

Highlands Act appeal is planned to top court

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Lawyers for nine landowners plan to petition the U.S. Supreme Court to hear their challenge that the state Highlands Act is unconstitutional.

The property owners, from Warren, Morris and Hunterdon counties, argue that their land has been stripped of its value as a result of the restriction on development in the seven-county region. They liken it to public confisca-

tion.

In 2008, a state superior court judge dismissed a challenge to the act by the landowners and Warren County. Subsequent appeals of the dismissal were unsuccessful.

The Highlands Act aims to preserve water and the environmental integrity of the 859,000-acre watershed, which covers 88 municipalities spread over seven counties, including Bergen, Passaic and Morris.

Water from the Highlands serves millions of residents outside

the region. Farmers and other landholders have complained for years that the plan's environmental constraints prevent them from selling their land to developers. Some local officials fear the plan will choke off future economic growth.

"By destroying land equity, the act makes it impossible to engage in farming as a livelihood," said a statement from the landowners' lawyers.

Stephen Shaw, a lawyer for Warren County, did not comment on the petition. The state Highlands Council could not be reached for comment Thursday evening.

The Supreme Court receives about 10,000 petitions a year and hears about 75 to 80 of them.

The deadline to petition the court is April 14.

The Highlands Act has come under criticism from Governor Christie's transition team, which called it an impediment to economic growth.

U.S. Supreme Court Asked to Hear Highlands Act Challenge

Nine northwest New Jersey property owners are petitioning the U.S. Supreme Court to hear their challenge of the state's Highlands Water Protection and Planning Act.

Attorneys Stephen H. Shaw of Hueston McNulty, P.C., and John M. Zaiter of Broschius Fischer & Zaiter, who represent the property owners, are asking the highest federal court to hear their argument that the Highlands Act violates the U.S. Constitution, after New Jersey courts rejected challenges to the law.

The property owners, from Warren, Morris and Hunterdon counties, own farmland that has seen much of its value stripped by the restrictions the Highlands Act places on development in the region. They say the resulting loss of value is tantamount to public confiscation.

A statement of the case from the attorneys is follows:

STATEMENT OF THE CASE

The New Jersey Highlands Act is a policy initiative of massive scope and utopian ambition. Water conservation and preservation of open space are to a substantial extent pretexts or euphemisms for what is in fact an anti-development measure. The net effect of the entire legislative scheme, when fully implemented, will take 859,000 acres, or about 1,342 square miles, and place it off limits to major development. A consequence to private landholders is a loss in the value of their property so great as to be tantamount to public confiscation. These are among the conclusions contained in a political scientist's expert report which, together with the extensive record below including the expert reports by a hydrogeologist, real estate appraiser and professional planner, illuminate the Act's constitutional violations.

The issue of whether the New Jersey Highlands Water Protection and Planning Act is a taking of private property by the State without just compensation was raised by the opinions of the Trial Court and the Appellate Division denying Plaintiffs' challenge that the Act was a violation of their constitutional right to equal protection.

Plaintiffs had submitted expert reports and documentation, including a 2003 interoffice memorandum from the Administration of Governor James E. McGreevy, which demonstrated that the true purpose of the Act was to serve as his environmental legacy by implementing the eco-socialist response of environmental lobbyists to the 2002 United States Forest Service and Department of Agriculture Study of the New York/New Jersey portion of the four-state Highlands Region: freeze all further development in the 859,000-acre area under the guise of water resource protection. As an arbitrary, manipulated and fictional designation without a scientific or rational basis, plaintiffs asserted that the "preservation area" established by the Act violated ordinary economic interests as protected by the equal protection provisions of the New Jersey and United States Constitutions. On motion for reconsideration, plaintiffs raised the issue of whether the right to farm is a fundamental right entitled to enhanced protections under the equal protection laws. By destroying land equity, the Act makes it impossible to engage in farming as a livelihood.

The Complaint was filed in conjunction with the County of Warren, a political subdivision of the State of New Jersey whose elected Freeholders are, pursuant to their oaths, sworn to uphold the Constitution of the State of New Jersey and the United States. The Complaint alleged constitutional violations under the New Jersey Constitution, since as a political subdivision, the County could not assert federal constitutional claims against the State. An amended pleading asserting the parallel United States Constitutional violations and a separate count asserting violations under the Civil Rights Law, § 1983, was attached to a motion to amend the pleadings filed on behalf of the nine individual plaintiffs, who are property owners and farmers within the Preservation Area representative of all those whose rights have been violated.

In addition to denying this motion, the Trial Court denied an application to have the pleadings amended to merely add the federal citations, indicating that the New Jersey courts and Constitution were fully capable of protecting plaintiffs' rights under the United States Constitution. To the contrary, the trial and appellate decisions establish that the New Jersey Highlands Act is a \$15 billion dollar uncompensated taking unprotected by the Constitution of the State of New Jersey.

The Appellate opinion analyzed plaintiffs' proofs and argument pursuant to takings principles as applied by New Jersey Courts and concluded that the Plaintiffs could avail themselves of the Act's waiver/takings application mechanism or receive compensation pursuant to the Highlands Transfer of Development Rights (TDR) program. The takings/waiver mechanism is a practical impossibility. The only statutory mechanism to compensate property owners for the taking of 75% of their property value in the 415,000-acre preservation area is a TDR program, which six years after the Act's March 29, 2004 retroactive effective date remains chimerical, has not generated a single transaction, and can never function on the necessary scale to address the takings since it requires voluntary participation by municipalities.

In its holding, the Appellate Division goes beyond violating the Constitutional protection from State takings of private property without just compensation to violation of the fundamental right to own private property which it protects. The Court held:

“Plaintiffs argue that Count Four of their Complaint was erroneously dismissed because the Highlands Act's establishment of the Highlands Region with a core preservation zone is ‘a legal fiction without scientific basis.’ They assert that the Highlands land area is distinguishable from the hydrogeologic conditions in the Pinelands, where those conditions warranted regulating the land by establishing a preservation area. For present purposes, we will assume that they are correct. However, they ignore the legislative findings contained in N.J.S.A. 13:20-2 that expressed the legislature's concerns to protect other exceptional natural resources such as clean air, contiguous forest, lands, wetlands, pristine watersheds and habitat for fauna and flora,” as well as “many sites of historic significance.”

In other words, the State's interest in preserving open space is in itself sufficient to justify exercise of police powers through regulations which prevent use of private property.

In order to understand how the Act violates the fundamental right to own private property, analysis begins with English Common Law and the concept of livery of seisin. No real right to land could be transferred without livery of seisin, a ceremony with witnesses generally standing on the land itself. Accompanying the words “Know ye that I have given,” the feoffee (grantee) was then handed an object representing the land such as dirt, turf or twigs. Over a period of hundreds of years, the delivery of a deed came to replace delivery of twigs, but the concept of physical possession and ownership of land remained.

At the time of the American Revolution, the English Common Law of real property was fully established, but with a caveat: we were a free people with liberty to own private property without any obligation to the English Crown. Our Constitution protects that right by forbidding the State from taking property for a public purpose without payment of just compensation.

Under current property law theory, instead of twigs symbolizing possession and ownership, property ownership is likened to a bundle of sticks. Each stick represents a different property right. As long as the government reasonably exercises its police powers in the form of environmental regulations and doesn't take too many sticks away, there is no violation of the right to own private property with constitutional protections from takings by the State.

Arguments for environmental regulations imposing preservation standards are premised on the public interest that preservation of land in its natural state is a universal, absolute and paramount State interest.

An individual may own private property, but the State's interest in preserving it justifies leaving the owner with one stick: the right to use the land as open space for the benefit of the public. This consequence mirrors the Marxist based eco-socialism concept of common grounds replacing private property. It is based on a usufructary property law system rooted in Roman Civil Law which is alien to our Common Law concept of private property. The Court's decision validates the variant of eco-socialism embodied by the Highlands Act.

Plaintiffs' Petition for Certification to the New Jersey Supreme Court was denied on January 12, 2010 and filed January 14, 2010.