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## Environmental law

### The Latest Battlefield

Depth and breadth of the regulations encircling the Highlands

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**P**urse seining is a fishing technique in which a boat encircles a large school of fish with a floating net that is ultimately closed up at the bottom. This harvesting method generally results in prodigious yields. Supporters laud its efficiency and ability to meet strong demands for popular seafood such as tuna. Opponents argue that uncontrolled purse seining rapidly depletes fish populations and unnecessarily kills other aquatic creatures that get swept up and caught in the nets along with targeted fish.

Strict environmental regulation of land uses — like purse seining — also has its proponents and detractors. Few would dispute the enormous impact that many of the New Jersey Department of Environmental Protection's rules have on land-use and development. The latest battlefield is the New Jersey Highlands region.

The depth and breadth of the regulatory "net" with which DEP has encircled

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the Highlands is currently being challenged in two different forums. The first venue is the New Jersey Supreme Court, which on September 23 heard oral arguments on the constitutionality of the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1 et seq. in *OFP, L.L.C. v. State*, 395 N.J. Super. 571 (App. Div. 2007), certif. granted, 193 N.J. 277 (2008).

The second arena is the Office of Administrative Law, where an adjudicatory hearing that challenges the science behind a Highlands septic regulation will take place pursuant to the Appellate Division's July 22 decision: *In Re Highlands Water Protection and Planning Act Rules*, N.J.A.C. 7:38-1 et seq., 401 N.J. Super. 587 (App. Div. 2008).

The *OFP* decision will determine whether DEP correctly asserted jurisdiction over a 26-lot residential development in the preservation area. The Highlands Rules matter will require DEP to defend an adopted septic rule that mandates an 88-acre minimum lot size per septic system in forested Highlands preservation areas and 25 acres per system in nonforested areas.

The Highlands Act was signed into law on August 10, 2004. It divides the 860,000-acre Highlands region into two major categories: 1) a preservation area, in which additional development is

severely limited; and 2) a planning area, in which development consistent with the act is to be encouraged. The act also created the Highlands Council, which was charged with preparing a Regional Master Plan as well as other regulatory programs to control development in the area.

Unlike the two other regional planning agencies which predate the Highlands Council, the council is not the master of its regulatory domain. Rather, the DEP is in charge of rulemaking for all major development in the Highlands preservation area.

The act contains a retroactive provision that attempts to capture within DEP's regulatory purview any major development that had not received certain specifically enumerated development approvals as of March 29, 2004, which was the date the act was introduced in the legislature. *OFP* had one last approval it needed in order to be freed from the Highlands permitting review program: a potable water supply permit. The circumstances surrounding the timing of this permit could be the linchpin that determines the constitutionality of the act's retroactivity provision.

On March 22, 2004, DEP rejected as administratively incomplete *OFP*'s potable water supply permit application. The sole defect in the application was the missing signature of a municipal official. Upon receipt of the rejected application, *OFP* obtained the appropriate signature and promptly returned the document to DEP prior to the March 29, 2004, cut-off date. DEP did not act on that permit until it approved it on May

14, 2004 — approximately a month and a half after the act's introduction date, but still around three months before the act was signed into law.

In the months following the August 10, 2004, effective date of the act, the property owner attempted to meet with the DEP commissioner to discuss exemptions or waivers from the Highlands review program. But in December 2004, apparently believing that further communications were futile, OFP filed suit complaining that the act was unconstitutional both facially and as applied to its property.

The Superior Court, in a November 15, 2005, unpublished opinion written by Judge Bozonelis, found that the Highlands Act was reasonably related to a legitimate state interest and thus was facially constitutional. It also found that the property owner's "as applied" claim was premature because it had failed to exhaust administrative remedies by, among other things, seeking a formal waiver from DEP. And finally, the court concluded that in weighing the state interests against the property owner's, OFP's "manifest injustice" claim was not valid. The court then dismissed the matter prior to trial by way of summary judgment.

On appeal, OFP argued that dismissal of the case was in error, and that its claim was ripe because administrative remedies the legislature had intended be made available to aggrieved property owners had not yet been created. *OFP v. State*, 395 N.J. Super. 571, 579 (App. Div. 2007).

In a well-reasoned opinion authored by Judge Skillman, the Appellate Division upheld Judge Bozonelis' decision in all respects. The appellate panel noted that since the owner had not filed a formal request for a waiver (under rules that were adopted during the pendency of the litigation), DEP had not yet been afforded an opportunity to act on the application, one way or another. Accordingly, the court determined that there was no way for a reviewing tribunal to determine whether DEP had gone "too far" so as to have effected a regulatory taking.

At oral argument before the Supreme Court, counsel for OFP asserted again that being thrown into the Highlands permitting review rubric was "manifestly unjust" for two reasons. The first being that the Highlands Council had not, during the pendency of the litigation and as mandated by the Act, adopted a Regional Master Plan or TDR program, and as such, OFP was without any remedy even if it were to have obtained a waiver from DEP.

The second contention was that since DEP ultimately approved its potable water supply permit application without any changes, it would be manifestly unjust to regulate this development purely on the technicality that the approval did not issue until after the March 29 cut-off date, despite OFP's timely submission.

At the conclusion of the argument, Justice Long asked the parties: "If OFP had received the permit back by March 29 would they be out of this mess?" To which counsel for both OFP and the state responded in the affirmative.

If the author were a betting man (which he is not), he would wager that Judge Skillman's opinion is too solid to reverse, and that despite some sympathy exhibited by a few Justices toward the developer's plight, a majority of the court will affirm.

At issue in the Highlands Rules case is the validity of an 88-acre minimum lot size requirement per septic system in "forested" Highlands preservation areas, and 25 acres per system in "non-forest" areas. This decision, like OFP, was authored by Judge Skillman, and it is unusual insofar as it has afforded the party challenging the rule an extra-judicial avenue through which to further build a record that bolsters its case.

The New Jersey Farm Bureau, a private lobbying group that represents agricultural producers and enterprises, is the entity that challenged the septic rule. It contended that the DEP was arbitrary in its use of certain assumptions, and that accordingly, the draconian development restrictions emanating from the rule are invalid. Two of the "scientific" assump-

tions used by DEP in particular appear to have gotten the court's attention.

The first was DEP's use of four (4) persons/household in the Highlands area rather than the "actual average household size of 2.7 persons." The second was the use of a drought of record rather than an annual average recharge rate to determine the amount of water available to dilute nitrates. The court also indicated in a footnote that DEP did not use lot size at all in setting septic standards in the Pinelands region. And thus, perhaps, it suspected that the net effect of these rules — which take a large amount of land out of play — might not be legally supportable. *In Re Highlands Rules*, 401 N.J. Super. 587, 595, FN2 (App. Div. 2008).

Judge Skillman concluded that "substantial questions regarding the validity of the septic density rule [were raised] that require an evidential hearing to determine whether the DEP has reasonably implemented the section of the Highlands Act requiring adoption of a septic system density standard." The matter was remanded to DEP to allow for an OAL hearing at which time the scientific validity of the standards will be challenged. The court also retained jurisdiction, and put a timetable on the remand.

Although the case is far from over, it will be interesting to track because New Jersey courts have traditionally been extremely deferential to state agencies in the exercise of their rulemaking authority, particularly where the agencies' so-called "expertise" is at issue. See, *N.J. State League of Municipalities v. Dept. of Community Affairs*, 158 N.J. 211, 222 (1999) (quoting *Bergen Pines County Hosp. v. N.J. Dept. of Human Services*, 96 N.J. 456, 474 (1984)).

Notwithstanding this deference, the Supreme Court has, in the not-too-distant past, voided DEP rules where it found that their effect exceeded the statutory authority under which they were promulgated. See, *In the Matter of Freshwater Wetlands Protection Act Rules*, 180 N.J. 478 (2004)

If the standards used as the basis for the septic rule are affirmed by the DEP commissioner in a final decision after an OAL hearing, and the Appellate Division ultimately gets the case back, the Court could still void the rule if it finds that the scientific assumptions DEP used were arbitrary.

And while one decision does not a trend make, such a circumstance could

be seen as an erosion of the deference courts ordinarily give to agency rules. Even if the Court ultimately upholds the septic regulation, the decision will still be of interest because of the procedure it employed allowing the party challenging the rule to conduct a post-promulgation administrative hearing.

In any event, both the OFP and Highland Rules case will test the reach

of DEP's regulatory "purse seine." The mere fact that the constitutionality of the Highlands Act has made it to the Supreme Court, and that the science behind a regulation that severely restricts development potential is being challenged, is notable if for no other reason than DEP's ever-growing influence on land use will be affected in some manner by the outcome of these two cases. ■