

## **New Jersey's Highlands Act: legal and constitutional**

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A PREVAILING view of the Highlands Act — the 2004 legislation enacted to halt the squandering of the single largest water supply source in the state — is that it has failed to make good on the act's provision to compensate landowners for lost development values.

A small, yet committed group of landowners attends every Highlands Council meeting to protest the act for being a government land grab. The governor has weighed in, claiming at his November 2010 town hall meeting in Hackettstown that the “failure of the Highlands Act is that it violated people's rights, it promised to compensate for that violation and it never did...”

He has since appointed new members to the Highlands Council that share his anti-Highlands viewpoint, and he saw to the firing of the Highlands Council executive director for not paying enough attention to the compensation issue.

The media have editorialized about the missing compensation. The Record opined that the Highlands Act, which “included provisions to compensate landowners ... will not be fully implemented until all property owners in the region receive fair compensation for losing their right to develop,” (Smart development, April 4, 2013).

However, despite all the clamor, there is no provision in the Highlands Act to compensate landowners. And in spite of disgruntled claims that the Highlands Act is a government “taking,” it is not.

The Highlands Act is legal and it is constitutional. Folks may claim otherwise, but no one has yet to convince a court of law.

In New Jersey, water is a “public trust” resource — which is a well-grounded concept that has its beginnings in Roman law. Water is owned by the citizens and it is given to the state to protect and to steward. This is a tremendous responsibility that cannot be ignored.

### **Protecting the public trust**

Under the New Jersey Constitution, the state has power over land use to protect public trust resources.

In 2004, the Legislature, by an overwhelming and bipartisan majority, passed the Highlands Act because it found that an extraordinary intervention was necessary because “the existing land use and environmental regulation system” proved incapable of halting the tide of sprawl development that had become an imminent threat to the water supply it was required to protect. Specifically, strict development regulations were put in place to halt the uncontrolled conversion of farm and forested lands into residential and commercial development.

The Farm Bureau sued. Warren County sued. Developers and individuals sued. But in every case that has gone to court, the state and the Highlands Act have been upheld. The U.S. Supreme Court was even petitioned, though unsuccessfully, as a final measure of an appeal. Always, the courts have found that the state had acted reasonably to protect an important public resource.

This hasn't stopped some people from claiming that the act is a “taking” requiring just compensation and that the Highlands Act is unconstitutional. But say what they will, they are wrong. “Takings” and “constitutional” are legal terms. A law enacted out of necessity may not always be fully fair to everyone, but that doesn't make it unconstitutional, a violation of rights or illegal.

This brings up the issue of fairness. Although there is no provision in the act for compensation, or a legal requirement to provide it, there may be an issue of fairness. And the Highlands Act does a great deal to rectify the issue of landowner fairness.

By prioritizing Green Acres and Farmland Preservation funding for acquisitions in the Highlands, by instituting a dual-appraisal method for the valuation of Highlands acquisitions, and by the establishing a Highlands Transfer of Development Rights Program, the Highlands Act significantly works to achieve landowner fairness.

### **Issues of fairness**

Yet some people will be unhappy no matter what. Let's say for the sake of argument — for it is extremely unlikely — that these individuals succeed in either repealing or undermining the Highlands Act. Their issues of fairness will have been satisfied.

But what about everyone else? What about the 5.4 million people in New Jersey and the industrial sector, so vital to our economy, that depend on a clean and plentiful supply of Highlands water? What about the state and its responsibility to protect our water resources?

Let's stop being distracted by the issue of compensation. If fairness is an issue, the discussion should be within the context of improving the implementation of the Highlands Act and not damning the act as being illegal or unconstitutional. The goal is to protect our water supply. Let's stop being distracted and let's make the Highlands Act work.