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Stephen H. Shaw, Esq.
Hueston, McNulty, P.C.
256 Columbia Tpk., Suite 207
Florham Park, NJ 07932

Re: Warren County et al. v. State of New Jersey, et al.
Docket No.: MER-L-1021-07
Your file no.: 8542

Dear Mr. Shaw:

You have asked me to supply you with a report concerning the above-referenced case. I have previously sent you my c.v. You have provided me with or directed me to abundant materials on the case for my review, including:

Comments on rule proposal from David K. Dech dated February 16, 2006 (planning)

Comments on Highlands Regional Master Plan from Warren County Planning Department dated May 11, 2007

Planning Impacts of the Highlands Act, by David K. Dech (undated)

Consulting Report from Holzhauer & Holenstein dated February 14, 2006 (value)

Technical Validity of the Highlands Water Protection and Planning Act of New Jersey by Frank Getchell of Leggett, Brashears, and Graham, dated July 27, 2007 (hydrogeology)

CD-ROM with maps

Complaint for Declaratory Judgment with Attachments A-D

OFP, LLC v. Superior Court, 2007 N.J. Super. LEXIS 289 (2007)

Defendants' Motion to Dismiss

The Highlands Act and proposed Rules

Miscellaneous maps of Highlands area available online

New Jersey Highlands Coalition web site

New Jersey Highlands Council web site

USDA Forest Service web site concerning Highlands of Connecticut, New Jersey, New York, and Pennsylvania

Miscellaneous U.S. Census data available online

Newspaper and journal articles concerning Highlands Act and the pending litigation.

In addition, on May 21, 2007, you took me on a drive through the New Jersey Highlands to see the area that lasted between two and three hours, and arranged for me to meet with affected individuals.

Based on my review of the foregoing, which include extremely detailed comments from several disciplines on the Act, proposed rules, and draft Regional Master Plan, and on my training and experience, I have some observations and opinions concerning the public policy initiative represented by the Highlands Act and its implementation.

- 1. This is a policy initiative of massive scope and utopian ambition that is certain to produce a host of adverse consequences for private landowners, public entities, and citizens in general within the area covered by the Act and to some extent elsewhere in New Jersey.
 - a. Some of these consequences are intended.
 - b. Some of the intended consequences are stated, and it may be that other intended consequences are less explicit.
 - i. It seems that water conservation and preservation of open space are to a substantial extent pretexts or euphemisms for what is in fact an anti-development measure. The Act places the 400,000 acre preservation area permanently off limits to development. The 400,000 acre planning area is subject to extremely strict limits (such as very low population densities) on development through eventual implementation of the Regional Master Plan, and these limits will effectively prevent nearly all the development that would have taken place otherwise. The net effect of the entire legislative scheme, when fully implemented, will be to take 800,000 acres, or about 1250 square miles, and place it off limits to major development.
 - ii. I have reference specifically to this language, from the Highlands Water Protection and Planning Council (Highlands Council) web site: "The Highlands Water Protection and Planning Act is a law

- signed in August 2004 that will preserve open space and protect the state's greatest diversity of natural resources including the precious water resources that supply drinking water to more than half of New Jersey's families."
- iii. However, there is a relative absence of means that directly protect water quantity and quality (environmental cleanup, statewide water consumption measures, etc.), and instead the focus is on restricting development in the 800,000 acre area.
 - iv. It is unlikely that the Act could have been defended, politically or legally, if it were promoted as a state-imposed prohibition of market-driven real estate development across a large portion of the state.
- c. Some of the consequences will be unintended and unanticipated. The Act will produce massive distortions of the private real estate market in the state and undermine the system of local government, and these effects will in turn have further ripple effects. It does not appear that the full scope of these consequences has been adequately considered.
2. This initiative carries enormous negative consequences for private landholders in the preservation and planning areas.
- a. Among these consequences is a loss in the value of their property so great as to be tantamount to public confiscation. Many of them have lost all, or nearly all, the value of their property that was represented by the potential for development of the property. For agricultural and other non-residential land, that development value was about 80% of the land's value. The total loss in property value within the preservation area alone is estimated at over \$15 billion.
 - b. There is at present no adequate compensation scheme for these owners to replace the lost value that has been taken for public purposes.
 - i. It is highly unlikely that the TDR program will ever be made to work as an effective compensation system for the many property owners who have lost value. The voluntary nature of the program and its ephemeral nature at present militate against it ever being a significant attempt to offset the losses. In order for a TDR program to work, two conditions must be satisfied: first, there must be localities willing to accept increased development pressure and density; second, there must be in those areas sufficient demand for new development. There is no rational basis to believe that those conditions exist. Moreover, implementation of a TDR program does not appear to be a high priority in any event.
 - ii. The provision of waivers and exemptions is also unlikely to offset much of the cost that the Act imposes on the vast majority of owners.
 - iii. The Green Acres, Farmland Preservation, and Garden State Preservation Trust and other compensatory funds will total far less than the actual economic loss.

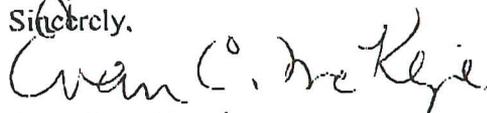
- c. Consequently, private landowners are bearing the costs of preservation that is intended to benefit people living elsewhere in New Jersey. The net effect is the public taking of private land value for public purposes, without compensation.
3. The initiative will also have major negative consequences for public entities located in the area covered by the Act, including Warren County and the municipalities located in Warren County.
 - a. The ability to control and plan for land use is one of the most important powers possessed by local governments
 - b. The existence of this power makes local governments significant in the lives of their citizens, and makes these governments the focal point of local politics.
 - c. Where the Highland Council states, "The Highlands Act provides the necessary mechanism to enhance local land use planning efforts," it would be more accurate to state that the Act strips local governments of their power to control and plan for land use within their jurisdictions.
 - d. Local governments in the area covered by the Act have therefore been deprived of what is arguably their most important function.
 - e. This fact will have significant consequences in the future and will diminish the importance of local governments in the lives of their residents, transforming the nature of local politics in the part of New Jersey covered by the Act.
 - f. These impacts will not be experienced by local governments outside the area covered by the Act, creating a distortion in the system of local government in New Jersey. Some communities will have control over land use and the power of self-determination, while others will not.
 - g. Recommendations from affected local governments on these issues, specifically the Strategic Growth Plans prepared by counties, and recommendations from the Five County Coalition, seem not to have been taken into account.
4. To the extent that local governments in the area covered by the Act have lost control over land use and development, the citizens residing in that area have lost their powers of self-determination. But for this Act, those citizens would have been able to guide the course of real estate development in their communities. They would thereby have been able to give their local communities certain identities; chart particular courses of economic development; attract or try to exclude particular activities; and perhaps compete with other communities for the types of development that are attractive to residents. The Act effectively transfers that power of community self-determination to the State of New Jersey, which has imposed a different vision on the entire area. That vision holds that this area is to be a largely undeveloped region whose open spaces are to be maintained in perpetuity as a resource for others.
5. Consistent with that vision, the Act seems to anticipate that, in addition to some amount of agriculture, a "recreation, ecotourism, and wildlife activities" economy will emerge in the area covered by the Act. This expectation is

unsupported and speculative at best and may prove to be a Potemkin Village. However, the loss of many billions of dollars to the area is real. That loss consists of economic development that would have come to this area had the Act not been passed and development allowed to take its natural course.

- 6. The implementation of the Act has not complied with the statutory time limits, to the detriment of property owners and local governments. This delay is apparently being attributed to the enormity of the tasks imposed on the Highlands Council by the Act. The Council is taking the position that it is unable to do what it has been asked to do within the time it was given.
 - a. The Regional Master Plan (RMP) has not been adopted (due by June 2006)
 - b. The Transfer of Development Rights (TDR) program does not exist, and as noted above it does not appear to be a high priority task.
- 7. The adverse consequences have already hit landowners and local governments but measures to offset those consequences have not been implemented and in all likelihood will never be implemented as claimed.
- 8. The boundary of the area covered by the Act is based in large part on considerations other than science.
 - a. The area covered by the Act was first enlarged beyond the limits suggested by science in order to prevent development in as much land as possible
 - b. Thereafter, certain areas were carved out of the area covered by the Act through a process of negotiation and political compromise that was not based on science
 - c. Consequently, it seems that the boundaries are arbitrary and were politically brokered rather than being established by science. This raises issues of rationality and equal treatment.

If you have any questions or need any further response from me on this matter, please do not hesitate to contact me.

Sincerely,



Evan C. McKenzie