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APPELLATE DIVISION UPHOLDS HIGHLANDS COUNCIL POLICY ON VOLUNTARY PLANNING AREA CONFORMANCE



In an August 7, 2013 *per curiam* decision, the Appellate Division of Superior Court approved the Highlands Council's approach for determining when a town must provide a land use ordinance amendment to the Highlands Council for review and approval.

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The case evolved from a dispute between two adjacent municipalities, Greenwich Township and Lopatcong Township, both in Warren County. On November 2, 2011, Lopatcong Township adopted an ordinance permitting asphalt and concrete manufacturing facilities as a conditional use on certain land within the Highlands Planning Area. The affected property bordered Greenwich Township.

Greenwich Township asserted that Lopatcong Township's March 17, 2011 receipt of conformance approval from the Highlands Council obligated it to obtain Highlands Council approval of the asphalt/concrete facility ordinance amendment.

Greenwich's position was supported by language in the March 17, 2011 Lopatcong Highlands Council conformance approval resolution. However, then-Executive Director Swan took the position that Highlands Council prior approval of the ordinance amendment was not required. The reason stated by Executive Director Swan involved the timing of the ordinance. Although Lopatcong had received Highlands Council conformance approval, the Township had not yet adopted a "petition ordinance" at the time that the asphalt/concrete facility ordinance was adopted. As a result, Lopatcong could adopt the asphalt/concrete facility

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ordinance without prior approval of the Highlands Council. The Appellate Division agreed, and deferred to the agency's plan conformance approach.

The Highlands Council's view is that, even after it approves a town's conformance petition,

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conformance in the planning area continues to be voluntary unless and until the town adopts a "petition ordinance." A "petition ordinance" is called for by the Highlands Act, and is an ordinance in which the town declares its intention to revise its master plan and development regulations to conform with the Highlands Regional Master Plan. Through this policy, the Highlands Council provides towns with the maximum flexibility, so that each town can go through the conformance process, find out what master plan and ordinance amendments are required, and once it has that information, decide whether or not it cares to bring its planning area into conformance with the Regional Master Plan. Until it makes a clear decision to comply via petition ordinance, the town may adopt zoning and site plan ordinances in the ordinary manner without Highlands Council review and approval.

As a result of this decision, the Highlands Council is now batting seven and zero, having won all legal challenges to the Highlands Act and Highlands Regional Master Plan. These prior cases include:

- The Castle Rock Estates case in which the Court found the Highlands Act did not violate due process and other constitutional provisions;
- The OFP case in which the New Jersey Supreme Court rejected various constitutional challenges to the Highlands Act and required a property owner to submit an application for a hardship waiver prior to filing a takings claim, *OFP, LLC v. State of New Jersey*, 197 N.J. 418 (2008);
- The Kasharian challenge to the Highlands Act in which the Court recognized the Legislature's

right to delegate to DEP the authority to regulate the State's waters and to regulate land in the Highlands more strictly than land in other parts of the State;

- The Warren County decision where the Court found that the 18 month deadline for adopting the Regional Master Plan was not mandatory, that the right to farm was not a fundamental constitutional right, nor was it interfered with by the Highlands Act and, again, refused to interfere with the Preservation Area boundaries drawn by the Legislature;
- The Town of Clinton and High Bridge decisions in which the Court upheld the plan conformance process against a challenge that it violated the Administrative Procedures Act;
- The Bi-County Development of Jefferson Associates decision, in which the Court agreed that a Mt. Laurel property should be valued based upon the DEP regulations in effect the day before enactment of the Highlands Act, thus precluding consideration of a settlement agreement requiring the property to be included in a sewer service area.

[Click here](#) to read the Appellate Division Upholds Highlands Council Policy on Voluntary Planning Area Conformance ruling.

Disclaimer: This article is for general information only and is not legal advice or counsel.



About the Author



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