

Highlands “Takings” Resources

Calls for landowner compensation for decreased property value continue throughout the Highlands region and in Trenton. Advocates of landowner compensation argue that any property right and value diminished by the Highlands Act, the DEP Preservation Area Regulations and/or the Highlands Regional Master Plan constitute a “taking” under the U.S. Constitution and the New Jersey Constitution.

The argument is far less simple than these advocates maintain. The call for landowner compensation has become a political rather than a legal question. New Jersey elected officials, up to the highest levels, have and continue to give support to the contention that compensation is due.

The public and decision makers at all levels generally do not have a working understanding of takings and are likely to be swayed by arguments that have no basis in law. Without such an understanding, unwise political and administrative decisions are possible, which could have serious negative impacts on New Jersey’s open space and environmental future and may well reverberate beyond our borders.

The following resources will help the public, environmental commissioners, planning board members and elected officials form a rational understanding of takings that may help prevent dangerous and destructive public policy.

Constitutional Provisions

The takings issue is related to the 5th and 14th Amendments of the U.S. Constitution, and Article I, Paragraph 20 in the New Jersey Constitution. Constitutional law evolves over time through the actions of legislatures and rulings by the U.S Supreme Court. Like many other issues, the “takings doctrine” has evolved. Both the federal and State constitutional provisions must be viewed in the context of relevant court decisions.

U.S. Constitution

5th Amendment (1789)

*No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; **nor shall private property be taken for public use, without just compensation.** (Emphasis added)*

14th Amendment (1868) (due process).

*1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property,***

without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added)

New Jersey Constitution (1947)

Article I

Rights and Privileges

20. **Private property shall not be taken for public use** without just compensation. Individuals or private corporations shall not be authorized to take private property for public use without just compensation first made to the owners. (Emphasis added)

Important U.S. Supreme Court and New Jersey Cases

Important U.S. Supreme Court cases followed by New Jersey cases are presented below with links to the decisions.

U.S. Supreme Court Cases

Koontz v. St. Johns River Water Management District (2013)

- **Pennsylvania Coal Co. v. Mahon**, 260 U.S. 393 (1922) - Regulatory
- **Pennsylvania Coal Co. v. Mahon**, 260 U.S. 393 (1922) - Regulatory takings doctrine established.
- **Penn Central Transportation Co. v. New York City**, 438 U.S. 104 (1978) - establishes factors to consider in takings claim.
- **Agins v. Tiburon**, 447 U.S. 255 (1980) - adopted two-part test.
- **Loretto v. Teleprompter Manhattan CATV Corp.**, 458 U.S. 419 (1982) - physical occupation of property
- **First English Evangelical Lutheran Church of Glendale v. County of Los Angeles**, 482 U.S. 304 (1987) - temporary takings
- **Nollan v. California Coastal Commission**, 483 U.S. 825 (1987) - requirement that a reasonable relationship exist between the property taken and a corresponding public need
- **Lucas v. South Carolina Coastal Council**, 505 U.S. 1003 (1992) - total taking
- **Dolan v. City of Tigard**, 512 U.S. 374 (1994) - rough proportionality required for dedication
- **City of Monterey v. Del Monte Dunes**, 526 U.S. 687 (1999) - rough proportionality test inapplicable to permit denial
- **Palazzolo v. Rhode Island**, 533 U.S. 606 (2001) - acquiring property after adoption of challenged regulation
- **Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning**, 535 U.S. 302 (2002) - temporary taking
- **Lingle v. Chevron U.S.A. Inc.**, 544 U.S. 528 (2005) - rejected *Agins* two-part test

Highlands New Jersey Court Cases

- [OFP L.L.C v. State of New Jersey](#) Found that
 - due process and equal protection rights were not violated;
 - a taking claim cannot be made before exhausting administrative remedies; and
 - the constitutional challenge was rejected.
- [The County of Warren et al v. the State of New Jersey](#) The New Jersey Department of Environmental Protection, the New Jersey Highlands Water Protection and Planning Council, and the New Jersey Water Supply Authority Warren Co. et al. Case brought by Warren County and several landowners was dismissed in the Superior Court but appealed to NJ Supreme Court. The Supreme Court upheld the trial court's decision and:
 - Upheld extended time to complete the *RMP*;
 - Found the "Right to Farm" not a fundamental constitutional right;
 - Found that a taking had not occurred because landowners still have some beneficial uses;
 - Said farming was favored and not impeded by *Highlands Act*;
 - Found that value reduction *per se* did not constitute a taking;
 - Found that equal protection rights had not been violated;
 - Upheld boundaries of the Highlands area and preservation area;
 - Found that large landowners had not been discriminated against;
 - Upheld broad, multiple purposes of the *Act*.

Takings Law, General Principles

- [Takings Law in Plain English](#) [Paperback] [Christopher Duerkson](#) (Author), [Richard Roddewig](#) (Author), [Elizabeth Byrd Wood](#) (Editor). Excellent brief background
- ["Takings Law"](#), short paper, with case law summaries
- ["Regulatory Takings"](#), short paper with links to important U.S. Supreme Court Cases

New Jersey Highlands Water Planning and Protection Act

- [NJ Highlands Water Protection and Planning Act](#) (full text) See: Sections relating to "compensation": 2(paragraphs 6, 7), 6(n), 6(o), 11(2)(a), 24, 35(b)(3)
- [Frequently Asked Questions](#) (*NJ Highlands Water Protection and Planning Act*)
- [Exemptions and Waivers](#) (*NJ Highlands Water Protection and Planning Act*) Note #3 under "Waivers".

- [Amendments and Executive Orders](#) Note extension of “special appraisal provisions.
- [Farming \(NJ Highlands Water Protection and Planning Act\)](#) Note special provisions for agricultural uses.
- [Highlands Act Exemptions for Single Family Dwellings](#)
- [Highlands Regional Master Plan](#) See: *Chapter 1*, pgs.18, 19, *Chapter 2*, p.41, *Chapter 3*, p.73 and *Part 7, Chapter 4*, p 137 and *Part 7, Chapter 5*, p. 314, and *Part 7*
- [Highlands Technical Reports](#) (15) See especially TDR Technical Report

[NJ DEP Highlands Preservation Area Rules](#)

The Highlands Water Protection and Planning Act authorized the NJ DEP to adopt special rules relating to the Preservation Area only.

[Full Text of N.J. Highlands Rules: N.J.A.C. 7:38](#)

See 7:38 (6.8) (11.6)

[NJ DEP Highlands Guidance](#)

General information on Highlands Act and regulations, including “Highlands myths”

[Christie Transition Team Report on Authorities](#)

[“Rethink the Highlands Council”](#) (p.6)

Advice of the Authorities Transition Team given to Governor Christie prior to assuming office, in many cases erroneous and ideologically driven

[Highlands Land Preservation](#)

Land preservation in the Highlands as elsewhere in New Jersey provides financial compensation to landowners who voluntarily sell their properties to state, county, and/or local government or to nonprofit land trusts. State funding, administered by the Garden State Preservation Trust, may come through the Green Acres program, the Farmland Preservation Program, or Historic Preservation programs. This funding is often matched with local or county open space trust funds derived from a portion of the real estate taxes or with nonprofit land trust funding.

Municipalities and counties with open space trust funds produce open space plans that define what lands should be preserved. Importantly the Highlands RMP also defines and prioritizes natural resource and agricultural lands for preservation. This detailed planned land acquisition framework is unique in the United States.

These programs have been highly effective in the Highlands and funds were nearly exhausted as of April 2013. State legislative action is need to renew these funds.

- [Highlands Land Preservation Report \(2012\)](#) Details land preservation activities in the Highlands as of 2010
- [Garden State Preservation Trust Highlands Statistics](#) Provides statistics of state funded land preservation in the Highlands for Fiscal Years 2000-2012.
- [New Jersey Green Acres Program](#)
- [New Jersey Farmland Preservation Program](#)

Transfer of Development Rights (General)

Beyond Takings and Givings by Rick Pruetz provides an in depth discussion of transfer of development rights from a national perspective. Chapter IV, “*What Are TDR’s Legal Considerations?*” by Daniel I. Berger, Esq., is of particular interest. Find an outline of the book and its contents at <http://www.beyondtakingsandgivings.com/legal.htm>

Highlands TDR Program

See Highlands Water Protection and Planning Act: Section 11

[Highlands TDR Program](#) - Explains the Highlands TDR Program and includes information for landowners, developers and municipalities