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February 19, 2015

Highlands Council
Attn: 2014 RMP Monitoring Program
100 North Road (Route 513)
Chester, New Jersey 07930

RE: 2014-2015 Highlands Regional Master Plan – Monitoring Program Comments

To Whom It May Concern:

On behalf of the state association and our local affiliates, the Metropolitan Builders and Remodelers (Metro), Builders and Remodelers Association of Northern New Jersey (BRANNJ), the New Jersey Builders Association (NJBA) submits the following comments for consideration as part of the Council’s “Monitoring Program”.

BRANNJ members represent the Highlands counties of Bergen, Passaic and Sussex, while Metro represents the Highlands counties of Hunterdon, Morris, Somerset and Warren. The NJBA and its local affiliates are professional trade associations comprised of builders, remodelers, material suppliers, attorneys, engineers and other technical consultants, lending institutions, subcontractors and others involved in housing and building-related activities. The NJBA advocates for members’ interests before various state agencies, the Legislature and the Judiciary. NJBA members have been actively involved from the early stages of discussion on the Highlands Water Protection and Planning Act (Act), as well as subsequent enactment and implementation of the Act and the Highlands Regional Master Plan (RMP).

The NJBA appreciates the ongoing communications, interaction and outreach with Highlands Council staff over the past several years, as such dialogue furthers the interests of our members. Nevertheless, the NJBA outlines substantive and procedural issues with the Council’s interpretation of the underlying Highlands Act and in turn implementation of the RMP. We believe the Council’s actions, through the implementation of the RMP, have failed to fulfill all the statutory mandates of the Act, which affect not only NJBA members but also the residents and businesses of the Region. The RMP overall is a compilation of environmentally driven goals and does not adequately address or support development and economic growth in the Region. Revisions to the RMP should focus upon a more balanced approach that would help the Region to fully realize its economic potential rather than deterring industries and businesses from establishing themselves here. NJBA views the required revision and update process as an

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opportunity for a thorough re-examination of the current RMP as well as the plan conformance and implementation processes.

The following outlines areas of concern based upon NJBA members' experience with the implementation of the RMP over the past six years. We reiterate comments made when the RMP was originally drafted. The RMP should be condensed and simplified so it is a more user friendly, understandable document. We urge the Council to seriously consider the comments presented below and include them as priorities for the anticipated update process. Further, we recognize that some of the concerns and recommendations provided are beyond the purview of the Council and would in fact require legislative action to amend the Highlands Act. NJBA has determined to include them in this commentary in the event opportunities to have legislative discussions do arise.

A. Monitoring Program in lieu of Statutory Revision and Update Process

Section 8 of the Highlands Act requires that the "Highlands regional master plan shall be periodically revised and updated **at least once every six years**, after public hearings." (Emphasis added.) First, the Association notes that the Council is delayed in the revision process itself, as the RMP update process should have been completed in **2014** given the 2008 adoption of the RMP. To our disappointment, the Council determined an alternative approach establishing the projected 6-month "RMP Monitoring Program" to gather public input and collect data on the Region from consultants, followed by issuing a draft "Monitoring Program Recommendation Report" for public review and comment.

NJBA's concerns with this approach are significant due to the Council's public statements that the Monitoring Program is "***not intended to amend*** the RMP, but rather develop factual foundation for ***potential*** amendments to the current or future iterations of the RMP". Such non-committal language raises serious doubts as to whether the process itself is, in reality, meaningless and the public's efforts to participate in the process for changes are futile. Further, we are concerned that this process, without clear timeframes to move forward expeditiously to address any issues, will only continue to hamper the economic growth potential of the Region and efforts to compensate land owners.

B. Distinguishing Planning Area vs Preservation Area

In enacting the Highlands Act, the Legislature determined that "that it is in the public interest of all the citizens of the State of New Jersey to enact legislation setting forth a comprehensive approach to the protection of the water and other natural resources of the New Jersey Highlands." (See Section 2.) While the Highlands Act has been touted as an environmentally oriented legislative initiative, the Legislature also deliberately incorporated language to emphasize the importance of economic growth and development to the Region. Specifically, while the Act calls for a new "comprehensive approach", the Act also recognizes that:

"it is appropriate to encourage in certain areas of the New Jersey Highlands, consistent with the State Development and Redevelopment Plan and smart growth strategies and principles, appropriate patterns of compatible residential, commercial, and industrial development, redevelopment, and economic growth, in or adjacent to areas already

utilized for such purposes, and to discourage piecemeal, scattered, and inappropriate development, in order to accommodate local and regional growth and economic development in an orderly way” (See Section 2.)

Consequently, the Act created two distinct areas—the **Preservation Area** and the **Planning Area**. The **Preservation Area** would be “subjected to stringent water and natural resource protection standards, policies, planning and regulation” that were reinforced by the New Jersey Department of Environmental Protection’s adoption of “stringent standards governing major development” in that area. In contrast, the **Planning Area** was distinguished to accommodate development, redevelopment and economic growth for the Highlands Region. (See Section 2.) Further, the Legislature gives direction to the Council to essentially balance the interests of environmental protection with economic growth and development:

“that all such aforementioned measures should be guided, in heart, mind, and spirit, by an abiding and generously given commitment to protecting the incomparable water resources and natural beauty of the New Jersey Highlands ... while also providing every conceivable opportunity for appropriate economic growth and development to advance the quality of life of the residents of the region and the entire State.” (See Section 2.)

Despite the intent of the Act to distinguish the Planning Area from the Preservation Area, the Council’s “blind to the line” policy approach from the initial stages of developing the structure of and then implementing the RMP actually made most of the Planning Area a *de facto* extension of the Preservation Area. As discussed below, the RMP and regulatory review standards should be revised to encourage development and growth in appropriate sections of the Planning Area, as envisioned by the Act.

Further, when the Act was proposed and enacted, it presumed that the Preservation Area is a remote undeveloped area and established specific standards for the NJDEP’s rules to preserve intact its “undeveloped” nature. However, these standards do not reflect reality in that some areas and sites are in fact fully developed and already contain public water and sewer utilities and major transportation corridors, which require considerable investment in infrastructure systems. The existence of these developed areas in the Preservation Area must be recognized and different standards should be applied in order to attract private economic investment and generate new revenue by taxation. Along with counties and municipalities, the Council should develop a formal means to identify and designate them as municipalities, villages, transportation corridors, or specialized “nodes” for utility infrastructure and public transit stations. Municipalities and counties need to develop balanced plans for these designated areas to ensure economic viability, allow infill development of vacant parcels, and allow for reasonable redevelopment.

In addition, prior to the Act, utility systems that serve the Planning Area, were located in what is now the Preservation Area. These systems were planned and financed with bonds to serve a certain area and population. Existing public infrastructure should be fully utilized and allowed to extend and expand to serve designated centers, specialized nodes and the Planning Area in accordance with the plans used when they were bonded and constructed. Similarly, new or

extended utility (i.e. sewer and water) infrastructure is permitted only in the Existing Community Zone, not including the environmentally – constrained subzone thereof. This restricts new utility infrastructure to the total 16,000 acres of undeveloped land in the Existing Community Zone. In all other zones within the Highlands, new or extended utility infrastructure, including community on-site treatment facilities, are permitted only where approved by the Council. However, no standards are stated for the Council’s review and approval.

C. Recognizing Statutory Mandates for Economic Growth and Development

Subsequent sections of the Act reiterates the need to address economic growth and development in the mandated land use planning document – the RMP. Section 11, subsection (6), of the Act requires the RMP to include a “**smart growth component**” that includes an assessment of “opportunities for appropriate development, redevelopment, and economic growth, and a transfer of development rights program which shall include consideration of public investment priorities, infrastructure investments, economic development, revitalization, housing, transportation, energy resources, waste management, recycling, brownfields, and design such as mixed-use, compact design, and transit villages.”

Subsection (6) also requires a “land use capability map” that identifies the above components, including: existing developed areas for redevelopment activities, undeveloped areas in the Planning area that are not environmentally constrained for development, brownfields sites or sites with 70% impervious coverage for redevelopment, potential voluntary receiving zones, transportation, water, wastewater, and power infrastructure that would support or limit development and redevelopment in the planning area as well as proposed densities.

The Council should seize this opportunity to effectuate the critical mandates of the Act that **have not been adequately addressed or supported**, such as economic growth, development, and the Transfer of Development Rights. The following highlights NJBA’s concerns with these defined elements of the RMP’s Smart Growth Component.

Land Use Capability Map

The statutorily mandated Land Use Capability Map (“Map”) *could* be a useful tool to provide a framework for regional planning and identify areas suitable for development and redevelopment. Unfortunately, the Map is environmentally oriented with a stagnant picture for the future. The RMP describes the “Existing Community Zone” depicted in the Land Use Capability Map as

“those areas characterized by existing development with comparatively fewer natural resource constraints than the Protection and Conservation Zones; they often are currently or more easily served with public infrastructure. The Existing Community Zone includes previously developed lands of regional significance in size, geography and infrastructure that may include areas of opportunity for future growth and development, including development and redevelopment which may involve the use of Highlands Development Credits (HDC), provided that such growth and development are consistent and compatible with existing community character, natural resource constraints and is desired by the municipality.” (RMP, page 188)

However, there are very **limited** amounts of vacant and developable acreage – only **16,000 acres (11%)** of a total of **145,682 acres** defined as Existing Community Zone. This represents less than **2% of Region’s entire land area as available for development**

The Council should re-examine these defined areas to identify other opportunities to achieve the statutory goals for the RMP to “encourage, consistent with the State Development and Redevelopment Plan and smart growth strategies and principles, appropriate patterns of compatible residential, commercial, and industrial development, redevelopment, and economic growth...” (Section 2.) Ultimately, the RMP should be revised to ensure the Existing Community Zones have significant amounts of vacant and developable acreage. The Council also has the duty to promote brownfields remediation and redevelopment in the Region. Overall, the RMP should be amended to remove vague language that the Council would “encourage” such development and instead incorporate specific actions to be taken, as we are well beyond the initial phases of Plan Conformance and RMP implementation.

During Plan conformance, municipalities may delineate Highlands Centers in their municipalities, which is subject to Council approval. The Council describes a Highlands Center as:

“an area where development and redevelopment is planned and encouraged. Highlands Centers are intended to support balance in the Highlands Region by providing for sustainable economic growth while protecting critical natural and cultural resources. The designation of a Highlands Center triggers a planning process that is specific to a geographic area. The process begins by identifying the development goals for the area, along with the desired level and intensity of development. Highlands Center planning is community-driven and flexible, resulting in a development plan tailored for a neighborhood or area.” (See Council website:

<http://www.highlands.state.nj.us/njhighlands/planconformance/#11>)

The NJBA strongly supports the availability of center designation as it is an indicator that development activity would be welcome. There are eleven municipalities with *approved* centers in the Highlands Region: **Alpha, Phillipsburg, Washington (Morris County), Hackettstown, Wharton, Hopatcong, Byram, Oxford, Lopatcong, Randolph, and Pohatcong**. Most recently Mahwah’s petition to designate two centers was approved by the Council. However, none of the municipalities have approved zoning amendments in place to fully **implement** the center approval to allow development, particularly in the Existing Community Zone. In order to ensure actual economic growth and development opportunities are realized, NJBA strongly recommends that deadlines be imposed to ensure municipalities move forward with amending their zoning for these centers.

Housing Needs

Ten years after the enactment of the Highlands Act, NJBA remains concerned that the restrictions imposed by the Act, as implemented through the RMP and plan conformance, make housing inaccessible to those who would choose to live in the Highlands Region, but simply cannot afford the high median house values. The Highlands Region is uniquely situated and extremely accessible with three interstate highways that provide access to New York City,

upstate New York and Pennsylvania. As such, the Region could be attractive for both business interests and residents. However, it is unclear from the RMP and the Land Use Capability Map where housing and workplaces are actually promoted in the Region.

Children of long-time Highlands residents who are just entering the workforce are unable to afford local housing while earning modest incomes. As a result, the Region is losing its pool of talented younger residents who are forced to leave the Region. Similarly, older residents are unable to downsize to age-restricted housing and remain in their communities due to lack of such housing. There is also a jobs to housing imbalance in the Highlands, for both zoned and developed land, with an inadequate supply of workforce housing, especially for the many employees at the more moderate pay scale. The RMP should strive to ensure workers providing essential services in the Region, such as in schools, hospitals, restaurants, stores, emergency services, etc., are able to find affordable housing in the vicinity of their employment.

The Council should better balance the need for homes and jobs with resource protection and identify realistic housing opportunities in the Region. The RMP should be revised to encourage municipalities to meet the housing needs of the full spectrum of New Jersey residents by providing a wide range of housing styles, densities and costs. Beyond promoting mixed-use developments, the Plan should encourage a variety of housing to be developed – town homes, single family detached, and apartments. NJBA also notes the availability of abandoned office space in the Region, which should be examined to determine if they can be repurposed for housing.

Cluster zoning is another approach that has been statutorily approved statewide and allows for more compact developments. This is another avenue the Council could affirmatively support and encourage municipalities to enact. Further, the Council should revise its policy position to mandate growth by those conforming municipalities that already have the capacity and infrastructure to accommodate development. **It is insufficient to require conforming municipalities to simply “evaluate” development and redevelopment opportunities for market-rate and affordable housing.** An affirmative responsibility should be placed on conforming municipalities to accommodate development and redevelopment opportunities of market-rate and affordable housing.

Affordable Housing

With regard to affordable housing needs, the NJBA recognizes the current state of flux with the ongoing Council on Affordable Housing litigation and the Third Round fair share allocations. However, there are executive and statutory mandates and guiding documents in place for addressing affordable housing in the Highlands Region: the Fair Housing Act (FHA) (amended by P.L. 2008, Chapter 46), Executive Order No. 114, the Memorandum of Understanding (MOU) between the Council and the Council on Affordable Housing (COAH) (October 29, 2008), and the Council’s Resolution 2008-41 (adopted October 30, 2008).

The amended FHA requires the Council to “identify and coordinate regional affordable housing opportunities in cooperation with municipalities in areas with convenient access to infrastructure, employment opportunities, and public transportation” and identify opportunities for affordable

housing, including the requirement for a 20 percent set aside in all residential developments in the Highlands. Executive Order No. 114 establishes major procedural requirements for municipalities, the Council, and COAH for preparing and reviewing affordable housing plans for Highlands municipalities. Executive Order No. 114 reiterates the FHA and also directs the Council to “identify additional sites, opportunities, and funding sources for 100 percent affordable housing developments...” (See paragraph 1.d.). Similarly, the MOU reaffirms and implements the obligations placed on the Council by the amended FHA and Executive Order No. 114. Pursuant to Highlands Resolution 2008-41, the Council resolved itself to develop and adopt affordable housing guidelines, after public hearing and public comment, in accordance with the amended FHA and Executive Order No. 114. (See Resolution 2008-41.)

Although clear responsibilities have been placed on the Council, the NJBA views that the Council has failed to complete the specific task of proactively identifying opportunities and appropriate sites for affordable housing, particularly through the RMP conformance process. NJBA strongly recommends that, as part of the “monitoring process”, the Council should evaluate the extent of zoning for affordable housing as well as the actual construction of same within the Highlands region since the Highlands Act was passed. Regarding the Council’s promised task of identifying appropriate sites for affordable housing, the Council should take the following recommended steps:

1. It should prepare an inventory of sites zoned for affordable housing pursuant to court orders or COAH approval.
2. It should promulgate a policy, adopted after rule-making, which recognizes the court/COAH designation of these sites, unless it is demonstrated that development cannot be accomplished in conformance with statewide DEP regulations or would threaten regional water quality or supply.

Economic Growth

The RMP includes several promising policies and objectives to support economic development in the Region as part of its “Sustainable Regional Economy Program.” See pages 356-358. For example, Objective 8A1b states: “Serve as an advocate and technical resource for Highlands economic development initiatives in work with municipalities, counties, regional agencies, and the private sector to promote sustainable economic development in the Region.” Page 357. From the private sector perspective, it is difficult for NJBA to agree that these measures have been well-established, well-publicized or effective in adequately addressing or supporting economic growth in the Region. NJBA reiterates that the RMP should be revised to attract and retain businesses and industries in the Region. The Council may consider partnerships with the building industry and others in the private sector who influence the economy.

The RMP discusses in “Subpart C Baseline Economic Indicators” that baseline “traditional” indicators would track population, employment, households, income, property taxes, equalized property values, land transaction, and building permits. (Page 128). These indicators should be tracked closely, reported publicly on an ongoing basis, and expanded to capture more specific data, such as supply and pricing of housing units, salary ranges and types of occupations.

The fiscal analysis that is being completed as part of the Monitoring Program will be critical to understanding the full impact of the Act and the RMP over the past ten years, even accounting for the effect of the economic recession. The NJBA urges that the analysis be fully disclosed and proactively addressed to enhance the Region's economic strengths and vitality.

Transfer of Development Rights (TDR) Program

The Highlands Act establishes as a very clear goal that the Council must identify 4% of the Planning Area to be Receiving Areas. Unfortunately, the Council has failed to establish the statutorily mandated TDR program with sufficient receiving zones that was envisioned to be the mechanism to compensate landowners for their lost equity in the land and life savings. Only 11,000 acres, 1.3% of the Highlands Region, is shown in the RMP as a voluntary TDR Rights receiving area.

The NJBA recommends that the Council should designate voluntary receiving zones in the Conservation Zone. No town has adopted zoning to implement a receiving area, while several have accepted TDR feasibility grants to evaluate establishing TDR receiving zones. Experience in other communities and regions outside of the Highlands has shown that developing a workable TDR program that would be appealing to the development community as the buyers of the credits is an extremely complicated and challenging undertaking. While broadening the TDR program to areas outside of the Highlands Region was a necessary step, it has not gone far enough to generate the necessary interest in the program. Additional incentives are necessary to encourage builder participation in the TDR program and impact fees should not be assessed. The Council should use the TDR program as a tool to address the housing needs of the Region and offer incentives to encourage the construction of higher density housing, including multi-family and work force housing.

Overall, NJBA supports the Council's rulemaking approach for the proposed "Land Owner Equity and Land Preservation Program". The draft program description explains how this new program would fit in with the overall mandatory TDR program:

"The TDR Program is designed to be an equitable means of guiding development away from sensitive lands in the Highlands Region and redirecting development to alternate locations, both within the Region as well as other areas of the State. The Highlands RMP recognizes the need to set priorities for acquisition or purchase of conservation easements in those lands within the Region that have the most significant resource values. To this end, the RMP includes numerous policies to address open space acquisition and farmland preservation. The Highlands Council has devised a Land Owner Equity and Land Preservation Program to implement these preservation goals. This program includes the purchase of Highlands Development Credits (HDCs) by the Highlands Development Credit Bank (HDC Bank) and the creation of an open space matching grant program. Both programs will provide for protection of Highlands resources, compensation for land owners, as well as management of contributions for future mitigation projects." (See page 1.)

The NJBA looks forward to learning more about the "Land Owner Equity and Land Preservation Program" and how its implementation will support and complement the delayed TDR program.

The NJBA appreciates prior opportunities to discuss and offer recommendations for establishing a viable TDR program that would generate interest by the development community. We remain available as a resource to implement a successful program to meet important statutory mandates.

D. Regional Master Plan – Implementation and Conformance

The NJBA has significant concerns with the Plan Conformance process, many of which have already been discussed extensively with the Council staff and made known to the Council.

Lack of Rule-making Procedures

The NJBA views the Highlands RMP as a substantial regulatory program that directly impacts property rights. Landowners, the general public, municipalities, and those seeking to invest in an area should be able to depend on an official, consistent and publicly vetted regulatory process to inform such decision-making. However, without any statutory authority, the Highlands Council has determined from the onset to take all formal actions without adopting rules and regulations in accordance with the Administrative Procedures Act (APA) and case law. The posted guidance documents and policies posted on the Council's website are subject to change at any time, including actions that may make significant changes to the RMP.

NJBA and others have brought the need for the adoption of rules and regulations to the attention of the Council and its staff. NJBA has in fact urged the Council to stop taking any official action until it operates within the standards of the APA. However, the Council has disregarded such advice and has proceeded with the county and municipal plan conformance without utilizing a formal administrative process (among other actions).

In discussing this issue with the Council staff, the Appellate Division decision was referenced as highlighting how the Highlands Act was sufficiently specific in its regulatory requirements that satisfied, essentially, rulemaking standards. However, NJBA highlights that more recent Appellate Division decisions have questioned and limited the scope of the New Jersey Department of Environmental Protection (DEP)'s guidance documents in its Waiver and Stormwater regulatory programs. The courts noted that these guidance documents had been developed and used by staff and the regulated community *without* having been adopted under the APA's formal public comment framework. The impact of these decisions is significant given that, in the case of the Stormwater Non-Structural Point System, the regulated community has already invested significant monies and has relied upon this tool to ensure regulatory compliance, and now is left in a state of uncertainty.

At its January 22, 2015 meeting, the Council determined to use the formal rulemaking for the pending Land Owner Equity and Land Preservation program. Although the rulemaking approach is pending approval of the Governor's Office, the NJBA nevertheless is very pleased that the Council supports the rulemaking approach for such an important endeavor to compensate landowners. Overall, the NJBA views the lack of rulemaking to be a significant public policy and regulatory issue that merits amending the Highlands Act to require the Highlands Council to adopt rules and regulations pursuant to the APA. Consistent with the rule making procedures utilized by other State agencies, the Council should propose for public comment and then formally adopt rules and regulations governing how it would make determinations. Guidance

documents should be used only to explain rules and regulations. Further, in light of the current monitoring program and anticipated updating of the RMP, the Council should establish procedures that conform to the APA for amending the RMP.

Regional Master Plan Conformance

Per the Act, municipal and county conformance to the RMP is voluntary in the Planning Area. However, the result is that many municipalities have petitioned to enter the plan conformance process and been approved by the Council, but then have failed to move forward and complete the plan conformance process. As of January 12, 2015, 65 municipalities and counties have initiated the plan conformance process by petitioning the Council as early as 2009, 47 have been approved by the Council as early as 2010 to proceed with the implementation process, but only High Bridge Borough, Vernon Township and Chester Township have actually completed the plan conformance requirements, including the required Model Ordinance. (See: http://www.highlands.state.nj.us/njhighlands/planconformance/implementation_tracking_sheet.pdf) The majority of municipalities have not adopted the “Planning Area Petition Ordinance”, nor the other mandatory elements and Highlands Ordinance. There have been long delays between Council conformance approval and adoption of the implementing ordinances. Notably, the initial surge of municipal petitions for plan conformance was clearly tied to the affordable housing protections laid out in Executive Order #114 under Governor Corzine. (See “Executive Order #114” discussion below.) The RMP should not be used as a means for municipalities to avoid their affordable housing obligations. The conformance should truly be voluntary and there should not be any “incentive” to goad municipalities to opt in.

There are no mechanisms, including deadlines, currently utilized by the Council to “force” a municipality or county to complete the conformance process. As a result, residents and those who want to conduct business in these areas are caught in the regulatory limbo as a final decision to achieve full conformance would impose severe restrictions on growth potential. In order to provide certainty, predictability and long-term planning, the NJBA strongly encourages the Council to enforce deadlines to require a decision to either withdraw from or proceed with Plan Conformance and its required actions. Further, this problem of “no end-in sight” for the plan conformance process is further compounded as municipalities that start the plan conformance process may drop out, but then have a change of position and initiate the process again. That contributes to a continual state of uncertainty at the expense of constituents.

The NJBA is also of the opinion that municipal and county plan conformance in the Preservation Area is an unnecessary and expensive requirement since all development in the Preservation Area has to obtain a Highlands permit from the DEP.

Model Highlands Land Use Ordinance

Upon adoption of the required Model Highlands Land Use Ordinance (Model Ordinance), land in the Highlands Planning Area will be severely restricted and may be subject to standard-less review and approval by the Highlands Council prior to any local Board review or approval. The Model Ordinance requires municipalities to adopt and enforce the Highlands resource and special protection area maps and policies as part of its zoning ordinance. Development potential would be significantly curtailed due to broadly mapped resources, such as forest resources,

critical wildlife habitat that may cover all undeveloped acreage, Highlands open waters, riparian resources, steep slopes, as well as policies concerning water conservation and deficit mitigation, development on agricultural land and use of groundwater resources. Sewer and water service is restricted to the Existing Community Zone unless the Highlands Council allows it in another zone.

There is no process for a property owner to prove that their site does not contain the mapped Highlands resources and change landscape designations, so the ordinance designation is final. Highlands Council approval is required before a development application can be deemed complete, despite the lack of statutory authority or articulated standards adopted pursuant to the APA. Also, certain criteria in the ordinance are extremely ambiguous and other standards violate the Municipal Land Use Law by dictating different criteria for variances and site plan exceptions. The Model Ordinance also attempts to have municipalities delegate the design and approval of septic and water systems to planning boards, despite the fact that this is clearly pre-empted by DEP. The Highlands Council should rescind the Model Ordinance and replace it with a workable and simple ordinance which meets all Municipal Land Use Law and other legal requirements.

Checklist Ordinance

The 95-page Model Ordinance has been acknowledged by the Highlands Council staff as unworkable for conforming municipalities. Per the January 12, 2015 “Municipal Plan Conformance Implementation Tracking Sheet”, only **six** municipalities out of 47 municipalities with conformance approval have the mandatory Model Ordinance in place that has been deemed consistent by the Council. Instead of amending the Model Ordinance, the Council has developed the “Checklist Ordinance” as an alternative ordinance for a municipality to satisfy the required elements of the Plan Conformance process. The Council defends its use of the Checklist Ordinance as an accepted tool under the Municipal Land Use Law and an “interim” measure until the municipality adopts the Land Use Ordinance. The effect of the Checklist Ordinance is two-fold: (1) authorizes the Council’s review of applications in Planning Area municipalities that have not yet fully conformed to the RMP; and (2) subsequently, development applications would be deemed incomplete until zoning is enacted to conform to the RMP. While the Council has stated that its use would be limited to municipalities with limited development that satisfy specific criteria, the Checklist Ordinance should not be used as it is contrary to the Highlands Act, which authorizes such review by the Council in only the Preservation Area, and violates the Municipal Land Use Law’s prohibition against development moratoria.

Further, although the Council discusses the municipalities seeking its use during the overall Council meetings and makes available some materials underlying the basis of its decision-making, NJBA believes that this approach still lacks transparency. The adoption of the Checklist Ordinance at the local level does not rise to the level of public discussion and vetting as other municipal ordinances. In the case of development applications, an applicant may view the Checklist Ordinance as a simple “checklist” for the town and understand its true effect only during the approval process.

The NJBA is also concerned with the Council's approach of utilizing the Checklist Ordinance in relation to the Permit Extension Act (PEA), as amended in 2012. By way of background, contrary to the legislative intent of the 2008 PEA, the Council boldly took the position that the PEA did not apply in the Highland Region as there are no areas designated for growth per the Regional Master Plan. To rectify that outcome, the 2012 PEA included a new definition of "extension area" to ensure permits and approvals would be extended in the Planning Area (except in those municipalities which obtained conformance approval and adopted one of specified ordinances), and also within Highlands and the State Development and Redevelopment Plan designated centers. Although the PEA explicitly limits these exempt conforming municipalities to those that adopted, as of May 1, 2012, either the Highlands Master Plan Element, a Highlands Land Use Ordinance, or an Environmental Resource Inventory, the Council has broadened the criteria of exempt municipalities to also include those that adopted a "Checklist Ordinance." This interpretation is clearly contrary to the PEA and the NJBA strongly recommends that the Council should strictly adhere to the parameters of the PEA.

Regulatory Review

The NJBA is concerned about the overall lack of clarity for regulatory reviews and permitting between the DEP and the Council in the Planning Area, which has caused undue burdens in the application process. The Water Supply Management Act was amended in conjunction with the Highlands Act to prohibit the DEP from taking any action (i.e. issuance of water allocation permits) in the Highlands Region unless they are consistent with the Highlands Act and the RMP. See, N.J.S.A. 58:1A-15.1. Per the Highlands Rules, DEP may approve Wastewater Management Plan amendments for the entire Region "only after receiving from the Highlands Council a determination of Consistency with the Regional Master Plan." See, N.J.A.C. 7:38-1.1k.

The Highlands Council considers much of the Planning Area to be in water deficit (a position that NJBA believes is scientifically flawed). Much of the Highlands Area is designated in the RMP as having insufficient groundwater available for human use. (Fig. 3.15 and 3.28 of RMP.) Until such time as a town adopts a "Water Use and Conservation Management Plan", any development application which requires water either from an onsite well or water supply provider, cannot be deemed complete until the Highlands Council has determined adequate water supply. The Council also seeks to preserve water resources by requiring enhanced groundwater recharge. NJBA disagrees with the council's definition for defining "water deficit" areas. Water deficit should be dependent on NJDEP's water allocation for municipalities and water purveyor. We also note that NJDEP already has regulations in place that require groundwater recharge.

In all other permit determinations, DEP has no statutory or regulatory authority to require a Highlands consistency review in the Planning Area. Nonetheless, DEP has indicated that even for a simple water main extension permit in the Planning Area, it will require a Highlands Consistency Determination for the water line and the development project to be served, despite approvals being issued prior to the municipality achieving full plan conformance. Members have also noted inconsistency in direction as to when Highlands consistency reviews are required in relation to how far along the municipality is with the Plan Conformance process.

The difficulties NJBA members have faced through the permitting process exemplify why rulemaking is necessary to inform the public and the regulated community and also to guide staff at both agencies in permitting matters. Clarity is necessary for the scope of the regulatory review between the DEP and the Council and such review should not exceed the underlying statutory authority. The Council should adopt regulations to properly and uniformly set forth when Highlands consistency reviews are required.

Environmental Standards

The RMP should be revised to ensure that the environmental standards and municipal ordinances for the Planning Area are not as stringent as for the Preservation Area (i.e. the DEP's regulations applicable to the Preservation Area). The NJBA identifies some problematic standards and recommends aspects to be revised:

1. The 300 foot buffer from Freshwater Wetlands and for any Highlands open waters, which are virtually all waters except for swimming pools, should be imposed only in the Preservation Area. In addition, riparian areas extending beyond these constraints are mapped and disturbance is not permitted. In the Planning Area, the buffer should be reduced to a maximum of 150 feet to be consistent with the Freshwater Wetlands Protection Act regulations;
2. The three percent limitation on impervious surface needs to be amended to allow for greater impervious cover. Virtually all permitted development must occur on very large lots and the driveway alone could account for the three percent cover. This limitation promotes sprawl development. To also help alleviate the problem, the definition of "impervious surface" needs to be amended to exclude porous paving, paver blocks, gravel, crushed stone, decks, elevated structures and other similar structures;
3. Disturbances on slopes of up to 25 percent should be allowed and disturbance of uplands forested areas for permitted uses or within designated centers and specialized nodes should be allowed;
4. Critical wildlife habitat areas may not be disturbed, unless permitted by the Council or the municipality has adopted the Habitat Conservation and Management Plan. Our experience is that the Council does not defer to the DEP's findings, despite their expertise in this area. NJBA strongly urges that critical wildlife habitat be subject to DEP's determination for any area to be served by public and/or community sewer. Property owners and municipalities should have the right to submit habitat suitability studies to dispute or revise the Council's determination of critical habitat areas. Further, the Council's determination of such areas is based on Landscape Project maps, which are not easily accessed nor provide the supporting data and sitings to allow for independent confirmation of the designations. The NJBA recommends that the basis for the Council's determination should be more transparent for the public's review without requiring such specialized computer software; and

5. No forested areas may be cleared unless “unavoidable” and mitigation plan is provided. It is unrealistic to not allow forested areas to be cleared, especially for affordable housing projects. This provision should be eliminated and standard municipal provisions regarding tree removal and mitigation should apply.

DEP Waiver and Exemption Processes

A landowner may recognize that property is not developable under the Highlands regulatory structure. Unfortunately, the DEP waiver process established in the Act is so cumbersome, expensive and unrealistic that it is virtually impossible to receive a waiver. The waiver process should be streamlined to expeditiously provide a landowner with a determination of a regulatory taking.

Also, many times a waiver from a required standard would actually prove to be beneficial to the Highlands environment. For example, there are existing situations where serious environmentally deleterious conditions exist. A waiver from an existing standard could allow development to proceed without being fully consistent with the regulatory standards while also greatly improving the condition. The overall improvement of existing problems should be a factor in determining whether to grant waivers.

The Act provides that for a number of exemptions that would exempt activities from DEP’s Preservation Area regulations. The NJBA viewed DEP’s exemption process as an unduly cumbersome, extensive application process that required considerable expense and extensive time. Thus, the NJBA supports the DEP and Council’s delegated “Highlands Area Municipal Exemption Determination Certification Program” enabling certified municipalities to issue determinations as an important efficiency measure. The Association encourages additional municipalities to participate in the program.

Lack of Process for Property Owners Input

Through the Council’s “Map Adjustment program” and “RMP Updates”, only local government bodies (municipalities and counties) may request adjustments to the Land Use Capability Map as part of the Plan Conformance process or as a separate request. The Council’s summary of the Map Adjustment Inquiry Form states: “The Map Adjustment Program allows for the exchange of planning information between the Highlands Council and local government units in order to ensure *a sound basis for local planning and development review* in support of the overall Goals, Policies and Objectives of the RMP and the Highlands Act.” However, public input is severely circumscribed since there is no similar process for property owners themselves to request map adjustments, center designations, or updates to the RMP. Property owners are not able to protect their rights, but instead must rely instead upon the municipality to request changes or correct factual errors, which would require the municipality’s support.

The NJBA strongly recommends the Council to establish a separate appeals process to the public that is available on an ongoing basis to address such mapping errors and concerns.

Overall Wastewater Management Planning

NJBA urges that all State Planning Areas 1 and 2 in the Region should be within the sewer service areas, as these designations are clearly aligned with overall State planning objectives and goals. Further, the NJBA has advocated to DEP and counties, including Highlands counties, about the unreliable nature of DEP's underlying Geographic Information Systems data used to locate freshwater wetlands, species habitat and stream buffer and then draw the Future Wastewater Service Area maps. Instead of delaying taking action to correct the mapped areas until the plan conformance process or the cumbersome site specific amendment and revision processes, the Council should proactively make the determination to add areas back in to the sewer service areas.

The DEP has imposed the requirement that the Council make a "determination of consistency" with the RMP for a Water Quality Management Plan amendment for the **entire** Highlands Region, not just the Preservation Area. As conformance with the RMP is voluntary for the Planning Area, this general consistency determination by the Council for the entire Planning Area is not in the Act, should be eliminated from the DEP regulations, and DEP should assume responsibility in the Planning Area. Also, the DEP should allow for new or expanded utilities (both for wastewater and water supply) within designated centers and other developed areas throughout the Region, Existing Community Zones, including any Environmentally-Constrained Sub-zones, as the current prohibition is unjustified and only inhibits economic growth. Currently, new or extended utilities in other zones must be reviewed and approved by the Council, despite the lack of standards for doing so.

It is also entirely unclear how the wastewater management plan (WMPs) amendment process is being conducted in the Highlands, where notably only very few WMPs have been adopted in the Planning Area. NJBA is concerned about the lack of transparency and public input involved in the process and perplexed about the secrecy when other regions and state agencies are far more open. The Council has not posted any correspondence or reports for public review and understanding and specifically states that "Draft WMPs are not available from the Highlands Council for public review." Further, the draft future wastewater maps for Morris and Hunterdon Counties simply stated: "The Future Wastewater Service Area delineation for those municipalities that have been identified as Highlands Conforming Municipalities on this map are being developed through the Highlands Council's Plan Conformance process cooperatively between the Highlands Council and the municipality." Such statements are not informative or reassuring since the process and respective responsibilities between the DEP and the Council have not been formalized (i.e. there is no "Memorandum of Understanding"). The wastewater management planning process should be more transparent with underlying reports and documents publicly available. Without such critical infrastructure related information available, it is difficult for the business and development communities to confidently invest financial resources in the Region.

Development on septic systems must adhere to septic system density requirements that override current zoning standards and require very large lots. The March 2010 Highlands Council publication concerning average lot size per septic system by land use capability zone for conforming municipalities in the Planning Area shows minimum acres per septic system of:

- Protection Zone: 19 acres - 43 acres;
- Conservation Zone: 7.7 acres – 15.1 acres; and
- Existing Community Zone: 7.2 acres – 15.7 acres.

The protection of areas from septic effluent should not be based on deep aquifer recharge for septic dilution. Septic density standards dictate very large lots (up to 88 acres) throughout the rest of the Planning Area, which do not meet the needs of residents and contribute significantly to sprawl.

Given the very large lots which result from septic density dilution standards in the Highlands area, the Council should require the use of alternate septic system designs. These systems support clustering and low impact development on reasonably sized lots. These alternative systems are equivalent to mini-sewer treatment systems and provide much better environmental protection than would low density development. Following the successful model of the Pinelands Region, the Council should establish a similar pilot program for alternative design septic systems that have proven effective at removing nitrates.

E. Conclusion

Despite anticipated economic recovery for the State, the Association is concerned that without a thorough revision of the RMP and eliminating conflicting, duplicative and overly restrictive regulations, recovery and growth for the Highlands region will be impeded. The Council is urged to seize this opportunity to effectuate the critical mandates of the Act that **have not been fulfilled** to support economic growth.

Sincerely,



Carol Ann Short, Esq.
Chief Executive Officer

C: Stephen Shaw, Shaw Built Homes, LLC