



Comments to the N.J. Highlands Council  
Verbal testimony prepared and presented by David Peifer, Nov. 30, 2006

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### **Social Equity vs. Real Estate Equity**

Today we have heard a great deal of discussion around the word equity. It is clear to me that the word is understood in very different terms by those providing comments. The Council should be mindful that the term “equity”, despite the protestations of landowners, does not appear in the Act. The Act does speak of just and fair compensation to landowners who sell their land or development rights to government for preservation purposes. This term should be understood by the Council in the context of traditional land acquisition practice and takings doctrine, not in some fantasy of compensation “due and owing” for partial takings and lost perceived speculative value.

Social equity demands that the rights of the citizens of the State as a whole be maintained and not foreclosed by the actions of a few. The right of all of New Jersey’s residents to a clean, healthy environment; to clean water, clean air and a sustainable future should not be abridged by the cumulative private actions allowed to take place under a system of bad planning, inadequate land use controls and ineffective regulation.

Additionally, maintenance of these social rights must be undertaken without creating illegal, unconstitutional or discriminatory rules, policies and procedures. Each of these words, “illegal”, “unconstitutional”, “discriminatory”, is a legal term of art supported by a body of legal doctrine, not to mention case law. It is quite common that understandings of the meaning of these words differ widely in the public mind and that these understandings differ from established legal doctrine. Such is the case with the term “equity” as discussed here today.

The problem of the Highlands is as clear today as it was to the authors of the 1907 Potable Water Commission Report. Today the extraordinary significance of the Highlands as a water supply, and as a reservoir of clean air, forests, wetlands, wildlife habitat, scenic quality and historic resources is recited in the findings of the legislature in the Highlands Act. The legislature also recognized the importance of protecting agricultural resources and the business of agriculture for social, economic and

environmental reasons. All of these statements relate to the social values of natural resources, economic activity and preservation of natural resources, not to enhancing private economic value or favoring one individual over another.

In the preamble to the Act, the threats to the region are well expressed and the lack of effective control is clearly identified: “...the existing land use and environmental regulation system cannot protect the water and natural resources of the New Jersey Highlands against the environmental impacts of sprawl development”.

Importantly, the legislature recognized the public interest imperative of protecting the resources of the Highlands “...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” and finally, that accomplishing these objectives 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”.

These legislative statements capture the need to protect the social equity rights to a clean and reliable source of drinking water for nearly half of New Jersey’s population. Thus, the protection of the social equity rights of nearly half of New Jersey’s water consumers is a major theme of the Highlands Resource Management Plan (RMS) that is fully supported by the Act and existing, established legal doctrine.

Real estate equity differs considerably from the concept of “social equity”. For the most part, real estate equity is a financial consideration important to individual owners. The equity referred to is usually the positive value retained by the owner when all debts connected to land ownership are satisfied. Real estate equity may also be perceived by owners to include a speculative component governed primarily by market factors and the “utility” of land.

Market factors are heavily influenced by the location of the property. Higher values generally follow public investment in infrastructure of all types, including sewer systems, water supply systems, roads (or other transportation investments) and investment in schools and other social services. In some cases, high environmental or “amenity value” increases the market value of land, for example, oceanfront or water front properties and property adjacent to preserved lands. Indeed, it is fair to say that decisions regarding the quantity and quality of these public investments, including the purchase of open space and parklands, actually create a major portion of real estate equity.

The “utility” of land is determined by an appraisal process that determines the “highest and best use”. These determinations are subject to the regulatory constraints imposed by government to protect the public health, safety and welfare. It is fair to say that the many of the comments on this persistent issue demonstrate a fundamental misunderstanding of the process of determining “highest and best use”. Often, they attribute a major portion of their real estate equity to speculative perceptions and a faulty conception of “highest and best use value”.

It is important for the Council to understand that the public has no obligation to compensate owners for real or perceived losses of real estate equity resulting from the application of regulations and controls rationally imposed on land to protect the public health, safety and welfare. Such compensation is due only upon a total taking of land for public purposes.

Rather, the Council must administer the Highlands Act through its RMP with the goal of protecting the social equity of New Jersey's residents. Despite this fact, and largely for political reasons, the Highlands Act contains numerous provisions designed to address the well known political-economic problem of "windfalls and wipeouts". These provisions were included in the Act to assist with the orderly and efficient protection of social equity that underlies the intent of the legislation.

Specifically, these provisions include special appraisal rules that allow the claiming of value and land utility as if the current, post Highlands Act, regulatory constraints do not exist. This portion of the Act is, arguably, a political accommodation and not a requirement under current legal doctrine. In fact, the whole purpose of the Act is to control land uses that were permitted by the pre-Highlands regulatory system which, if allowed to continue, would clearly and demonstrably destroy social equity.

The former socially destructive utility values created by this inadequate planning and regulatory framework are now to be used to compensate landowners who choose to sell their land for preservation purposes. This is beyond the normal realm of fair and just compensation and is a transparent political accommodation that will allow the public pocket to be picked by area landowners. In actuality, this appraisal process is not recognized as legitimate by the Internal Revenue Service for purposes of calculation charitable donation value that must, under IRS rule, be calculated on current value, including all applicable regulatory constraints. Property owners in the Highlands region are fortunate that the Act allows this fiscally unwise and legally questionable practice, to their advantage.

That being said, a compelling case for the achievement of rapid and comprehensive land use control is in the public interest. The cost of achieving this desired outcome by applying special appraisal rules may indeed be reasonable. However, accessing public funds in this manner is not a "right" but a particular accommodation to achieve social equity objectives of the Act.

The Act, the NJDEP Highlands Water Protection and Planning Act Rules (N.J.A.C. 7:38) and the Draft RMP provide for a total of 17 exemptions to accommodate and possibly exceed requirements under established "takings" legal doctrine. Landowners within the Highlands region have the advantage, not available to other New Jersey residents, of developing properties in defined circumstances as exemptions to the rules that apply to others within the Highlands region. These provisions are favorable treatment of a specific class of landowner in the Highlands region. Again, there is no "right" to these exemptions. Rather, they are a political accommodation designed to achieve the social equity goals of the Act.

Finally, the Act mandates the development and implementation of a transfer of development rights program (TDR) to allow the public to move development rights from areas deemed critical for preservation (sending zones) to areas deemed appropriate and suitable for additional development (receiving zones). Protecting the social equity of the residents of these receiving zones is a fundamental problem as yet unaddressed in the RMP. Despite the considerable legal and economic issues involved in developing the program, property owners within the Highlands will ultimately have another mechanism for receiving compensation not commonly available to other residents of the State as social equity is pursued under the Act.

The Council should release the Draft Regional Management Plan today and should continue to develop and perfect its implementation. These efforts should concentrate on quantifying the financial requirements engendered by the requirements of the Act, subject to the overall social equity objectives that are the genesis of the Act itself, not the speculative fantasies of regulated landowners.

The Council should work diligently to implement the goals of the Act and the RMP, including advocating before the legislature, the Governor and at the Federal level to secure adequate funding to discharge the mandates of the Act to preserve the social equity of all of New Jersey's residents.