police power.

76. The restrictions imposed on property in the preservation area by virtue of Highlands Act violate the due process and equal protection guarantees inherent Article One, paragraph One of the State Constitution.

WHEREFORE, Plaintiffs seek judgment as follows:

1. Declaring N.J.S.A. 13-20-7(b) defining the boundaries of the preservation area to be arbitrary capricious and unreasonable since it is without a legitimate scientific basis.

2. Declaring that N.J.S.A. 13-20-7(b) violates the equal protection and due process guarantees of Article I Paragraph 1 of the New Jersey Constitution.

3. Declaring that N.J.S.A. 13:20-7(b) is essential to and *non-severable from the Highlands Act.*

4. Declaring that the Highlands Act is invalid.

5. Declaring that this decision shall be stayed for six months to permit the State Legislature to enact curative legislation.

6. Award of such other relief as the Court may deem equitable and just.

HUESTON MCNULTY, P.C.
Attorneys for County of Warren

By: _____
STEPHEN H. SHAW, ESQ.

Dated: 4/17/07

BROSCIOUS, FISCHER AND ZAITER
Attorneys for David Shope, Hank Klumpp, Charles Shoop, Robert and Ruth Best, Andrew and Lois Drysdale, Jerry W. and Sandra Kern

By: John M. Zaiter
JOHN M. ZAITER, ESQ.

Dated: 4/17/07

CERTIFICATION PURSUANT TO RULE 4:5-1

Pursuant to Rule 4:5-1, the undersigned certifies that to the best of my knowledge and belief, the following actions have been instituted concerning the Highlands Act and the Highlands Regulations: ABD Liberty, Inc. v. State, Docket No. SOM-L-505-05, Castle Rock Estate, Inc. v. State Docket No.: PAS-L-003218-05, Congregation of the Daughters of Divine Charity v. State, Docket No.: WRN-L-325-05, Gospel Tabernacle of the Christian and Missionary Alliance of Phillipsburg, Inc. v. State, Docket No.: 07-132, US District Court, Trenton Division, OFP, LLC. v. State, Docket No.: MRS-L-000160-05, Pio Costa Enterprises, et al v. State, Docket No.: MRS-L-002607-05, In the Matter of the Highlands Water Protection and Planning Act Rules, N.J.A.C. 7:38, A-5389-05T1, A-3125-06T1, A-3026-06T1, A-3027-06T1, A-3128-06T1, A-3129-06T1, A-3130-06T1, A-3131-06T1, A-3132-06T1, A-3133-06T1, A-3134-06T1, A-3135-06T1, A-3136-06T1, A-3137-06T1, A-3138-06T1, A-3139-06T1, A-3140-06T1, A-3141-06T1, A-3142-06T1, A-3143-06T1, A-3144-06T1, A-3145-06T1, A-3146-06T1, A-3147-06T1, A-3148-06T1, A-3149-06T1, A-3150-06T1, A-3151-06T1.

HUESTON MCNULTY, P.C.
Attorneys for County of Warren

By: _____
STEPHEN H. SHAW, ESQ.

Dated: 4/17/07

BROSCIOUS, FISCHER AND ZAITER
Attorneys for David Shope, Hank Klumpp, Charles Shoop, Robert and Ruth Best, Andrew and Lois Drysdale, Jerry W. and Sandra Kern

By: John M. Zaiter
JOHN M. ZAITER, ESQ.

Dated: 4/17/07

DESIGNATION OF TRIAL COUNSEL PURSUANT TO RULE 4:25-4

You are hereby notified that STEPHEN H. SHAW, ESQ. is hereby designated as trial counsel on behalf of plaintiff, County of Warren and JOHN M. ZAITER, ESQ. is designated trial counsel on behalf of David Shope, Hank Klumpp, Charles Shoop, Robert and Ruth Best, Andrew and Lois Drysdale, Jerry W. and Sandra Kern.

HUESTON MCNULTY, P.C.
Attorneys for County of Warren

By: _____
STEPHEN H. SHAW, ESQ.

Dated: 4/17/07

BROSCIOUS, FISCHER AND ZAITER
Attorneys for David Shope, Hank Klumpp, Charles Shoop, Robert and Ruth Best, Andrew and Lois Drysdale, Jerry W. and Sandra Kern

By: _____
JOHN M. ZAITER, ESQ.

Dated: 4/17/07

Exhibit "A"

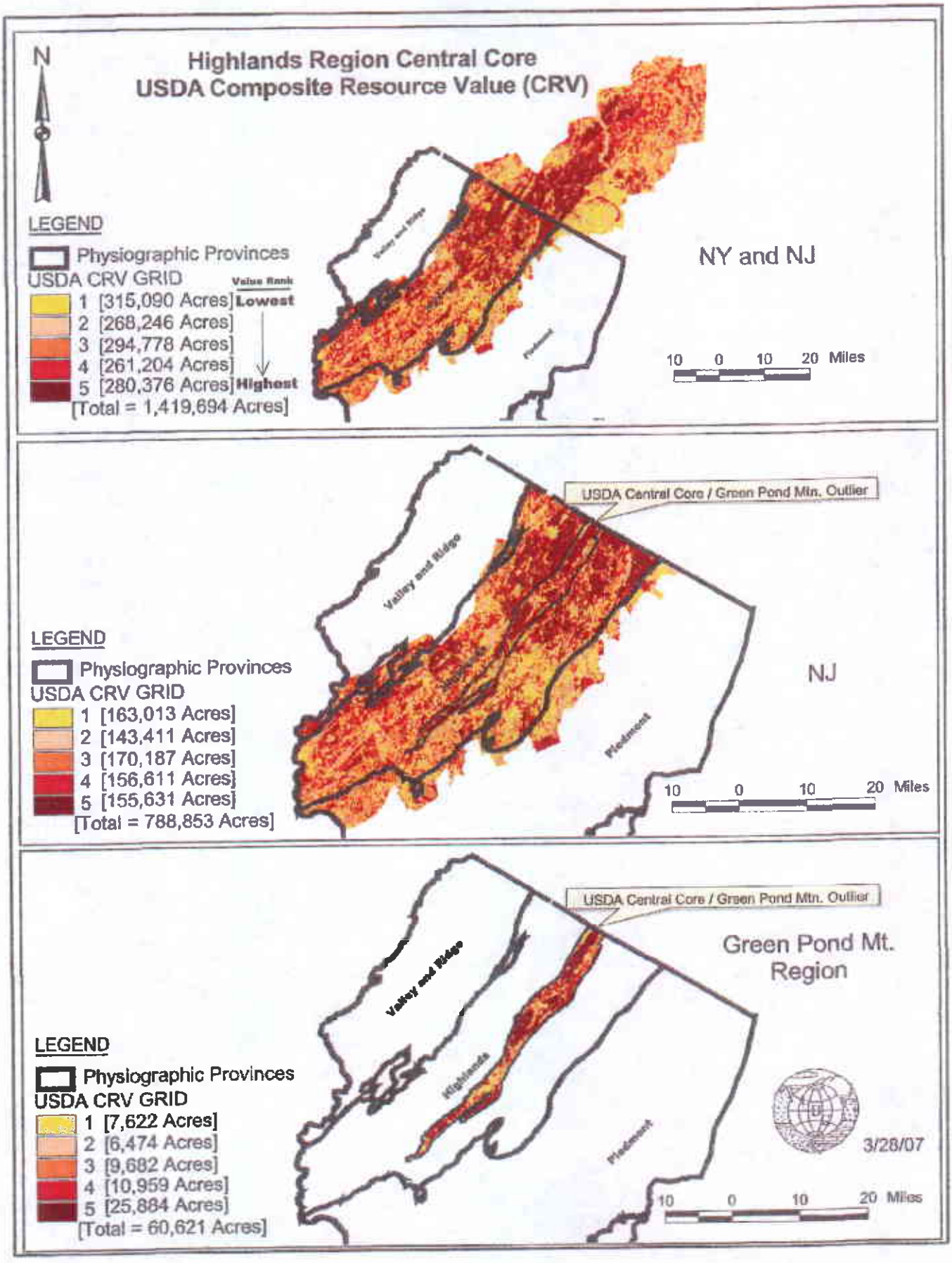
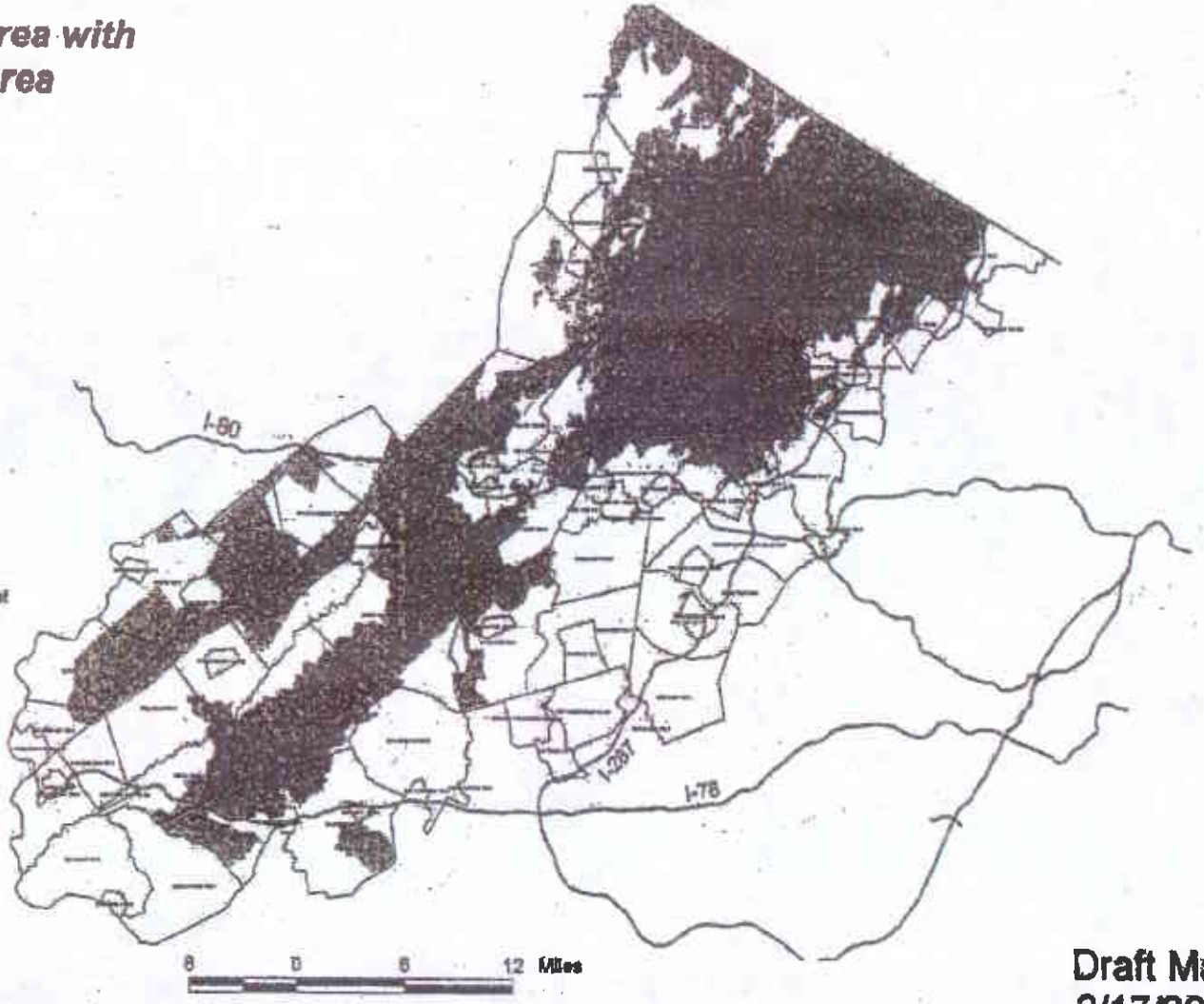

N
Highlands Region Central Core
USDA Composite Resource Value (CRV)
LEGEND
Physiographic Provinces
USDA CRV GRID
Value Rank
1 [315,090 Acres] Lowest
2 [268,246 Acres]
3 [294,778 Acres]
4 [261,204 Acres]
5 [280,376 Acres] Highest
[Total = 1,419,694 Acres]
NY and NJ
10 0 10 20 Miles
USDA Central Core / Green Pond Mtn. Outlier
Valley and Ridge
Piedmont
LEGEND
Physiographic Provinces
USDA CRV GRID
1 [163,013 Acres]
2 [143,411 Acres]
3 [170,187 Acres]
4 [156,611 Acres]
5 [155,631 Acres]
[Total = 788,853 Acres]
NJ
10 0 10 20 Miles
USDA Central Core / Green Pond Mtn. Outlier
Green Pond Mt.
Region
Valley and Ridge
Highlands
Piedmont
LEGEND
Physiographic Provinces
USDA CRV GRID
1 [7,622 Acres]
2 [6,474 Acres]
3 [9,682 Acres]
4 [10,959 Acres]
5 [25,884 Acres]
[Total = 60,621 Acres]
3/28/07
10 0 10 20 Miles

Exhibit "B"

Highlands Study Area with Conceptual Core Area



Conceptual Core Size: 370,325 Acres
Major Surface Water in core - 17,915 Acres

This map depicts a conceptual core area. Additional gis layer updating, digitizing corrections and refinements will be necessary for a final core area.

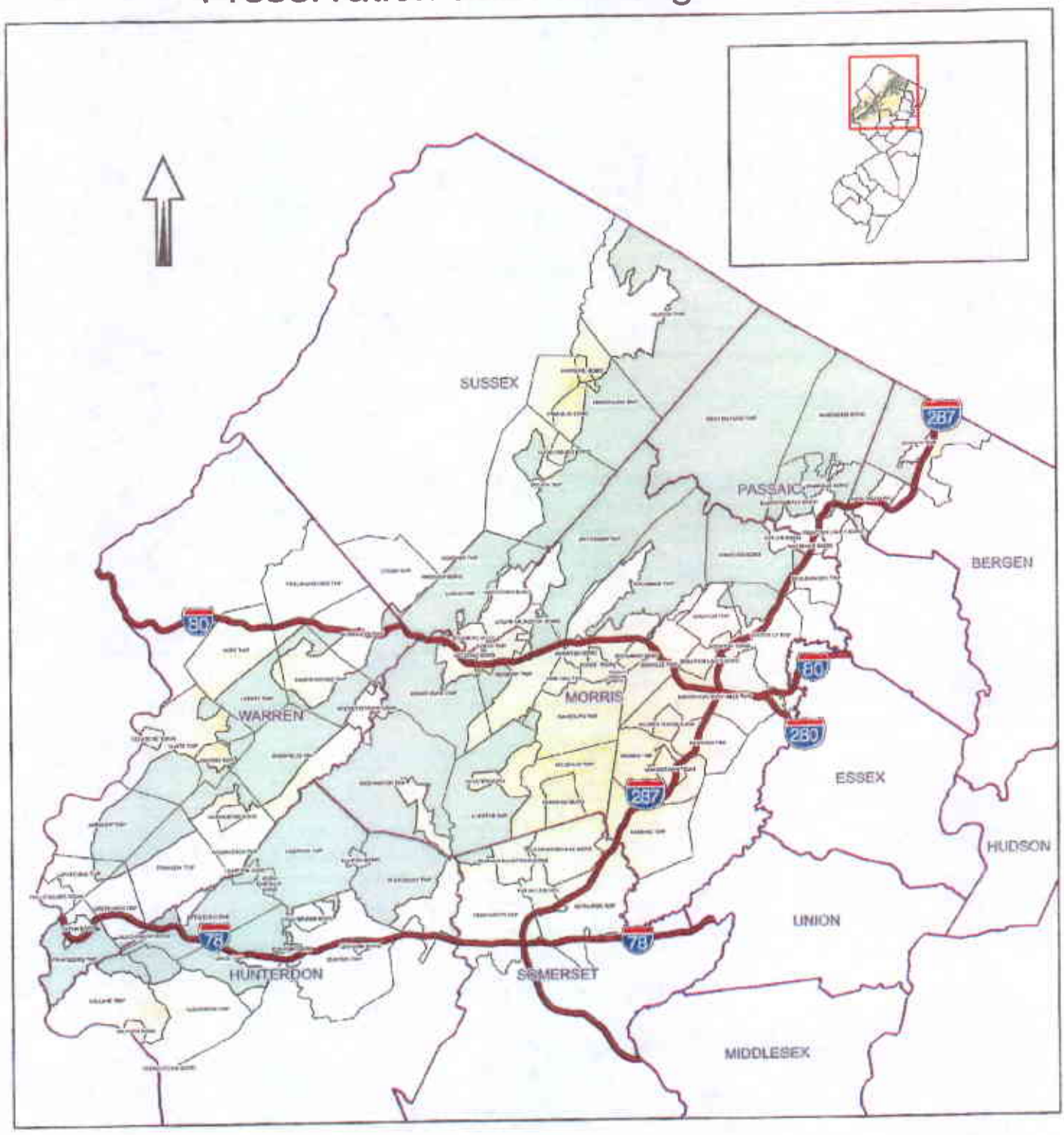
Basis for delineation: Natural Drainage to Reservoirs, headwaters of the South & North Branch of the Raritan, Largest Remaining Forest Sections, Open Space Connectivity and SDRP PA 5

GIS Scale 1:700,000

Draft Map
2/17/2004

Exhibit "C"

New Jersey Highlands
Preservation and Planning Areas

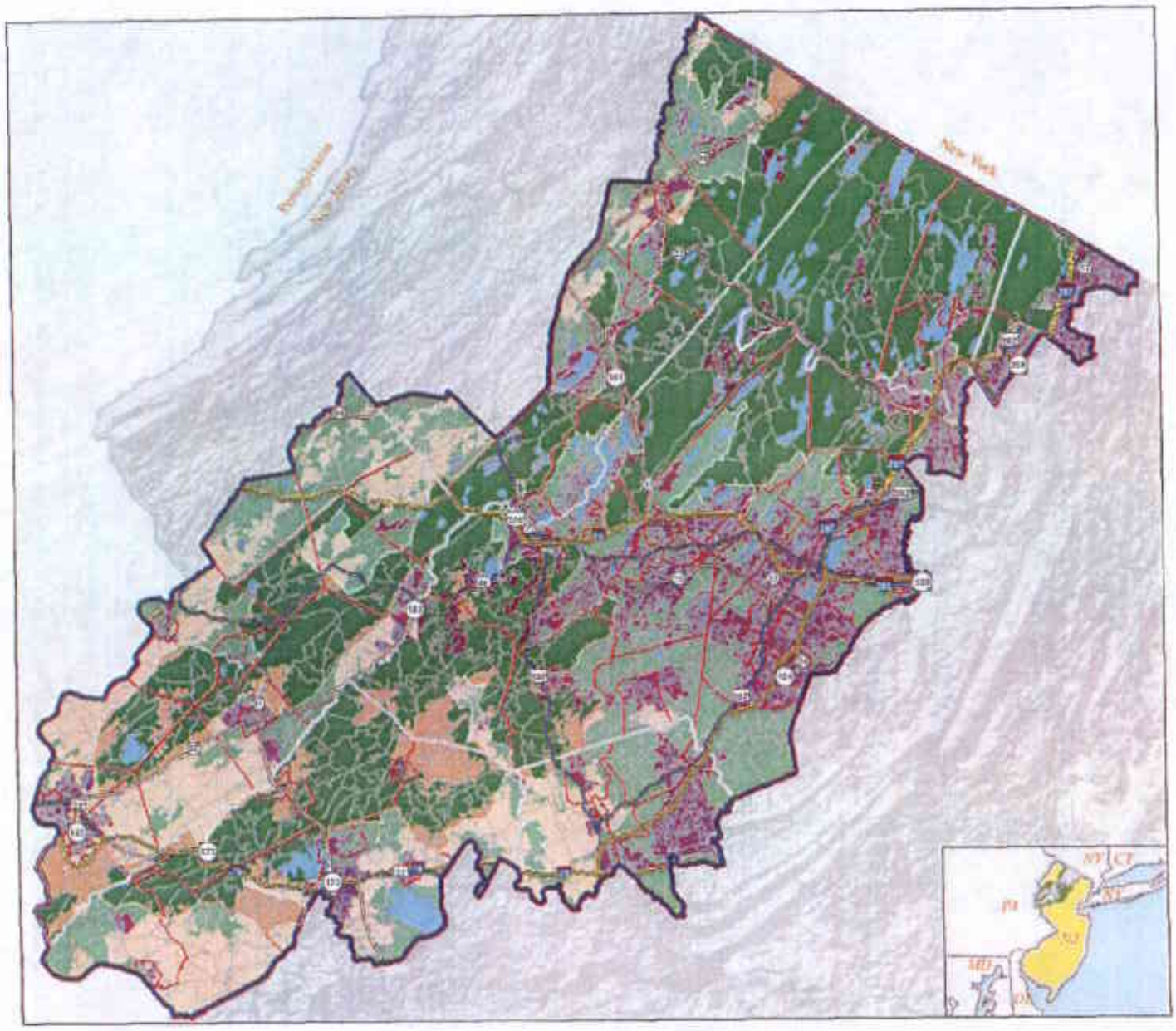


0 2.5 5 10 15 20 Miles

- Highlands Preservation Area
- Highlands Planning Area
- Counties
- Municipalities
- Interstate Highways

December 2005

Exhibit "D"



Draft
Regional Master Plan

LAND USE CAPABILITY MAP

Source:
New Jersey Highlands Council, 2006

Legend

- Highlands Boundary
- Preservation Area
- County Boundaries
- Municipal Boundaries
- Major Lakes
- Interstate Highways
- U.S. Routes
- State Routes
- County and Local Roads

Regional Master Plan
Overlay Zone Designations

Preservation Area	Planning Area
Conservation Zone	Conservation Zone
Protection Zone	Protection Zone
Planned Community Zone/ Specially Planned Areas	Planned Community Zone/ Specially Planned Areas

N

0 1.5 3 6 9 12 Miles

The information contained on this map is the best available according to the Highlands Council. However, unintentional inaccuracies may occur, particularly where data or information is derived from sources other than the Highlands Council. The Highlands Council cannot be responsible for the errors or misinterpretation of the information presented herein. Therefore, under no circumstances shall the State of New Jersey or specifically, the Highlands Council be liable for any unintentional errors or omissions made from reliance on any information contained herein from whatever source nor shall the State be liable for any other consequences from any such reliance. Additional sources of information may include NJDOT and NJDEP GIS digital data, but this secondary product has not been verified by NJDEP.

Prepared By:
New Jersey Highlands Council

November 2006

Highlands Council
New Jersey

CIVIL CASE INFORMATION STATEMENT

(CIS)

Use for initial Law Division – Civil Part pleadings (not motions) under Rule 4:5-1.
Pleading will be rejected for filing, under Rule 1:5-6(c), if information above the black bar is not completed or if attorney's signature is not affixed.

FOR USE BY CLERK'S OFFICE ONLY	
PAYMENT TYPE:	CK CG CA
CHG/CK NO.	
AMOUNT:	
OVERPAYMENT:	
BATCH NUMBER:	

ATTORNEY/PRO SE NAME	TELEPHONE NUMBER	COUNTY OF VENUE
John M. Zaiter, Esq.	(908) 689-0992	Mercer County
FIRM NAME (If applicable)		**DOCKET NUMBER (When available)**
Broscious, Fisher and Zaiter		To Be Supplied
OFFICE ADDRESS		**DOCUMENT TYPE**
111 W. Washington Avenue Washington, NJ 07860		Complaint For Declaratory Judgment
		JURY DEMAND ☐ YES ☑ NO

NAME OF PARTY (e.g., John Doe, Plaintiff)	CAPTION
David Shope, Hank Klumpp, Charles Shoop, Robert & Ruth Best, Andrew & Lois Drysdale, Jerry W. & Sandra Kern	County of Warren, David Shope, Hank Klumpp, Charles Shoop, Robert and Ruth Best, Andrew and Lois Drysdale, Jerry W. and Sandra Kern vs. State of New Jersey et al vs. NJ Highlands Coalition et al

CASE TYPE NUMBER (See reverse side for listing): 999 - Declaratory Judgment Action

IS THIS A PROFESSIONAL MALPRACTICE CASE? ☐ YES ☑ NO
IF YOU HAVE CHECKED "YES," SEE N.J.S.A. 2A:53A-27 AND APPLICABLE CASE LAW REGARDING YOUR OBLIGATION TO FILE AN AFFIDAVIT OF MERIT.

RELATED CASES PENDING? ☑ YES ☐ NO
IF YES, LIST DOCKET NUMBERS: See Certification Pursuant to Rule 4:5-1 Attached

DO YOU ANTICIPATE ADDING ANY PARTIES (arising out of same transaction or occurrence)? ☐ YES ☑ NO

NAME OF DEFENDANT'S PRIMARY INSURANCE COMPANY, IF KNOWN
☐ NONE ☑ UNKNOWN N/A

THE INFORMATION PROVIDED ON THIS FORM CANNOT BE INTRODUCED INTO EVIDENCE.

CASE CHARACTERISTICS FOR PURPOSES OF DETERMINING IF CASE IS APPROPRIATE FOR MEDIATION

A. DO PARTIES HAVE A CURRENT, PAST OR RECURRENT RELATIONSHIP? ☐ YES ☑ NO
IF YES, IS THAT RELATIONSHIP ☐ EMPLOYER-EMPLOYEE ☐ FRIEND/NEIGHBOR ☐ OTHER (explain) _____ ☐ FAMILIAL ☐ BUSINESS

B. DOES THE STATUTE GOVERNING THIS CASE PROVIDE FOR PAYMENT OF FEES BY THE LOSING PARTY? ☑ YES ☐ NO

USE THIS SPACE TO ALERT THE COURT TO ANY SPECIAL CASE CHARACTERISTICS THAT MAY WARRANT INDIVIDUAL MANAGEMENT OR ACCELERATED DISPOSITION:

DO YOU OR YOUR CLIENT NEED ANY DISABILITY ACCOMMODATIONS? ☐ YES ☑ NO
IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION: _____

WILL AN INTERPRETER BE NEEDED? ☐ YES ☑ NO
IF YES, FOR WHAT LANGUAGE: _____

ATTORNEY SIGNATURE: John M. Zaiter

Revised effective 9/1/05

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PAYMENT TYPE:	CK CG CA
CHG/CK NO.	
AMOUNT:	
OVERPAYMENT:	
BATCH NUMBER:	

ATTORNEY/PRO SE NAME	TELEPHONE NUMBER	COUNTY OF VENUE
Stephen H. Shaw, Esq.	(973) 377-0200	Mercer County
FIRM NAME (If applicable)		**DOCKET NUMBER (When available)**
Hueston McNulty, P.C.		To Be Supplied
OFFICE ADDRESS		**DOCUMENT TYPE**
256 Columbia Turnpike, Suite 207 Florham Park, N.J. 07932		Complaint For Declaratory Judgment
		JURY DEMAND ☐ YES ☑ NO

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Plaintiff-County of Warren	County of Warren, David Shope, Hank Klumpp, Charles Shoop, Robert and Ruth Best, Andrew and Lois Drysdale, Jerry W. and Sandra Kern vs. State of New Jersey et al vs. NJ Highlands Coalition et al

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RELATED CASES PENDING? ☑ YES ☐ NO

IF YES, LIST DOCKET NUMBERS: See Certification Pursuant to Rule 4:5-1 Attached

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IF YES, PLEASE IDENTIFY THE REQUESTED ACCOMMODATION: _____

WILL AN INTERPRETER BE NEEDED? ☐ YES ☑ NO
IF YES, FOR WHAT LANGUAGE: _____

ATTORNEY SIGNATURE

Revised Effective 4/1/05

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Broscious, Fischer and Zaiter		To Be Supplied
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WILL AN INTERPRETER BE NEEDED? ☐ YES ☑ NO — IF YES, FOR WHAT LANGUAGE: _____

ATTORNEY SIGNATURE

Revised effective 4/1/05