

# New Jersey Law Journal

VOL. CLXXX – NO. 12 – INDEX 1116

JUNE 20, 2005

ESTABLISHED 1878

## REAL ESTATE & TITLE INSURANCE

### Landowner Equity Is Missing in the Highlands

In the preservation area, development is no longer an option

By Thomas Jay Hall

**E**arly in our training as lawyers, we were taught that law is about fairness and equitable treatment. It is wrong to treat similarly situated persons and property differently, we were told, and lawyers are trained to detect unfair or discriminatory treatment.

Land use lawyers, particularly, have to struggle with the notion of fairness and equity in property rights. Land use planning and zoning and environmental regulation, by their very nature, constrain individual property owner rights. Those regulations affect different properties in different ways. For example, local zoning regulations have different lot size and building height restrictions depending on different zones. DEP regulations as to wetlands and stream encroachment affect the owner's rights to use the land, which, depending on where and how the wetlands or stream segment exist, may have a minor or substantial impact on the use of land. When regulatory impact is extensive, landowners ask if their rights have been so constrained that their property may be considered "taken" by government.

Landowners have come to expect

---

*Hall is chair of land use and zoning at Sills Cummis Epstein & Gross of Newark.*

that zoning imparts value; if property were zoned, for example, at one dwelling unit per acre, it would have a certain value; and if the zoning required three acres for a dwelling, the land would have a different value. In New Jersey particularly, landowners understand that the ability to use land may be affected by environmental regulations. Most landowners are willing to accept some diminution of value due to governmental restrictions as part of a kind of social compact, if the regulations are of benefit to the society and they still retain use and value of their land.

Lawyers learned early on that if land is "taken" by a public entity, or property rights so infringed upon that a landowner cannot make use of the property, compensation should be paid. Sanctity of property rights is enshrined in the Fifth Amendment to the United States Constitution, and made applicable to the states via the Fourteenth Amendment. New Jersey's Constitution, at Article I, paragraph 20, contains a similar prohibition against taking private land for public use without compensation.

The issues which people have with governmental regulation are not merely how those regulations impact their property and their individual rights to use the land, but whether the process is fair. The land regulation system seems

to impact those who have lands which are valuable to society, either because of specific natural resources found on the land, or increasingly, because society seems to value "open space" as opposed to development. Landowners become concerned when their neighbors were permitted to develop property, but because they waited and social values shifted, they are not permitted to use their property. One acre zoning becomes five acre zoning; five acre zoning becomes 20 acre zoning. Landowners ask about the fairness of those restrictions.

As Justice Black noted in *Armstrong v. United States*, 364 U.S. 40 (1960), "The Fifth Amendment's guarantee that private property shall not be taken for public use was designed to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole."

Equitable treatment of property owners is, in the United States, deeply embedded in the law and notions of fundamental fairness. It appears to be part of New Jersey State policy as well, at least in theory. The New Jersey State Development and Redevelopment Plan contains the following statement about equity for property owners:

[A] basic policy in implementation of the State Plan is to achieve the public interest goals

of the State Planning Act while protecting and maintaining the equity of all citizens. It is the intent of the State Planning Commission that the benefits and burdens of implementing the State Plan should be equitably distributed among all citizens of the state. Where implementation ... of the State Plan affects the reasonable development expectations of property owners or disproportionately affects the equity of other citizens, agencies ... should employ programs ... including compensation ... to ensure that the benefits and burdens ... of the State Plan are borne on an equitable basis." State Development and Redevelopment Plan, Statewide Policy 1, printed text p. 110 available online at [www.nj.gov/dca/osg/plan/stateplan.shtml](http://www.nj.gov/dca/osg/plan/stateplan.shtml).

Equitable treatment of landowners, however, appears to be missing in the Highlands, which is the area generally running from Sussex to Hunterdon County, including large quantities of land in Morris, Passaic, Warren, Bergen and Somerset Counties. Preservation of that area became a high priority in the McGreevey administration. First, the legislation itself contained extraordinary restrictions amounting to a total recasting of permissible land uses in approximately 800,000 acres, nearly one-fifth of the state's total land area. The Highlands Water Protection and Planning Act, codified at N.J.S.A. 13:20-1 et seq. The legislation established two areas: the Highlands Preservation Area, about half of the total Highlands, and the remaining area, the Highlands Planning Area.

Within the Preservation Area, the legislation established strict limits on development, such that only those uses which were already in existence could be used or slightly expanded. With new development, most land uses were strictly regulated. Anything (except for very limited exceptions, e.g. the construction of a single family dwelling on a pre-Highlands Act legal lot, for an

individual's own use) which involves development within the Preservation Area requires NJDEP approval. The development may not occur within 300 feet of a stream, lake or other water body, may not have more than 3 percent of the land area as impervious surface, and is impermissible on slopes of more than 20 percent.

This kind of legislative enactment, with sweeping proscriptions against development, removes local zoning or other land use controls, and affects prior "reasonable expectations" of development of property. Perhaps the landowner was permitted, prior to the Highlands legislation, to rely on local zoning of one dwelling unit for each acre. After the Highlands legislation, with the various restrictions in place, it looks like the "permitted" development would be closer to one dwelling unit per five or more acres. The impact on small landowners who may have had holdings of say, 10 acres, which they were holding for retirement or other personal needs, would be substantial.

That was only the first half of the Highlands restrictions. As provided for in the act, the NJDEP issued new regulations, N.J.A.C. 7:38 et seq., on May 9 to implement the legislation, and these include some shocking elements, including:

1) A prohibition against any extension of public sewage treatment systems into the Preservation areas, N.J.A.C. 7: 38-2.6, which requires any development which might survive the permitting process to be on septic systems, N.J.A.C. 7: 38-2.6;

2) For a forested lot (i.e., a lot which has tree cover on more than 50 percent of the lot area) no septic system would be permitted unless the lot contained at least 88 acres;

3) For a lot which contained less than 50 percent tree cover, the minimum required acreage for a septic system is 25 acres. N.J.A.C. 7: 38-2.6

The "major Highlands Development approval" required under the act, which includes any nonresidential development, or any residential development resulting in a disturbance of an acre or more of ground or the creation of more than one-quarter acre of

impervious surface, is extraordinarily complex and expensive. There is a \$750 (plus \$100 per acre) fee to determine if the regulations apply to a property; the application fee for the permit itself is \$2,500 plus \$50 per acre; and N.J.A.C. 7:38-10 and the professional studies required will cost literally hundreds of thousands of dollars. For most landowners, the costs of attempting to get a permit, which on its face looks like it should never be issued, is too much. They simply will give up.

Any fair reading of the rules would suggest that the intent of the regulations is to make any development within the Preservation Area nearly impossible. "Reasonable expectations" of landowners to develop their property have been eliminated. It's not just one dwelling unit per five acres; it's a minimum of 25 acres for a parcel with less than 50 percent forestation; and 88 acres per house if the tract is forested. For most landowners, this means development is no longer possible. Their land value has been "taken" by governmental regulation.

I am unaware of an "official" estimate of the value of the Highlands Preservation Area lands, and there is clearly some watershed land in public ownership, some park land already in public ownership, and some tracts for which development was an unlikely option at best. However, there clearly exists substantial property for which development has ceased to be an option, for which substantial private value has been lost. A report in the *Daily Record of Morris County* cited an estimate of \$1.45 billion to fund land preservation for 300,000 acres of land in the Preservation Area. "DEP sets stiff fines, fees in Highland Rules," *Daily Record*, May 11, 2005. There is nothing like that sum of money in the current New Jersey State budget and no availability for anything like that sum of money in any of the Green Acres funds. Indeed, even though the total amount of money raised since 1961 for all land preservation purposes, some \$3.3 billion, is quite astounding, there is little money currently available for land acquisition in the Highlands. New Jersey

Department of Environmental Protection, Report on Land Preservation, December 2004. Absent some substantial new tax revenue allocated for this purpose, it is highly unlikely that landowners in the Highlands will receive compensation for their loss of economic value.

There is no doubt that supporters of the Highlands Preservation law and regulations will point to the enormous public benefits of open space preservation, retention of the special cultural environment of the Highlands, and preservation

of the water supply, which is the basis of the law. These are all important public benefits. It is too bad, particularly for the landowners affected by these important public benefits, that the legislature and the regulators seem to have forgotten the wonderful language of Justice Hall in *Morris County Land v. Parsippany-Troy Hills*, 40 N.J. 539, 555-56, when he said:

These are laudable public purposes and we do not doubt the high-mindedness of their moti-

vation. But such factors do not cure basic unconstitutionality. Both public uses are so all-encompassing as practically to prevent the exercise by a private owner of any worthwhile rights or benefits in the land. So public acquisition rather than regulation is required.

The language of *Morris County Land* seems almost quaint today. Too bad for the landowners in the Preservation Area. ■