Edward J. McKenna, Chairman
New Jersey State Planning Commission
New Jersey Department of Community Affairs
Office of Smart Growth
P.O. Box 204
Trenton, New Jersey 08625-0204

May 22, 2009

Dear Chairman McKenna:

The New Jersey Highlands Coalition has reviewed a copy of the April 24, 2009 letter (attached) from attorney Ronald Morgan to Warren County Planning Director David Dech, regarding what Mr. Morgan claims is the failure of the Office of Smart Growth to correct an “error” in a Planning Area designation shown on the Final Draft State Plan Policy Map, concerning block 93, lots 4 & 5 in Pohatcong Township, Warren County. You were listed as a carbon copy recipient of the letter.

We are concerned by the mischaracterizations, inaccuracies and omissions of fact that are found throughout Mr. Morgan’s letter, to the extent that if unchallenged, Mr. Morgan may succeed in rewriting history by having his unreasonable demands accommodated.

Mr. Morgan claims that “the property is surrounded in three sides by fully improved higher density residential uses.” Aerial photographs and satellite imagery (Exhibit A) will show that the property is bounded by two sides with developed areas and that the property is actually part of an almost uninterrupted stretch of farm and grasslands that extend west to the Delaware River and south.

Mr. Morgan characterizes those that filed an appeal of the 1998 Final Judgment as “residents and groups that oppose affordable housing production.” That is a specious mischaracterization of individuals and others who opposed this particular project for many good reasons. Such a wholesale dismissal of their legitimate concerns has as much insight as concluding that someone who refuses a glass of water because a bug is floating in it must be hydrophobic.

It is a stretch to conclude that since “the project has also received a host of approvals from [NJDEP] confirms that applicable environmental regulations are being addressed.” The project’s site specific Amendment to the Upper Delaware WQMP has yet to receive approval from NJDEP. By NJDEP rule, the Department “shall approve a Water Quality Management Plan only after receiving from the Highlands Council a determination of consistency with the Regional Master Plan (RMP)…, when adopted by the Highlands Council.”¹ The Highlands Regional Master Plan was fully adopted on September 8, 2008. On September 18, the Highlands Council made a Consistency Determination on the project’s WQMP Amendment and passed a Resolution (Exhibit B) with a finding of “inconsistent.” The project was found to be consistent with 16 goals, policies and objectives of the RMP, and inconsistent with 47. How does this confirm “that applicable environmental regulations are being addressed.”?

¹ N.J.A.C. 38:1.1
Which OSG staff members advised EAI “that the planning area designation of the property would be changed during the pending cross-acceptance process”? Is there any documentation or correspondence to support this claim? What other stakeholder interests in cross-acceptance were considered in any such arrangement? Mr. Morgan insists that the Final Draft State Plan Policy Map’s current designation of the EAI site is an “error”. Is this claim based on any OSG policy decision, or is it merely wishful thinking?

Mr. Morgan’s interpretation of the April 15, 2009 Order to Extend Judgment of Repose, by Judge Accurso, attached to his (and this) letter, does not support the conclusion that the site is ultimately suitable for affordable housing, or in fact, any housing at all. The Order instead, recognizes that the “Highlands Council places [the site] in a “Conservation Zone” and “Environmentally Constrained Sub-zone” and the Highlands Council has provided DEP... a Determination that the proposed Project is inconsistent with the... Highlands Regional Master Plan (emphasis added).

Judge Accurso concludes, “that it is appropriate to extend Pohatcong Township’s second round period of repose against exclusionary zoning challenges, inasmuch as [the site] continues, subject to ongoing agency review, to remain a suitable, viable parcel for affordable housing production in satisfaction of the Township’s fair share housing obligations under the Mount Laurel doctrine and Fair Housing Act, in order to develop a cumulative third round compliance plan that is consistent with the Highlands RMP...” As proposed, the project is inconsistent with the Highlands RMP.

Pohatcong is working with the Highlands Council towards full conformance with the Highlands Regional Master Plan. A required component of conformance is to work with the Highlands Council to address any prior and Third Round affordable housing obligations. Pohatcong should be allowed to continue in this process, working in the context of regional solutions to both preserving Highlands environmental resources and addressing the need for affordable housing. Mr. Morgan’s demands that agencies look only as far as his client’s needs is the antithesis of sustainable regional planning initiatives that are to the benefit of us all.

Sincerely,

Elliott Ruga
Campaign and Grassroots Coordinator

attachments

cc: Joy Farber, OSG
    Larissa Whittaker, OSG
    Julia Somers, Exec. Dir., NJ Highlands Coalition
    Frank Banisch, P.P., Special Master
    Laura Oltman, Eco-Action Initiatives of Warren County
    Wilma Frey, New Jersey Conservation Foundation
    Dave Peifer, ANJEC
    Mark Mauriello, Commissioner, NJDEP
    Eileen Swan, Exec. Dir., NJ Highlands Council
    Hon. Stephen Babinsky, Mayor, Pohatcong Township
    David Dech, Planning Director, Warren County
    Ronald C. Morgan
April 24, 2009

David Dech, Planning Director
County of Warren
Warren County Planning Offices
165 Route 519 South, Suite 111
Belvedere, NJ 07823-1949

Re: EAI Investments, LLC Affordable Housing Parcel
Block 93, Lots 4 & 5 – Pohatcong Township, Warren County
Request for State Planning Area Re-designation Through
The Cross-Acceptance Process

Dear Mr. Dech:

This office represents EAI Investments, LLC (“EAI”) which is the owner of Block 93, Lots 4 and 5, a 170 acre parcel in Pohatcong Township, Warren County (the “Property”). The Property was first designated by the Pohatcong Planning Board to facilitate the production of affordable housing in 1988. It has been designated as an affordable housing site since then, a designation that has been repeatedly affirmed by the Law and Appellate Divisions (most recently by order the Honorable Allison Accurso, JSC, by Order dated April 15, 2009), and by Pohatcong Township, which granted preliminary major subdivision and site plan approval in January, 2007.

It is our understanding that the State Planning Commission is currently entertaining revisions to the State Development and Redevelopment Plan but, in doing so, has designated the Property as a PA-4. The purpose of this letter is to request that the Property be placed in a Metropolitan Planning Area 1 (PA-1) in the manner contemplated by the Fair Housing Act and the Highlands Water Protection and Planning Act. The reasons for this request follow.

The property is surrounded on three sides by fully improved higher density residential and nonresidential uses that are designated as Planning Area 1 (“PA-1”) in the State Development and Redevelopment Plan (“SDRP”) which are benefitted by centralized sewer and water utilities. Indeed, there is an apartment complex across the street that was constructed a number of years ago at a density of 12.5 units per acre and neighboring single-family homes and two-family dwellings are all constructed on modest sized lots. Inexplicably, the affordable housing parcel was nonetheless placed in Planning Area 4 (“PA-4”) in the State Plan.
The Law Division of the Superior Court approved a Settlement Agreement to conclude first and second round affordable housing litigation in 1996 which designated the parcel as Pohatcong’s sole affordable housing site. The Agreement documents that the community believes that the parcel is the only property in the entirety of the Township that is appropriate for the construction of higher density affordable housing. The Settlement Agreement was approved by the Court and the Township thereafter adopted a second round Housing Element and Fair Share Plan (collectively “Compliance Plan”) which relied upon the production of affordable housing on the property to fully satisfy the community’s cumulative 12-year second round fair share obligation. The Compliance Plan was approved by the trial court which thereafter entered a second round Final Judgment of Compliance and Repose in 1998.

Several residents and groups that oppose affordable housing production filed an appeal of the 1998 Final Judgment which was ultimately disposed of by the Appellate Division by the issuance of the enclosed written decision under date of June 20, 2000. The Court determined that the property is ideally suited to facilitate the production of affordable housing in satisfaction of Pohatcong’s second round fair share obligation despite the fact that it is inappropriately designated as PA-4 in the SDRP. As you can see, the Appellate Division determined that the parcel is surrounded by high density uses and is in fact a growth area in-fill parcel that is a de facto “center” in the State Plan.

The affordable housing project that EAI intends to construct has since received Court-ordered general development plan approval and preliminary major subdivision and site plan approval from the Pohatcong Land Use Board. Moreover, the project has also received a host of approvals from the New Jersey Department of Environmental Protection (“DEP”) that confirms that applicable environmental regulations are being addressed.

EAI’s staff was heretofore advised by representatives of the Office of Smart Growth (“OSG”) that the planning area designation of the property would be changed during the pending cross-acceptance process to either PA-1 or PA-2 in the next iteration of the State Plan. A “draft” of the forthcoming SDRP was recently made available for public inspection on the OSG’s website and it appears as if an error has been made and that the planning area designation for the affordable housing parcel has not been changed to either PA-1 or PA-2. In this regard, the Honorable Allison Accurso and the Court’s Mount Laurel Master (Frank Banisch) have taken the opportunity to re-review the suitability of the EAI parcel for affordable housing production in connection with declaratory judgment proceedings that the Township filed with the Court with respect to its third round affordable housing initiatives. As a result of the foregoing, Judge Accurso entered the enclosed Order on April 15, 2009 confirming that Block 93, Lots 4 & 5 continue to remain suitable and viable for affordable housing production in satisfaction of the Township’s second and third round fair share obligations.

In light of the Appellate Division’s and the trial court’s determinations on this issue and the error that was made by the OSG and the State Planning Commission in failing to ensure that
the planning area designation for the property is changed from PA-4 to PA-1 or -2, EAI and the Mount Laurel beneficiaries are respectfully requesting that the County notify the State Planning Commission and the OSG of the planning area designation error and request that the planning area designation be changed to PA-1 or PA-2.

Thank you for your time and consideration and please feel free to contact me should you have any questions.

Very truly yours,

[Signature]

ROBERT K. MORGAN

RCM/lkc
Encl.

cc: Edward McKenna, Esq., Chairman, NJ State Planning Commission
    Benjamin Spinelli, Ex. Dir. – OSG
    Lucy Vandenburg, Ex. Dir. – COAH
    Melissa Orsen, Esq. – COAH
    Frank Banisch, P.P. – Court Master
    Neil Yoskin, Esq.
    Rob Helfgott
    Bob Geiger
    Jim Biegen, P.E.
TRUE COPY

MAIL 4/15/09
BENBROOK & BENBROOK, LLC
1734 Route 31 North, Suite 1
Clinton, New Jersey 08809
(908) 735-8100
Attorneys for Petitioner, Township of Pohatcong

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
SOMERSET COUNTY

DOCKET NO. L-1767-05
DOCKET NO. SOM-L-625-04

Civil Action
(Mount Laurel)

ORDER TO EXTEND
JUDGMENT OF REPose

THIS MATTER having come before the Court upon application of Petitioner
Township of Pohatcong ("Township" and/or "Pohatcong") for an Order to extend the
Township's second round Judgment of Compliance and Repose which was originally entered
by the trial Court on January 30, 1998 and thereafter extended (a) by Court Order entered on
December 17, 2004, (b) by operation of the Appellate Division's decision in In re Adoption
of N.J.A.C. 5:94, 390 N.J. Super. 1 (App. Div. 2007), and (c) due to delays in revised third
round rulemaking by the New Jersey Council on Affordable Housing ("COAH"); and the
Court having considered that:
1. There is an existing, second round affordable housing project approved by the Court with respect to property identified on the Township's tax map as Block 93, Lots 4 and 5 that has been allocated existing sewerage capacity by both Phillipsburg and Pohatcong pursuant to court order.

2. The entire Township, including the Project, is now under the regional planning jurisdiction of the Highlands Water Protection and Planning Council ("Highlands Council") as a result of the adoption of the Highlands Water Protection and Planning Act ("Highlands Act") on August 10, 2004 at N.J.S.A. 13:20-1, et seq., and the Highlands Regional Master Plan ("RMP") which took effect on September 8, 2008, see 40 N.J.R. 5852(b).

3. The Highlands Act designates Block 93, Lots 4 and 5 in Pohatcong Township as one of several parcels in Pohatcong that are in the Highlands "Planning Area."

4. Preliminary Major Subdivision and Site Plan approval with respect to Block 93, Lots 4 and 5 has been granted by the Pohatcong Land Use Board to facilitate the production of affordable housing in accordance with the 1998 Judgment of Compliance and Repose with extended vested rights in accordance with the Municipal Land Use Law. The

5. The New Jersey Department of Environmental Protection ("DEP") is currently reviewing an amendment to Pohatcong's Wastewater Management Plan ("WMP") the effect of which would be to designate Block 93, Lots 4 and 5 as a "sewer service area" in accordance with N.J.A.C. 7:15-1, et seq. and COAH's rules such that sewer extension permits can be issued to facilitate affordable housing production.

The 1998 Final Judgment of Compliance and Repose was reviewed and sustained by the Appellate Division in a per curiam decision dated June 20, 2000 under Docket No. A-3804-97TI.
6. Section 25.b of the Highlands Act [N.J.S.A. 13:20-23.b] states that "[n]othing in this act shall affect protections provided through a grant of substantive certification or a judgment of repose granted prior to the date of enactment of this act."

7. The Highlands RMP places Block 93, Lots 4 and 5 in a "Conservation Zone" and "Environmentally Constrained Sub-zone" and the Highlands Council provided DEP, in accordance with N.J.A.C. 7:38-1.1(k), a Consistency Determination finding that the proposed project is inconsistent with the goals and objectives of these Zones in the Highlands Regional Master Plan.

8. The Township must conform its Master Plan and land use ordinances to the Highlands RMP and has adopted a Resolution approved by the Highlands Council indicating its intention to opt in to the Highlands RMP with respect to the entirety of the Township, including the Planning Area wherein Block 93, Lots 4 and 5 are located.

9. Pursuant to Executive Order 114 signed by Governor Corzine, the Highlands Council and COAH have entered into a Memorandum of Understanding that, inter alia, contemplates an extension of time within which municipalities located in the Highlands Region can submit third round compliance plans such that those plans can take into account the impact of the Highlands RMP on affordable housing obligations.

10. In light of the foregoing, the Court finds and determines that it is appropriate to extend Pohatcong Township's second round period of repose against exclusionary zoning challenges in order for it to develop a cumulative third round compliance plan that is consistent with the Highlands RMP while allowing the second round compliance project to continue in pursuit of its pending WMP amendment.

Ongoing agency review to remain a suitable and viable parcel for affordable housing production in satisfaction of the Township's fair share obligations under the Mount Laurel doctrine and the Fair Housing Act.
IT IS on this 15th day of April, 2009, ORDERED as follows:

1. The foregoing findings and determinations are incorporated by reference herein.

2. The Township of Pohatcong is granted a continued Judgment of Repose through December 8, 2009. By virtue of said repose, the Township of Pohatcong shall have complete immunity and repose from any and all litigation challenging the Township's compliance with the Mount Laurel doctrine and the provisions of the Fair Housing Act.

3. Counsel for the Petitioner, Township of Pohatcong, shall forward a copy of this Order to counsel for EAI Investments, LLC, the Council on Affordable Housing, and the New Jersey Highlands Council within five (5) days of receipt.

Allison E. Accursio
ALLISON E. ACCURSO, J.S.C.
Exhibit B
RESOLUTION 2008-38
NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL
PROPOSED WATER QUALITY MANAGEMENT PLAN AMENDMENT FOR
HAMPTONS AT POHATCONG, POHATCONG TOWNSHIP

WHEREAS, the Highlands Water Protection and Planning Act (Highlands Act) has created a
public body corporate and politic with corporate succession known as the Highlands Water
Protection and Planning Council (Highlands Council);

WHEREAS, the New Jersey Department of Environmental Protection (NJDEP) had adopted rules
at N.J.A.C. 7:38-1.1 et seq. (Highlands Rules) governing the NJDEP's review of projects in the
Highlands Region; and

WHEREAS, the Highlands Rules, at N.J.A.C. 7:38-1.1, specifies that upon adoption of the
Regional Master Plan, NJDEP shall not approve a Water Quality Management Plan (WQMP)
amendment for a project proposed in the Planning Area or Preservation Area of the Highlands
Region without first obtaining a consistency determination from the Highlands Council; and

WHEREAS, the Highlands Rules, at N.J.A.C. 7:38-1.1, were adopted in accordance with the
Highlands Act as well as the Water Quality Management Act which specifically requires a continuing
planning process to coordinate and integrate water quality management plans with related Federal,
State, regional and local comprehensive land use, functional and other relevant planning activities;
and

WHEREAS, a proposal has been submitted that consists of a proposed amendment to the Upper
Delaware WQMP submitted on behalf of EAI Investments, LLC, for an expansion of the
Phillipsburg STP sewer service area to include the proposed Hamptons at Pohatcong development
(Block 93, Lots 4 and 5) in Pohatcong Township, Warren County; and

WHEREAS, consistent with NJDEP's Highlands Rules at N.J.A.C. 7:38-1.1, and the procedures
adopted by the Highlands Council pursuant to Resolution 2007-18 for review of WQMP
amendments for a proposed project, Highlands Council staff conducted a consistency determination
for the Proposed Amendment based upon the standards and policies set forth in the adopted
Regional Master Plan (RMP); and

WHEREAS, the Highlands Council duly considered the Proposed Amendment, the Highlands
Council staff consistency determination, which was posted on the Highlands Council website, and
all public comments;

NOW, THEREFORE, BE IT RESOLVED by the Highlands Council that the Executive
Director is hereby authorized to provide the consistency determination to NJDEP on behalf of the
Highlands Council.

CERTIFICATION
I hereby certify that the foregoing Resolution was adopted by the Highlands Council at its meeting
held on the 18th day of September, 2008.

[Signature]
John Weingart, Chairman
Mr. Lawrence J. Baier, Director  
Division of Watershed Management  
New Jersey Department of Environmental Protection  
P.O. Box 418  
Trenton, NJ 08625-0418

Re: Proposed Amendment to the Upper Delaware Water Quality Management Plan  
Phillipsburg STP  
Hamptons at Pohatcong  
Pohatcong Twp, Warren County  
NJDEP Activity # AMD030001

Dear Mr. Baier:

On behalf of the Highlands Water Protection and Planning Council (Highlands Council), in accordance with N.J.A.C. 7:38-1.1(k), please accept the enclosed Consistency Determination (CD) on the above-referenced proposed amendment. The CD for the Proposed Amendment is based upon our review of the project file as provided to us by the applicant, Highlands Council information and public comment, relative to the standards and policies set forth in the Regional Master Plan (RMP). The Highlands Council approved a resolution on September 18, 2008 authorizing the Executive Director to provide this CD to NJDEP on behalf of the Highlands Council.

Please find also enclosed a document that summarizes the public comments received on the Highlands Council’s draft CD. The Highlands Council finds that the proposed project is inconsistent with the Regional Master Plan. Primary issues include:

- Extension of both public water supply and wastewater systems into the Conservation-Environmentally Constrained Sub-Zone not associated with cluster development or a waiver for public health and safety, and into the Agricultural Resource Area without mandatory clustering;
- Water availability constraints in two HUC14 subwatersheds, one of which potentially could be addressed by an RMP Update. Incursion of structures and stormwater infrastructure into Highlands Open Waters buffers, and a proposal to discharge stormwater off-site to a preserved park. Stormwater recharge
requirements have been waived by NJDEP without a requirement for achieving on-site recharge to the extent practicable given karst topography, or for off-site mitigation of any recharge that cannot be met on-site;

- Conflicting information, potentially due to a distinction between Landscape Project versions 2 and 3, regarding potential upland sandpiper habitat; and

- Insufficient information to determine consistency regarding the application of Low Impact Development BMPs, karst topography concerns for the long-term integrity of construction and infrastructure (especially sanitary sewers and stormsewers), compliance with the TMDL for pathogens on Lopatcong Creek, wellhead protection, and “maximum feasible” water conservation measures.

These policies and the inconsistencies are described in more detail in the CD.

If you have any questions or comments regarding this matter, please feel free to contact me at (908) 879-6737.

Sincerely,

Eileen Swan
Executive Director

Enclosures – Consistency Determination
Public Comment Summary