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Scotus + Sconj + TDRS = New Jersey Highlands Act Litigation Outcomes: Will It All Add up to a Fair Outcome for Property Owners

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COMMENTS

SCOTUS + SCONJ + TDRS = NEW JERSEY HIGHLANDS ACT LITIGATION OUTCOMES: WILL IT ALL ADD UP TO A FAIR OUTCOME FOR PROPERTY OWNERS?

*Cory Kestner**

I. INTRODUCTION

Riamede Farm has been farmed in Chester, New Jersey since as early as 1740.[1] This Morris County Farm falls inside an area designated as the preservation area of the New Jersey Highlands Water Protection and Planning Act.[2] For Deborah Post of Riamede Farm, the Highlands Act means being forced to fight for her property rights. She claims that the town has lobbied the State legislature to include her farm in the non-buildable "preservation zone," interfered with her retail business, and arrested her workers.[3] Although any possible development on her land has been prohibited for now by the Act and the town's lobbying efforts, and she may be frustrated by the restrictions, the question remains as to which of her rights remain after the passage of the Highlands Act.[4]

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1. Chester Historical Society: Driving Tour, http://historicchesternj.com/programstours/drivingtour.html (last visited Apr. 12, 2007).

2. Highlands Water Protection and Planning Act, N.J. STAT. ANN. § 13:20, (West 2006) [hereinafter *Highlands Act*].

3. Deborah Post, *Farmer is Forced to Fight for Survival*, THE STAR LEDGER, Aug. 20, 2006, at Morris Reader Forum.

4. *Id.*

There is no middle ground when it comes to New Jersey residents and the Highlands Act. People have called the Highlands Act everything from "an action worthy of the Communists under Vladimir Lenin,"[5] to "the worst environmental bill the state has ever seen,"[6] to "the most significant event to preserve natural resources. . . ."[7] Regardless of with whom you agree,[8] the issue is whether the Highlands Act may withstand legal challenge based on constitutional and regulatory takings jurisprudence.

This Comment will show that New Jersey has the authority to create and enforce legislation that, like the Highlands Act, creates zoning laws based on environmental standards. It will be further shown that any compensation the State owes property owners based on the Takings Clause of the United States and New Jersey Constitution could be decided on a case by case basis using a formula based on past takings jurisprudence. Finally, the "compensation clause" of the Highlands Act,[9] along with transfer development rights (TDRs),[10] will reduce the success of lawsuits involving Highlands property.

Part I of this Comment will focus on the United States and New Jersey Constitutions, and takings law jurisprudence as it has developed in both the United States Supreme Court and the New Jersey Supreme Court. The main question to be examined in Part I is whether or not New Jersey has the authority to create zoning legislation, and whether *Mahon*, *Penn Central*, *Agins*, *Lucas*, and *Tahoe-Sierra*, along with New Jersey caselaw, will allow property owners

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5. Michael Daigle, *Freeholder: Highlands legislation near completion; Reassurances on property rights, lost taxes offered at 'Green Table' meeting*, DAILY RECORD (Morristown, NJ), May 26, 2004, at 15A ("Last week, Morris County assemblymen Richard Merkt, R-Mendham Township, and Joseph Pennacchio, R-Montville, each called the Highlands bill an action worthy of the Communists under Vladimir Lenin.").

6. Chris Gosier, *Governor signs bill to protect Highlands; But backers still critical of fast-track legislation*, DAILY RECORD (Morristown, NJ), Aug. 11, 2004, at 1A.

7. *Id.*

8. *See* Fred Snowflack, *"Real" Republicans Set Themselves Apart*, DAILY RECORD (Morristown, NJ), May 13, 2005 at 11A. (Even members of the same political party disagree about the Highlands Act. Republican candidates for Washington Township (Morris County) Town Council Howard Popper, Esq., and Kim Ball Kaiser, Esq., debated the legitimacy of the Act).

9. *Highlands Act, supra* note 2, §13:20-11(2)(a) (listing possible sources of compensation to be distributed under the Highlands Act).

10. *Id.* §13:20-13.

to collect for diminished land values. Part II will focus on the compensation scheme known as TDRs, the Highlands Act, and the New Jersey Pinelands Act. Part III will focus on a discussion of arguments raised by Highlands Act opponents based on the three questions to be answered, *supra*, and how Highlands Act litigation may be decided under caselaw from both the United States Supreme Court and the New Jersey Supreme Court. Common arguments include that the Act takes away a land owners right to use the land, everyone's property values will go down because of the restrictions, and that municipalities will lose a large part of their tax base as property values decrease or disappear.

II. THE UNITED STATES CONSTITUTION AND TAKINGS LAW

A. The United States Constitution

Agriculture dominated New Jersey's economy at the time the Constitution was written.[11] Being a landowner was not only a status symbol,[12] but also necessary to vote as a "freeholder" in many parts of the country.[13] The Fifth Amendment Takings Clause holds no person shall "be deprived of life, liberty, or property, without due process of law."[14] The importance of land, along with the founders' belief in representative democracy would explain the significance of the Fifth Amendment Takings Clause.[15]

The Fifth Amendment "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a

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11. HUBERT G. SCHMIDT, AGRICULTURE IN NEW JERSEY: A THREE-HUNDRED YEAR HISTORY Preface xii (Rutgers Univ. Press 1973).

12. *Id.*

13. P.J. Coleman, *Voting Rights in America*, The Constitutional Gazette (Sept. 2004), *available at* http://www.constitutioncenter.org/CitizenAction/ISignedtheConstitution/asset_upload_file631_12419.pdf. *See also* James W. Fox Jr., *Citizenship, Poverty, and Federalism: 1787-1882*, 60 U. PITT. L. REV. 421, 440-41 (1999) (stating that Madison argued that non-propertied voters would be too easily influenced by the propertied, and would have no will of their own).

14. U.S. CONST. amend. V.

15. William Michael Treanor, *The Original Understanding of the Takings Clause*, http://www.law.georgetown.edu/gelpi/papers/ptreanr.htm.

taking."[16] The clause seems to encourage citizens to purchase land with the understanding that any investment made in the land shall not be lost to the government.[17] Although land was used mostly by farmers for agricultural purposes in the 1700's and 1800's,[18] the fact that most land is developed into homes, retail outlets, or office spaces does not make it any less valuable today.[19] If anything, land has become more valuable as more money can be earned per square foot than in the past.[20]

The Takings Clause of the Fifth Amendment is made applicable to the States through the Fourteenth Amendment.[21] Therefore, a party may file a complaint based on a state law claiming a violation of both the Federal and a state Constitution.[22] Theoretically this offers additional protections for landowners to feel secure in the ownership of their property.[23] In reality, the protective wall of the Fifth

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16. Lingle v. Chevron U.S.A., 544 U.S. 528, 537 (2005) (quoting First English Evangelical Lutheran Church of Glendale v. Los Angeles 482 U.S. 304, 315 (1987)).

17. Office of Senator John Cornyn, This Land Is My Land, http://cornyn.senate.gov/index.asp?f=page&pid=277&lid=1 (last visited Apr. 12, 2007) (introducing bill that allows takings only for "*true* public uses, as guaranteed by the Fifth Amendment.")

18. Economic Growth (from United States), ENCYCLOPEDIA BRITANNICA ONLINE, http://www.britannica.com/eb/article-77694/United-States. Although some land was farmed for individual purposes, most farmland in North America was used to raise cash crops. *Id.*

19. RICHARD M. HAUGHEY, HIGHER-DENSITY DEVELOPMENT: MYTH AND FACT 13, 32 (Urban Land Institute 2005), *available at* http://www.uli.org/Content/ContentGroups/PolicyPapers/MFHigher010.pdf (describing rising real estate values as land is being increasingly developed).

20. *See generally id.* (discussing the general increase in values of different types of properties).

21. *Lingle*, 544 U.S. at 536 (citing Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226 (1897)).

22. Nick Rosenberg, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?*, 30 B.C. ENVTL. AFF. L. REV. 641, 655 n.134 (2003) (stating the Takings Clause of the Fifth Amendment is incorporated against the states through the Fourteenth Amendment. Dolan v. City of Tigard, 512 U.S. 374, 383-84 (1994); Chicago B. & Q.R. Co., 166 U.S. at 239).

23. Haw. Housing Authority v. Midkiff, 467 U.S. 229, 244 n.7 (1984) (stating that there is no "public use" requirement in the Fourteenth Amendment, but the requirement is made binding on the states by the Fifth Amendment through incorporation).

Amendment appears to be coming down brick by brick in case after case.[24]

B. New Jersey Constitution and Takings Law

Article III of the New Jersey Constitution provides the Legislature the authority to regulate land use.[25] Article IV, Section VI, Paragraph 2 of the State's Constitution authorizes the New Jersey Legislature to grant zoning power to municipalities, but not counties.[26] The Legislature used that authority to enact the Municipal Land Use Law of 1975 (MLUL).[27] Under the MLUL, townships have exclusive powers to enforce the law,[28] and to adopt and enforce zoning ordinances.[29] County planning boards may be created by the board of chosen freeholders.[30] When combined, the New Jersey Constitution and the New Jersey Statutes highlight the fact that the Legislature is the ultimate arbiter of zoning regulations, and that the Legislature may enact laws that are not "arbitrary, capricious, or unreasonable."[31]

The New Jersey Constitution[32] allows for a more affirmative grant of power to the New Jersey Legislature and agencies to acquire property than the United States Constitution grants to Congress.[33]

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24. *See, e.g.*, Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (holding that a taking may occur when a regulation goes too far, but the court never defines "going too far"); Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) (explaining that takings jurisprudence examined the rights entire bundle of rights, and not just one part of the whole); Agins v. Tiburon, 447 U.S. 255, 260 (1980) (stating that a regulation will constitute a taking when either: (1) it does not substantially advance a legitimate state interest; or (2) it denies the owner economically viable use of her land).

25. N.J. CONST. art. III, ¶ 1; *see* WILLIAM M. COX & DONALD M. ROSS, NEW JERSEY ZONING AND LAND USE ADMINISTRATION § 1-1 (Gann Law Books, 2003).

26. N.J. CONST. art. IV, § VI, ¶ 2.; N.J. State League of Municipalities v. Dep't of Cmty. Affairs, 708 A.2d 708, 710 (N.J. Super. Ct. App. Div. 1998).

27. N.J. STAT. ANN. § 40:55D-1 to 106 (West 2006).

28. *See id.* § 40:55D-18.

29. *See id.* § 40-55D-62.

30. *See id.* § 40:27-1.

31. Pheasant Bridge Corp. v. Twp. of Warren, 777 A.2d 334, 338 (N.J. 1991).

32. N.J. CONST., art. IV, § VI, Para. 3.

33. *Compare* N.J. CONST., art. IV, § VI, Para. 3 *with* U.S. CONST. amend. V. The New Jersey Constitution enumerates potential situations for acquiring property and grants authority to *any* "agency or political subdivision of the State or agency" while there is no equivalent grant of authority in the United States Constitution. N.J. CONST., art. IV, § VI, Para. 3 (2006); U.S. CONST. amend. V.

However, under the New Jersey State Constitution, like the United States Constitution, any landowner must be compensated when his land has been taken for a public use.[34] The New Jersey Constitution was adopted in 1948,[35] postdating the United States Supreme Court's early regulatory takings discussions,[36] but the legislators did not likely consider regulatory takings when contemplating New Jersey's taking clause because New Jersey's Supreme Court did not cite Justice Holmes and his famous quote[37] until 1963.

C. Takings Caselaw

Takings law in the United States has a long and varied history.[38] The Supreme Court's takings jurisprudence centers on thirteen words in the Fifth Amendment: nor be deprived of life, liberty, or property, without due process of law.[39] The earliest interpretations of this clause focused only on situations where the government would expropriate property for public use,[40] but that began to change

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34. N.J. CONST., art. IV, § VI, Para. 3.

35. N.J. CONST.

36. *See Mahon*, 260 U.S. 393 (displaying Justices Holmes and Brandeis disagreement about what constitutes a regulatory taking).

37. Morris County Land Improv. Co. v. Parsippany-Troy Hills, 193 A.2d 232, 241 (N.J. 1963) (citing Justice Holmes's famous dissent from Pennsylvania Coal Co., 260 U.S. at 415, where he said, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."). The New Jersey Constitution was adopted in 1948, some 26 years after the Mahon decision. The New Jersey Supreme Court did not quote this line until 40 years later in the Morris County Land Improv. case.

38. DOUGLAS T. KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 15 (American Legal Publishing Corp. 2000) [hereinafter KENDALL]. Barron v. Baltimore, 32 U.S. 243 (1833), is one of the earliest takings cases in Supreme Court jurisprudence. KENDALL, *supra* note 38, at note 4.

39. U.S. CONST. amend. V, cl. 3. The entire Fifth amendment reads:

> 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.

40. *Barron,* 32 U.S. 243 (holding that the United States Supreme Court lacked jurisdiction over the case because the Fifth Amendment did not extend to state acts); Pumpelly v. Green Bay Co., 80 U.S. (13 Wall.) 166 (1872) (holding the Gov-

with *Pumpelly v. Green Bay Co.* in 1872.[41] The Court later expanded their inquiries by examining required dedications or exactions[42] and regulatory takings.[43]

The Court allowed the expansion of the government's police powers to protect citizens when it decided *Hadachek v. Sebastian.*[44] The *Hadacheck* Court held that:

> [T]he police power of a state cannot be arbitrarily exercised. It is to be remembered that we are dealing with one of the most essential powers of government, -one that is the least limitable. It may, indeed, seem harsh in its exercise usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. To so hold would preclude development and fix a city forever in its primitive conditions.[45]

Oddly enough, the Highlands Act seeks to keep the region in a "primitive condition" by limiting development in some cases, while completely restricting it in others.[46] Primitive land conditions or not, the owner's property interests are non-compensable whenever

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ernment may be forced to provide compensation to a property owner "where real estate is actually invaded").

41. *Pumpelly*, 80 U.S. at 166. In *Pumpelly*, the Court held the Government may be forced to provide compensation to a property owner "where real estate is actually invaded." *Id.*

42. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987) (holding that a building permit conditioned upon a grant of a public easement constituted a taking and required compensation from the state); Dolan v. City of Tigard, 512 U.S. 374 (1994) (establishing that dedication requirements must be "roughly proportionate" to land use plans and their impact on proposed development).

43. Concrete Pipe and Products, Inc. v. Constr. Laborers Pension Trust, 508 U.S. 602 (1993); Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 326 (2002).

44. 239 U.S. 394 (1915).

45. *Hadachek*, 239 U.S. at 410.

46. *Highlands Act*, *supra* note 2, § 13:20-10(2) (stating that one of the goals of the Highlands Act is to "preserve extensive and, to the maximum extent possible, contiguous areas of land in its natural state, thereby ensuring the continuation of a Highlands environment which contains the unique and significant natural, scenic, and other resources representative of the Highlands Region.").

the government's purpose is to protect the public from harm,[47] but when regulations are solely for a public benefit, the taking must be compensated.[48] The courts must decide whether an act is solely for a public good or to prevent a public harm, determined by analyzing whether an action made illegal by an act "is dangerous to the safety, health, or welfare of others."[49] The Court has found a nuisance when cattle grazed on another person's land,[50] where a brickyard was operated within a residential area,[51] or sand and gravel was excavated below the water line.[52]

D. Physical Takings

Physical expropriations cases are the clearest examples of when the government must compensate a landowner. The idea of a categorical brightline rule for regulatory takings is borrowed from physical takings.[53] Understanding the basics of physical takings can aid in evaluating regulatory takings.

Although a taking may remove the property owner from his property, a partial invasion can also be a taking.[54] The appellant in *Loretto v. Teleprompter Manhattan CATV Corp.*,[55] purchased an apartment building after the prior owner had allowed the appellee cable company to install a cable on the building.[56] N.Y. Exec. Law § 828(1) (Supp. 1981-1982) stated that a landlord must permit cable facilities to be installed upon the landlord's property.[57] To the extent the government permanently occupied physical property through

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47. *See generally Hadachek*, 239 U.S. 394.

48. *Morris County Land Improv. Co.*, 193 A.2d 232.

49. *Penn Cent. Transp. Co.*, 438 U.S. at 145.

50. Curtin v. Benson, 222 U.S. 78 (1911).

51. *Hadacheck*, 239 U.S. 394.

52. Goldblatt v. Hempstead, 369 U.S. 590 (1962).

53. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 330-31 (highlighting that the categorical rule endorsed and applied in Lucas provided that the government compensate a landowner when he is deprived of all economically beneficial uses of his land, much like if a landowner's property were physically invaded). However, a regulation must destroy all of a landowner's value to recover, while the government must compensate for even "5 percent of the value of the owner's property, so long as there was a physical appropriation of any of the parcel." *Id.*

54. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 442 (1982).

55. *Id.*

56. *Id.* at 421-22.

57. *Id.* at 423.

legislation, it effectively eliminated the owner's rights to exclude others from, or control, that portion of her property.[58] The Court held that a minor but permanent physical occupation of an owner's property authorized by statute constitutes a taking for which just compensation is due under the Fifth and Fourteenth Amendments of the Constitution.[59] The Court found the taking was proportional to the amount of land required by the statute, and that the landlord was entitled to proportional compensation.[60]

E. Regulatory Takings

The Court first discussed the idea of a regulatory taking in *Pennsylvania Coal Co. v. Mahon*.[61] Opinions dealing with regulatory takings after *Mahon* have consistently repeated Holmes's idea that "if a regulation goes too far it will be considered a taking."[62] While no test was developed for regulatory takings in *Mahon*, regulatory takings have never required physical appropriations or a public use.[63]

The Court further developed the idea of what constitutes a taking in *Penn Central Transportation Co. v. New York City* when it discussed the "parcel-as-a-whole" theory.[64] The City of New York passed the Landmarks Preservation Law[65] to encourage preservation by the owners and users of New York's historic landmarks.[66] The owners of the Grand Central Station terminal claimed a taking had occurred because the Preservation Act barred the owners from build-

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58. *Id.* at 427.

59. *Id.* at 421.

60. *Id.* at 441.

61. 260 U.S. 393 (1922); *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 325-26 (2002) (crediting Justice Holmes with developing idea of regulatory takings); KENDALL, *supra* note 38, at 22.

62. *Mahon.*, 260 U.S. at 415.

63. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 326 (discussing Justice Holmes' rejection of Justice Brandeis's dissenting opinion regarding what constitutes a taking in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)).

64. *Penn Cent. Transp. Co.*, 438 U.S. 104.

65. N.Y. City Admin. Code, §§ 25-301 to 322 (1976).

66. *See Penn Cent. Transp. Co.* 438 U.S. at 109 (The Court noted that "[t]he city acted from the conviction that 'the standing of [New York City] as a world-wide tourist center and world capital of business, culture and government' would be threatened if legislation were not enacted to protect historic landmarks and neighborhoods from precipitate decisions to destroy or fundamentally alter their character). *See also id.* at 104.

ing upward into the building's airspace.[67] The Supreme Court found otherwise.[68] Justice Brennan explained that the Court focuses on the "character of the action" and the "nature and extent of the interference with rights in the parcel as a whole," and does not divide property into segments.[69] Additionally, the owners continued to profitably operate their business, and therefore did not lose any investment backed expectations.[70]

Agins v. Tiburon[71] presented an opportunity for the Court to discuss its two part takings analysis by examining whether a municipality's police power is legitimately exercised when it enacts open-space zoning plans to protect its citizens from the negative effects of urbanization.[72] The appellants purchased land in a highly desirable area of California for residential development.[73] The City of Tiburon modified its existing zoning laws with the adoption of two new ordinances, which placed the appellants' property in a zone devoted to "one-family dwellings, accessory buildings, and open-space uses."[74] Additionally, density restrictions only allowed the appellants to build "between one and five single-family residences on their 5-acre tract." The *Agins* Court denied the appellant's claims and held that a taking occurs whenever a zoning scheme does not substantially advance a legitimate state interest, and it denies an owner all economically viable use of the land.[75] Due to the lack of a rule to determine when a taking has occurred, the Court noted "the question necessarily requires a weighing of private and public interests."[76]

Lucas v. South Carolina[77] focused on the distinction between total and partial takings, and when compensation is owed to a party claiming a taking by state regulation. In *Lucas*, Mr. Lucas paid $975,000 for two residential lots on the Isle of Palms in South Carolina in

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67. *Id.* at 109.

68. *Id.* at 138 (holding that the Landmark Law did not effect a "taking" because the restrictions imposed were substantially related to the promotion of the general welfare and permitted reasonable beneficial use of the landmark site).

69. *Id.* at 130-31.

70. *Id.* at 136.

71. *Agins*, 447 U.S. 255.

72. *Id.* at 260.

73. *Id.* at 257-58.

74. *Id.* at 257.

75. *Id.* at 260.

76. *Id.* at 260-61 (citations omitted).

77. Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

1986.[78] Mr. Lucas intended to build two single family homes, but in 1988 the South Carolina Legislature enacted the Beachfront Management Act.[79] The Act effectively barred Mr. Lucas from erecting the two homes on his lots, so he filed an action against the state.[80] The State trial court found that this prohibition rendered Lucas' parcels worthless, but the State Supreme Court reversed.[81] The State Supreme Court's opinion found that Mr. Lucas had failed to attack the validity of the Act, and the Court was bound to accept any uncontested findings of the Legislature.[82] The court ruled that no compensation was owed because the act was designed to "prevent serious public harm."[83]

The *Lucas* Court denied this proposition because preventing harmful uses was merely an early formulation of the police power justification to sustain (without compensation) any regulatory diminution in value; it is impossible to distinguish between benefit-conferring and harm-preventing regulation.[84] The Court added further that noxious use cannot be the cornerstone to distinguish compensable takings from non-compensable takings.[85] The Court then established a "categorical rule" that any regulation which renders land valueless is a taking.[86] Some have found the *Lucas* decision disappointing because of its narrow scope requiring property to be valueless,[87] and that the decision allows the government to take land without paying "as long as you don't take it all."[88] The Court's holding in *Lucas*, when combined with Justice Holmes's "goes too far" analysis, begs the question of whether there is any room between going too far and taking everything.[89] The Court further reduced property owner's

78. *Id.* at 1006.
79. *Id.* at 1007.
80. *Id.*
81. *Id.* at 1009.
82. *Id.* at 1045.
83. *Id.* at 1010 (quoting Lucas v. South Carolina Coastal Council, 304 S.C. 376, 378 (1991)).
84. *Id.* at 1026.
85. *Id.*
86. KENDALL, *supra* note 38, at 23; *Lucas*, 505 U.S. at 1016 (offering that the appropriate test to be applied is if the government "denies an owner economically viable use of his land." (citations omitted)).
87. Henry N. Butler, *Regulatory Takings after Lucas*, http://www.cato.org/pubs/regulation/reg16n3g.html (last visited Apr. 16, 2007).
88. *Id.*
89. Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (discussing the elements to examine when a regulation does fall short of a categorical taking which

chances for successfully protecting their property when it provided the government with a defense for when the landowner's right had been diminished from the beginning.[90]

Because regulatory takings can be temporary in nature, there was a question about what test is proper to decide such situations.[91] The Supreme Court was faced with a temporary moratorium on development in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[92] The Tahoe Regional Planning Agency was given the task of developing a regional plan to protect Lake Tahoe from being destroyed by overdevelopment.[93] A temporary moratorium barred development while the regional plan was developed.[94] An action was brought by persons who had purchased property to build homes claiming that the moratorium was a taking without just compensation.[95] The Court's *Penn Central* analysis found that the property owner's interest did not outweigh the government's interest or police powers.[96]

F. New Jersey Caselaw

Despite the commonality of language between the United States Constitution and the New Jersey Constitution,[97] and similar takings analysis, the United States Supreme Court and New Jersey Supreme Court have drawn different conclusions about the meaning of takings law.[98] Cases involving the New Jersey Pinelands Protection Act

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includes: "the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action.").

90. KENDALL, *supra* note 38, at 23.

91. *See* James E. Holloway & Donald C. Guy, *Tahoe-Sierra Preservation Council, Inc.: A Shift or Compromise in the Direction of the Court on Protecting Economic and Property Rights*, 10 ALB. L. ENVTL. OUTLOOK 229, 231 (2005) *See also Tahoe-Sierra Pres. Council, Inc.,* 535 U.S. at 342 (The majority opinion relied on a *Penn Central* analysis rather than developing a new categorical taking rule like *Lucas*).

92. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 302.

93. *Id.* at 310-11.

94. *Id.* at 311.

95. *Id.* at 312.

96. *Id.* at 342.

97. Gardner v. N. J. Pinelands Comm'n, 593 A.2d 251, 257 (N.J. 1991).

98. Jennifer L. Bradshaw, *The Slippery Slope of Modern Takings Jurisprudence in New Jersey*, 7 SETON HALL CONST. L.J. 433, 434-35 (1997) (Footnote 12 compares two United States Supreme Court cases with two New Jersey Supreme Court Cases). The comparison displays the New Jersey Supreme Court's greater

present the best opportunity to discuss New Jersey takings law and potential Highlands Act cases.

Morris County Land Improv. Co. v. Parsippany-Troy Hills, one of New Jersey's earliest environmental regulation cases, found the state's authority under its police power for zoning insufficient on its own to avoid a taking, even when it is for a public benefit.[99] A sand and gravel operator owned sixty-six acres that, by ordinance, forbade any new use or change in existing use except for agricultural or fish farm purposes.[100] Plaintiff changed the landscape of his property, and complaints were filed against him.[101] The court held that a taking had occurred when the plaintiff was required to keep his land in a natural state for a wildlife preserve.[102] At issue was the clear purpose of the ordinance which was to benefit the public and retain the land in its natural state.[103] Excessive regulation allows the owner to retain title to property, but does not allow the owner to use land in a constitutionally permitted manner.[104] Groups have already listed the excessive regulation argument as a reason for challenging the Highlands Act through litigation.[105]

Orleans Builders & Developers v. Byrne,[106] although decided well before *Tahoe-Sierra*,[107] held that temporary moratoria do not qualify as a taking.[108] Orleans was a development company that was in the middle of building 1,500 planned units when the National Parks and Recreation Act created the Pinelands National Reserve.[109] Governor Brendan Byrne issued Executive Order 71[110] which put a halt to all development in the Pinelands Region so the newly developed Pine-

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deference to the State's zoning power, while the United States Supreme Court's ad hoc analyses have produced inconsistent results.

99. Morris County Land Improvement Co. v. Twp. of Parsippany-Troy Hills, 193 A.2d 232, 239 (N.J. 1963).

100. *Id.* at 235.

101. *Id.*

102. *Id.* at 243.

103. *Id.* at 240.

104. Bradshaw, *supra* note 98, at 447 (invalidating a zoning ordinance whose sole purpose was a public use, and not to prevent a public nuisance).

105. Joint Summary Statement, Reasons for Challenge of Highlands Act, http://www.co.hunterdon.nj.us/highlands/WarrenandHunterdonJointSummaryStatement03082005.pdf.

106. Orleans Builders & Developers v. Byrne, 453 A.2d 200 (N.J. 1982).

107. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 325.

108. *Orleans Builders*, 453 A.2d at 208-09.

109. *Id.* at 202-03.

110. *Id.*

lands Commission could create a comprehensive plan to regulate the Pinelands Reserve.[111] The court found that Orleans met none of the moratorium exceptions under N.J. Stat. § 13:18A-10(c),[112] and that the Act did not deprive Orleans of any beneficial use of the property.[113] New Jersey caselaw does not allow for compensation when a moratorium allows for limited studies and the development of a comprehensive plan to preserve the environment.[114] This could be important because of the moratorium period designated in the Highlands Act.[115]

Gardner v. New Jersey Pinelands Commission[116] may be a preview of Highlands litigation to come.[117] A farmer in Shamong Township, whose land was classified as being in the "preservation" area of the New Jersey Pinelands, wanted to subdivide his property into farm-related units.[118] However, the Pineland Commission determined that future owners might not use his land for farming which would defeat the purpose of the Pinelands Act.[119] The New Jersey Supreme Court found the regulations to be constitutional, and affirmed the lower court's grant of summary judgment in favor of the Pinelands Commission.[120] The court concluded that the restrictions placed on the farmer's property did not deprive him of a beneficial use or interfere with his ownership interest,[121] force him to bear the burden while the many benefit,[122] or exceed New Jersey's police power.[123]

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111. *Id.*

112. *See* N.J. Stat. Ann. § 13:18A-4 (1979) (established the Pinelands Commission under the Department of Environmental Protection and allowed for development during the moratorium if a petitioner could show extraordinary hardship, compelling public need or consistency with both the federal and state law purposes, and that no resulting substantial impairment of the Pinelands resources would occur).

113. *Orleans Builders & Developers*, 453 A.2d 200 at 208.

114. *Id.*

115. *Highlands Act*, *supra* note 2, § 13:20-2.

116. 593 A.2d 251 (N.J. 1991).

117. This case focused on the Pinelands Act which, while not officially presented as such, is the predecessor of the Highlands Act.

118. *Gardner*, 593 A.2d at 253, 256.

119. *Id.* at 256.

120. *Id.* at 253.

121. *Id.* at 262-63.

122. *Id.* at 263.

123. *Id.* (quoting Holmdel Builders Ass'n v. Holmdel, 583 A.2d 277, 286 (N.J. 1990)). Holmdel quoted N.J.S.A. 40:48-2 which allows municipalities to "make,

The New Jersey cases demonstrate that the state has the authority to not only authorize municipalities to zone land uses, but to also enact legislation for a variety of reasons.[124] The New Jersey Supreme Court, much like the United States Supreme Court, appears deferential to zoning laws that are not arbitrary, capricious, or unreasonable.[125] However, the New Jersey Supreme Court starts its analysis by examining and stating the authority used to pass the legislation,[126] while the United States Supreme Court seems to assume authority and has traditionally skipped straight to the *Penn Central* ad hoc analysis.[127] This difference in starting points could lead to the New Jersey Supreme Court being more deferential because the Court is recognizing the Legislature's broad zoning authority under the New Jersey Constitution before they reach any of the plaintiff's issues. If the New Jersey Supreme Court finds the legislation to be within the Legislature's authority, then the plaintiff starts with one strike against them. The plaintiff must then prove that the State has "gone too far" or has "taken everything" even though the State had the authority to enact the law. Although this may account for the low success rate of plaintiffs in takings cases,[128] legislators have also started to include schemes that provide for some compensation which diminishes land owner's losses and claims.[129]

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amend, repeal and enforce" any "ordinances, regulations, rules and by-laws" necessary to protect the public health, safety, and welfare so long as they do not conflict with the law of the United States. The State can grant zoning power under the New Jersey Constitution. N.J. Const., art. IV, § VI, ¶ 2.

124. *See generally Morris County Land Improv. Co.*, 193 A.2d at 235; *Orleans Builders & Developers*, 453 A.2d at 208; *Gardner*, 593 A.2d 251.

125. *Cf. Morris County Land Improv. Co.*, 193 A.2d. at 235; *Orleans Builders & Developers*, 453 A.2d at 200; *Gardner*, 593 A.2d at 253; *Penn Cent. Transp. Co.*, 438 U.S. at 109; *Palazzolo*, 533 U.S. 606; *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. 302.

126. *See Morris County Land Improv. Co.*, 193 A.2d. at 237; *Orleans Builders & Developers*, 453 A.2d at 202; *Gardner*, 593 A.2d at 253.

127. *Palazzolo*, 533 U.S. at 616; *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 314-15.

128. F. Patrick Hubbard, Shawn Deery, Sally Peace, & John P. Fougerousse, *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of Penn Central Transportation Company?*, 14 DUKE ENVTL. & POL'Y F. 121, 141 (2003). The analysis identified over 1,300 cases citing the Penn Central ad hoc test, and selected 10 percent of those cases at random to maintain objectivity. *Id.* The owners were successful in less than 10 percent of the cases selected. *Id.*

129. *Highlands Act*, *supra* note 2, § 13:20-11(a)(2)(a).

III. LEGISLATION

A. Transferable Development Rights

The United States Supreme Court brought TDRs to the forefront of takings jurisprudence in *Penn Central Transportation Co. v. New York City*.[130] New Jersey's TDR law was first organized under the "Burlington County Transfer of Development Rights Demonstration Act" in 1989.[131] Burlington County's Act was incorporated into the State Transfer of Development Rights Act in 2004,[132] and later incorporated into the Highlands Act.[133] TDRs have been used by governments to offset the losses that may occur from a taking[134] by assigning a value to the land equal to agricultural property values.[135] However, the Highlands Act values land at fair market values[136] which would not allow property owners to recover the increased amounts available under other TDR plans using agricultural values.

TDRs protect a property owner's investment value by transferring a property owner's "rights to develop" from one area and sold to another.[137] This right has been found valuable by courts as a way to

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130. 438 U.S. 104 (1978).

131. State Transfer of Development Rights Act, N.J. Stat. § 40:55-138 (2004). The "Burlington County Transfer of Development Rights Demonstration Act," P.L. 1989, c. 86 (C. 40:55D-113 et al.) succeeded at showing how feasible TDR programs could be as a land planning tool. *Id.*

132. *Highlands Act*, *supra* note 2, § 13:20-2.

133. *Id.* § 13:20-13; *see also* James T.B. Tripp and Daniel J. Dudek, *Institutional Guidelines for Designing Successful Transferable Rights Programs*, 6 YALE J. ON REG. 369, 378 (1989) (discussing the New Jersey Pinelands Act as the most "ambitious, innovative, and geographically extensive TDR program in the country."). The Highlands Act reads very similarly to the New Jersey Pinelands Act. See discussion of Pinelands Act *infra* Sec. II(C). Interestingly, environmentalists often argue TDR's shift pollution and planning problems to other areas rather than dealing with problems directly as public issues. *Id.*

134. *See Highlands Act*, *supra* note 2, §§ 13:20-1 to -35; The Pinelands Protection Act, N.J. Stat. § 13:18A-1; Zoning regulations; public hearing; definitions, A.R.S. § 9-462.01(A)(12) (2006) (Arizona TDR law); Acquisition of interests in real property and water rights, Cal. Fish & G. Code § 1348(b) (2006); Regulations, Conn. Gen. Stat. § 8-2(a) (2006).

135. Transfer of Development Rights, CDFS-1264-98, Land Use Series, Timothy J. Lawrence, http://ohioline.osu.edu/cd-fact/1264.html (last visited Apr. 16, 2007) [hereinafter *Lawrence*].

136. State Transfer of Development Rights Act, N.J. Stat. § 40:55D-153(b) (2006). The Highlands Act adopted the State Transfer of Development Rights Act for its TDR program. *Highlands Act*, *supra* note 2, § 13:20-13.

137. Lawrence, *supra* note 135.

protect an owner's rights,[138] although the Court is far from accepting a per se doctrine that would deny finding a taking has occurred merely because an act includes TDRs as compensation.[139] Functionally, however, every effective TDR program is easy to understand, manages growth, provides adequate incentives, and is managed to ensure proper growth.[140]

The general design of any TDR program, and that of the Highlands TDR program,[141] theoretically resembles a financial bank: only property rights are deposited and money is withdrawn.[142] The TDR concept works on an exchange principle that creates "sending" and "receiving" areas, which are designated by municipal, county, or state authorities.[143] Sending areas are properties that have been designated as permanently restricted in their use, while receiving areas have been recognized as areas where growth is beneficial.[144] The "banks" act as an intermediary allowing for the safe storage and transfer of property rights.[145]

B. The Highlands Act

The Highlands Act was developed in response to the increasing rate of development in the state of New Jersey, and the accelerated loss of forested lands and wetlands.[146] New Jersey, as the most

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138. Holloway & Guy, *supra* note 91, at 234 n.15 (citing generally Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725, 741-42 (1997) (recognizing that transferable development rights (TDR) have utility and value under the Takings Clause)); *see also Penn Cent. Transp. Co*, 438 U.S. at 137 (finding that TDRs have value in mitigating the impact of a regulation).

139. James E. Holloway & Donald C. Guy, *The Utility and Validity of TDRs Under the Takings Clause and the Role of TDRs In the Takings Equation Under Legal Theory*, 11 PENN ST. ENVTL. L. REV. 45, 49 (2002) (discussing *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. 302 (2002) and *Lucas*, 505 U.S. 1003 (1992) in footnote 15).

140. Lawrence, *supra* note 135.

141. *Highlands Act*, *supra* note 2, §§ 13:20-13 to -35.

142. Lawrence, *supra* note 135.

143. Lauren A. Beetle, *Are Transferable Development Rights a Viable Solution to New Jersey's Land Use Problems?: An Evaluation of TDR Programs Within the Garden State,* 34 RUTGERS L. J. 513, 515-16 (2003).

144. *Id.*

145. *Id.*

146. *Highlands Act*, *supra* note 2, § 13:20-2. New Jersey's complex demographics may surprise anyone not familiar with the "Garden State": New Jersey would be the third wealthiest country in the world if they seceded from the United States due to the fact that they had the highest median and family income of any

densely populated state in the nation,[147] appears to be bursting at the seams as people are seeking larger and larger homes on smaller and smaller lots.[148] The State legislature passed the bill because it felt it could not trust, and perhaps with good reason, the local governments and landowners to protect or preserve the land on their own.[149] The current state of development in New Jersey validates the Legislature's argument, while stoking the flames of discontent among parties on both sides of the Highlands issue.

The 800,000 acre Highlands region extends from northwestern Connecticut across the lower Hudson River Valley and Northern New Jersey into east Central Pennsylvania.[150] This region of land is an essential source of drinking water for approximately one-half of the State's resident's drinking water, while covering only thirteen percent of the State's land area.[151] The region also provides other natural resources and recreational opportunities.[152]

Land in the Highlands region is divided by the Act into "planning areas" and "preservation areas."[153] Although neither term is given a

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U.S. state. Broadband Home Report, *New Jersey and Telecom: Can this Marriage be Saved?* http://www.broadbandhomecentral.com/report/backissues/Report0504_7.html (last visited Apr. 16, 2007) (citing James Huges, Dean of Rutgers School of Planning and Public Policy as the source of the statistics.) New Jersey has the highest amount of people per square mile with over 1000, compared to Japan with 835 and India at 914. *Id.* New Jersey has more horses per human and percentage of land covered by forests. *See* Andrew Jacobs, *North Caldwell Journal; Acre by Acre, an Old Family Farm Fades Away*, N.Y. TIMES, § 1, at 34, column 3 (2000). (Ironically, New Jersey ranks second in mass transit but has the third longest commute. Additionally, more than 50,000 acres of farmland were lost during the 1990's despite attempts to preserve farmland through preservation programs.).

147. Rusty Russell, *Equity in Eden: Can Environmental Protection and Affordable Housing Comfortably Cohabit in Suburbia*, 30 B.C. ENVTL. AFF. L. REV. 437, 466 (2003).

148. New Jersey Future, *Is New Jersey Full?*, http://sierraactivist.org/print.php?sid=43482 (last visited Apr. 16, 2007, (discussing New Jersey's potential "build out" date based on various population density hypotheticals).

149. *Highlands Act*, *supra* note 2, § 13:20-2. This brings to mind the saying that "[w]hen the legislature is in session, there is no such thing as an insurable interest." Henry N. Butler, *Regulatory Takings after Lucas*, http://www.cato.org/pubs/regulation/reg16n3g.html (last visited Apr. 16, 2007).

150. *Highlands Act*, *supra* note 2, § 13:20-2.

151. *Id.*

152. *Id.*

153. *Highlands Act*, *supra* note 2, § 13:20-7. The planning area is defined as "that portion of the Highlands Region not included within the preservation area,"

helpful definition, the property located in the Highlands Planning Area is not subject the DEP Highlands rules.[154] Property located within the Highlands Preservation Area is subject to the DEP Highlands rules unless the proposed project does not meet the definition of major Highlands development.[155] The definitions of a major Highlands development, and the numerous activities that will be exempted from Highlands regulations are outlined in the Act,[156] and the Highlands Act does allow for "fast track" building in certain areas of the state.[157]

Additionally, "overlay zones" have been created under the Highlands Regional Master Plan that create Conservation, Protection, and

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while the preservation area is defined as "that portion of the Highlands Region so designated by subsection b. of section 7 of this act." *Id.* § 13:20-3.

154. New Jersey Highlands Council, Frequently Asked Questions, http://www.highlands.state.nj.us/njhighlands/actmaps/faq/#5 (last visited Sept. 28, 2006).

155. *Id.* The Highlands Act defines Major Highlands development:

> [A]s otherwise provided pursuant to subsection a. of section 30 of this act, (1) any non-residential development in the preservation area; (2) any residential development in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more; (3) any activity undertaken or engaged in the preservation area that is not a development but results in the ultimate disturbance of one-quarter acre or more of forested area or that results in a cumulative increase in impervious surface by one-quarter acre or more on a lot; or (4) any capital or other project of a State entity or local government unit in the preservation area that requires an environmental land use or water permit or that results in the ultimate disturbance of one acre or more of land or a cumulative increase in impervious surface by one-quarter acre or more. Major Highlands development shall not mean an agricultural or horticultural development or agricultural or horticultural use in the preservation area.

Highlands Act, *supra* note 2, § 13:20-3.

156. New Jersey Highlands Council, Frequently Asked Questions, http://www.highlands.state.nj.us/njhighlands/actmaps/faq/#5 (last visited Sept. 28, 2006) (stating "If your property is located within the Highlands Preservation Area and your proposed project meets the definition of major Highlands development, then your project may be regulated. Some activities and projects, however, may be exempt."); *Highlands Act*, *supra* note 2, §§ 13:20-28(3)(a)-(c).

157. Gosier, *supra* note 6, at 1A. Environmentalists argue that the Highlands Act would expedite development in "smart growth" areas, but an ombudsman appointed by the governor could overrule regulations proposed by state agencies. *Id.*

Planned Community Zones.[158] Conservation Zones are areas that the Highlands Council determined should be preserved when possible because of the land's important agricultural or environmental features.[159] These lands are largely farmlands that should be preserved as open space when possible, but light development may be allowed.[160] Protection Zones are environmentally sensitive lands that maintain water quality or other vital ecological processes.[161] The significance of these lands places them atop the list of lands to be acquired and preserved.[162] Planned Community Zones are areas that have been significantly developed in the past, and will require less environmental protection.[163] These areas are open to further development that does not run counter to the spirit of the Highlands Act.[164]

The Act established a Highlands Council, under the Department of Environmental Protection, to oversee the development and implementation of a regional master plan,[165] as well as to develop regulations for the enforcement of the Highlands Act.[166] The open public meetings have been filled with hostility toward the Council and the

158. Highlands Draft Regional Master Plan 45-46, *available at* http://www.highlands.state.nj.us/njhighlands/master/rmp/draft/draft_regional_master_plan_final_proof_for_web.pdf.

159. *Id.* at 46.

160. *Id.*

161. *Id.*

162. *Id.*

163. Highlands Water Protection and Planning Council, Highlands Draft Regional Master Plan 47, *available at* http://www.highlands.state.nj.us/njhighlands/master/rmp/draft/draft_regional_master_plan_final_proof_for_web.pdf.

164. *Id.*

165. *See Highlands Act*, *supra* note 2, § 13:20-10 (outlining the goals of the regional master plan to protect and preserve, to the maximum extent possible, natural resources, farmland, historic resources, while promoting diverse recreational purposes and construction and development to the maximum extent possible).

166. *Highlands Act*, *supra* note 2, §§ 13:20-5, -6. The Highlands Council has the authority to, *inter alia*, sue and be sued in its own name, obtain federal funds through grants or loans, enter into agreements and contracts, establish and implement road signage, and to identify lands that should be obtained.

Act[167] despite the fact that tax and property values have remained unaffected by the change.[168]

The Highlands Act includes a provision for alleviating financial burdens placed on landowners and municipalities whenever land value is diminished by the Act.[169] Such provisions include property tax stabilization measures, TDR banks, and acquiring property.[170] Funding for these alleviatory aids is expected to come from the Highlands Protection Fund which is managed by the New Jersey Department of Treasury.[171] The Fund provides the funding for implementing the Regional Master Plan, and the Highlands Act requires twelve million dollars to be allocated to the Highlands Protection Fund for the first 10 years, and then five million dollars per annum after thereafter.[172] However, these limited dedicated funds could leave many landowners lost in a forest of statutory promises with dry riverbeds.[173]

C. *The New Jersey Pinelands Regulations*

The Highlands Act is not the first significant piece of environmental legislation in New Jersey. The Pinelands Protection Act was passed by the New Jersey legislature in 1979[174] as an enabling act for the Pinelands National Reserve created by the President and Congress.[175] Much of the Highlands Act language is similar to the Pinelands Protection Act, and the scheme established by the Highlands Act is virtually identical in form and function.[176]

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167. Fred Snowflack, *Highlands Council hasn't heard last of farmer*, DAILY RECORD (Morristown, N.J.), Nov. 12, 2006, at Columnists 01.

168. *See* John Wihbey, *Minor Impact from Highlands Act: In Legislation's First Year, Land Sales and Tax Rates Mirrored State Trends*, THE STAR-LEDGER, July 12, 2006, at County News (reporting that the Highlands Region has followed state trends, and has not seen the major losses in taxes or property values that opponents claimed would befall the region).

169. *Highlands Act*, *supra* note 2, § 13:20-11(a)(2)(a).

170. *Id.*

171. Highlands Water Protection and Planning Council, *supra* note 163, at 46.

172. *Id.*

173. Colleen O'Dea, *Highlands Funds May Benefit Only a Few Landowners*, DAILY RECORD (Morristown, NJ), Oct. 6, 2006, at Communities.

174. N.J. Stat. § 13:18A-1.

175. Pinelands National Reserve, 16 U.S.C. § 471(i) (1978).

176. *Cf.* N.J. Stat. §§ 13:18A-1 et seq. and *Highlands Act*, *supra* note 2.

The New Jersey legislature found that, similar to the current Highlands Act findings,[177] the Pinelands Region was vulnerable to environmental degradation, and that the Pineland Region's resources needed to be protected from New Jersey's rapid development.[178] To accomplish this end, the Pinelands Act divided the Pinelands Region into a preservation area,[179] and a protection area.[180] Although the Management Plan sets the minimum standards that county and municipal master plans and land use ordinances must follow, counties and municipalities may set more stringent requirements.[181] Additionally, all New Jersey property owners inside the Pinelands' boundaries must follow the regulations established by the Management Plan.[182]

The Pinelands Act created the New Jersey Pinelands Commission ("Pinelands Commission")[183] whose purpose was to draft and adopt what would be known as the Comprehensive Management Plan ("Management Plan").[184] Partial use or all use of an owner's land may be restricted by the Pinelands Act under the Management Plan.[185] To compensate landowners when they faced preservation or denial of an existing use, the Management Plan used TDRs which are referred to as Pinelands Development Credits under the Pinelands Act.[186] The New Jersey Supreme Court held in *Gardner* that the Management Plan's TDRs met the standard required by *Penn Central* because they offset any benefits that may have been lost under the Pinelands Act.[187]

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177. *Highlands Act*, *supra* note 2, at § 13:20-1.

178. *Id.* § 13:18A-2.

179. *Id.* § 13:18A-9(c).

180. *See id.* § 13:18A-9(c) (The protection area consists of all sections not included in the preservation area). *See also id.* 13:18A-3(k).

181. *Id.* § 13:18A-8(i)(1); Fine v. Galloway Twp. Comm., 463 A.2d 990 (N.J. 1983) (allowing a municipality to develop more stringent standards than the minimum requirements developed in the Management Plan).

182. N.J. Stat. Ann. § 13:18A-11.

183. *Id.* § 13:18A-4.

184. *See id.* § 13:18A-2 (Public hearings to make amendments are allowed). *See also id.* § 13:18A-8.

185. *Id.* § 13:18A-8.

186. N.J. Admin. Code §§ 7:50-5.41-7:50-5.47.

187. *Gardner*, 593 A.2d at 261.

IV. DISCUSSION

The New Jersey Legislature has the authority to create and enforce legislation like the Highlands Act because of the broad grant of power given to the Legislature under the New Jersey Constitution.[188] However, the question of whether the State of New Jersey owes property owners compensation based on the Takings Clause of the United States and New Jersey Constitutions still remains. Additionally, can the "compensation clause" of the Highlands Act,[189] along with transfer development rights (TDRs),[190] reduce the need for lawsuits?

Potential Highlands Act litigation could be thought of as a mathematical equation with variables that must each be handled in turn before the equation can be solved. "(P)ity (m)y (d)ear (A)unt (S)ally" is a pneumonic device used by math students to remember the standard formula used when solving mathematical equations. Parentheses, multiplication, division, addition, and subtraction are the mathematical tools used, in that order, to properly solve a mathematical equation. Anytime two of the same function appear in an equation, they are taken in order of appearance so that the first to appear is the first solved. The Highlands equation could be drawn as: $(A + B) - (C - D) = X$.

"A" would stand for whether or not the Highlands Act "substantially advance[s] [a] legitimate state interest,"[191] and "B" would stand for whether or not the Highlands Act "denies an owner economically viable use of his land."[192] "C" would stand for the "takes everything" part of our equation,[193] while "D" would stand for if the Highlands Act "goes too far."[194] You would then subtract the sum of the second paragraph from the sum of the first paragraph, the mathematical equivalent of a legal balancing test, to determine if the outcome is a compensable taking or non-compensable action. While no legal balancing test can provide an exact answer every time, this

188. N.J. Const., art. III, para. 1; N.J. Const., art. IV, sec. VI, para. 2.

189. *Highlands Act*, *supra* note 2, § 13:20-11(2)(a) (listing possible sources of compensation to be distributed under the Highlands Act). The New Jersey Supreme Court has not heard any cases dealing with compensation clauses in land preservation acts.

190. *Id.* § 13:20-13.

191. *Agins*, 447 U.S. at 260.

192. *Id.*

193. *Lucas*, 505 U.S. at 1003.

194. *Mahon*, 260 U.S. at 415.

Highlands equation offers a systematic way for attorneys and the courts to examine the facts of each case against the law. Some potential outcomes are displayed with their caselaw counterparts in the following discussion.

There are three potential outcomes in solving this Highlands Act equation. First, the State would prove it has a legitimate state interest in the Highlands Act, but the Act would be found to deny an owner of all economically viable use of the land; therefore, there is a compensable taking because the second parenthesis outweighs the first one, and the Highlands Act "takes everything" from the property owner.[195] The second potential outcome is that while the Highlands Act does not deny a property owner of all economically viable use of his land, and the Highlands Act does not "take everything" or "go too far," the Highlands Act would be found arbitrary so as to be unconstitutional.[196] Here, the Highlands Act would be found void and unenforceable, so there would be no compensable taking. The third outcome is that the State has a legitimate state interest in the Highlands Act, the owner is not denied all economically viable use of his land, and the first parenthesis outweighs the second.[197] The first scenario resulted in a compensable taking in *Lucas* and *Morris County Land Improv.*,[198] while the second and third scenarios did not in their respective cases.[199]

Whether or not the State must compensate property owners, and if compensation schemes reduce the need and success of litigation can be answered with this equation. Highlands Act litigation must be handled on a case by case basis, but the Highlands Act equation and its variables can provide a framework to analyze individual situations with consistency.

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195. *See generally Lucas*, 505 U.S. 1003.

196. *See generally Lingle*, 544 U.S. 528.

197. *See generally Gardner*, 593 A.2d 251 (holding that an owner who is not denied all economically viable use of his land does not have a compensable taking).

198. *See generally Lucas*, 505 U.S. 1003; *Morris County Land Improvement Co.*, 193 A.2d at 239.

199. *Penn Central Transportation Co.*, 438 U.S. at 138 (finding that although the plaintiff's right to develop had been properly diminished under New York City's zoning power, the plaintiff still had rights remaining that barred plaintiff from recovering), *Agins*, 447 U.S. at 262 (1980), *Gardner*, 593 A.2d at 262-63; Tahoe-Sierra Pres. Council, Inc., 535 U.S. at 321.

A. Not Substantially Advance a Legitimate State Interest

The deciding court must first determine if the Highlands Act is constitutional because it substantially advances a legitimate state interest. No New Jersey agency or political subdivision may arbitrarily discriminate between similarly situated persons regardless of the public interest that undergirds a police-power regulation.[200] Additionally, legitimate state interests should bear "a substantial relationship to the public welfare," and inflict no irreparable injury upon the landowner.[201] Although *Lingle* held that this part of the test is a substantive due process question,[202] the fact still remains that if a law is unconstitutional the challenge must end because the law cannot be enforced. The Highlands Act could be found to meet all three standards.

A guiding principle of the Fifth Amendment is that the government cannot force the few to bear the burden of the many.[203] In the case of the Highlands Act, each person is asked to bear his or her own burden as a property owner.[204] No single landowner is being isolated by the Act or asked to do anything that anyone else in the same situation is not being asked to do.[205] The Highlands Act, like all other government regulations, "involves the adjustment of rights for the public good."[206] Governments would go bankrupt and their regulations would be toothless if they had to worry about property value fluctuations with every new law.[207] Similar to the Pinelands Act, the Highlands Act is not asking any one person, or even small group of people to bear the burden. Neighbors in the Highlands Region are regulated by the same Act, and there is no intent in the Act

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200. *Gardner*, 593 A.2d at 264.

201. *Agins*, 447 U.S. at 261 (citing Euclid v. Ambler Co., 272 U.S. 365 (1926)).

202. *Lingle*, 544 U.S. at 542 (holding that the "substantially advances" element is a substantive due process question that focuses on whether or not a law "runs afoul of the *Due Process Clause*"). Interestingly, a party must now raise two arguments: 1. That the act is unconstitutional and should be overturned, or 2. in the alternative, if the case is constitutional, that the act causes a taking of the party's property.

203. Armstrong v. United States, 364 U.S. 40, 49 (1960).

204. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 321 (finding "that the Takings Clause was 'designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.'" (Citations omitted)).

205. *Goldblatt*, 369 U.S. at 594-595.

206. Andrus v. Allard, 444 U.S. 51, 65 (1979).

207. *Mahon*, 260 U.S. at 413.

to impact specific properties differently.[208] Additionally, Highlands Region citizens will share with the public the benefits from the preservation of the natural environment and the protection of the water supply.[209] New Jersey citizens living in regulated regions of the state have benefited from lower property taxes because their public services are not as burdened.[210] This will likely bring few complaints of wrongdoing from the citizens of the Highlands Region, and only strengthens the connection between the Legislature's legitimate purpose (ends) and the means used to achieve that purpose (the Highlands Act).

Legislation is legitimate and substantially advances the legislature's purpose when the legislation is rational, and a rational legislator could believe that the legislation would promote the stated purpose.[211] The Highlands Act bears a substantial relationship to the public welfare, and its enactment should not inflict irreparable injury upon the landowner.[212] While property taken solely for a public use is not substantially related to a legitimate state interest,[213] the New Jersey Legislature may use its zoning police power to protect important environmental concerns.[214] The New Jersey Legislature found that properly managing development and preserving natural resources is vital to protecting the citizens of New Jersey.[215] The New Jersey Supreme Court has recognized the difference between regulating for a legitimate purpose and taking for the public good,[216] and

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208. *Gardner*, 593 A.2d at 263 (The Highlands Region and the Pinelands Region, along with their respective Acts, are very similar. Both were identified as valuable resources that were being threatened by overdevelopment, and the legislature took the same basic steps to protect both areas). *Compare* Pinelands Protection Act, N.J. Stat. Ann. § 13:18A-1 (West 1979), *with Highlands Act*, *supra* note 2.

209. *Gardner*, 593 A.2d at 263.

210. N.J. PINELANDS COMM'N, ANNUAL REPORT (2003), *available at* http://www.nj.gov/pinelands/images/photo_library/2003report.pdf (showing taxes are $500 less than non-Pinelands areas, and over $1,700 less than the state average).

211. Kelo v. City of New London, 545 U.S. 469, 488 (2005).

212. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 395-397 (1926).

213. Bradshaw, *supra* note 98, at 7. (invalidating a zoning ordinance whose sole purpose was a public use, and not to prevent a public nuisance).

214. *Gardner*, 593 A.2d at 257 (holding "the preservation of agriculture and farmland constitutes a valid governmental goal. N.J. Const. art. VIII, § 1, para. 1(b)").

215. *Highlands Act*, *supra* note 2, § 13:20-2.

216. *See generally Morris County Land Improvement Co.*, 193 A.2d at 239.

the Highlands Act qualifies as regulating for legitimate state purposes because the ends are rationally related to the means.

New Jersey landowners and towns will be hard-pressed to make arguments that they have suffered irreparable harm. The history of New Jersey real estate prices after the Pinelands Act was passed has diminished the force of this argument because land and home prices have increased,[217] and even the short-term data indicates that land protected by the Highlands Act is following statewide trends.[218] Additionally, tax rates for the Pinelands region are among some of the lowest in the state[219] despite the outcry that tax bases would be destroyed and taxes would need to increase.[220] Rather than irreparable harm, the benefits that flow from enactments such as the Highlands Act may soften any pain felt from losing the possibility that a strip mall or development may be built down the street.

New Jersey's legitimate state interest of preserving land for environmental purposes under the Highlands Act answers the substantive due process question. However, this only answers the question of constitutionality and the inquiry must now turn to the "cornerstone inquiry in this circumstance [of] whether the [Highlands] regulation denies 'all economically beneficial or productive use of [the] land.'"[221]

B. Denying An Owner All Economically Viable Use of the Land

Highlands Act opponents have the uphill burden of proving that the Highlands Act denies all economically beneficial or productive use of the landowner's property. Justice Stevens has called the "economically beneficial use" test "wholly arbitrary" because the

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217. N.J. PINELANDS COMM'N, ANNUAL REPORT (2003), *available at* http://www.nj.gov/pinelands/images/photo_library/2003report.pdf (The inflation-adjusted median home price rose by 8.4% in the Pinelands compared to an increase of only 6.6% for a non-Pinelands home).

218. Wihbey, *supra* note 168, at County News (reporting that the Highlands Region has followed state trends, and have not seen the major losses in taxes or property values that opponents claimed would befall the region).

219. N.J. PINELANDS COMM'N, *supra* note 217, at 7 (showing taxes are $500 less than non-Pinelands areas, and over $1,700 less than the state average).

220. Board of Chosen Freeholders, County of Warren and Board of Chosen Freeholders, Joint Summary Statement, Reasons for Challenge of Highlands Act (Mar. 9, 2005), *available at* http://www.co.hunterdon.nj.us/highlands/WarrenandHunterdonJointSummaryStatement03082005.pdf.

221. Mansoldo v. State, 898 A.2d 1018, 1024 (2006) (citing Lucas v. S.C. Coastal Council, 505 U.S. at 1015.

land owner that loses one hundred percent of his land's value will recover, but would not recover if he lost ninety-five percent.[222] However, what exactly does it mean to lose one hundred percent of the "economically beneficial use" of land? Does the use have to be one that the owner would reasonably be willing to participate in? Should we expect Mr. Lucas to build a 140 square foot deck,[223] and then sell popsicles to beachgoers? Is it reasonable to say that Deborah Post of Riamede Farms cannot claim a taking because she can continue to farm and engage in agritourism?[224] The one hundred percent loss mark seems to be an almost unachievable standard, especially when there is no obnoxious use to claim.

The Highlands Act's compensation clause suggests, as do the politicians,[225] that land owners will be compensated for a loss of property value.[226] TDRs also offer another statutory method of allocating value to a land when it might have otherwise been lost.[227] While it can be argued whether TDRs would stand up under constitutional scrutiny as just compensation for a *Lucas* categorical regulatory taking, it seems plausible that they would reduce the chance of a court finding a *Mahon* taking. In seeking to answer the question of what it means to lose one hundred percent of the "economically beneficial use of the land," the idea of TDRs and agritourism seems to provide some value to the property. Basic math would seem to indicate that

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222. *Lucas*, 505 U.S. at 1019 n.8 (Stevens, J., dissenting).

223. *Id.* at 1009 n.2 (Decks up to 140 square feet were a permissible structure under the Beachfront Management Act).

224. Some farmers rely on special events for a large part of their income. John Wihbey & Saba Ali, *Farmers Hoping Nature Shines Favorably on Business*, THE STAR-LEDGER, Oct. 16, 2005, at New Jersey. Agritourism often includes farm tours and holiday-themed events, including traditional favorites such as hay rides, corn mazes, and farm-raised produce stands. Linda A. Johnson, *Agri-secretary See N.J. Farms' Future*, THE STAR-LEDGER, July 4, 2006, at Business. The idea is "to protect the farmland but make sure we keep these farm family entrepreneurs viable." *Id.* (stressing the importance of protecting New Jersey's farms to better protect plant and wildlife).

225. Josh Gohlke, *Early on, advantage Corzine; Poll has him up 10 points over Forrester*, THE RECORD (Bergen County, NJ), June 16, 2005 at A3 (Republican Gubernatorial candidate Doug Forrester supported the Highlands Act, but was unsure whether compensation would ever be forthcoming for land owners whose property values were diminished by the Act).

226. Press Release, US States News, Highlands Landowners Must Receive Just Compensation, (May 1, 2006); Colleen O'Dea, *Highlands Panel*, DAILY RECORD (Morristown, NJ), Feb. 26, 2006 at 16A.

227. *Highlands Act*, *supra* note 2, § 13:20-11.

something is not nothing. In Deborah Post's case, as a farmer, she still has an economically viable use of her land.

C. *Takes Everything*

The New Jersey Supreme Court might be able to find that the Highlands Act has "gone too far," but *Lucas's* categorical taking test should be easily overcome. A *Lucas* analysis will only be relevant for Highlands Act litigation when, in the "extraordinary case," the Act permanently deprives a property of all use.[228] A Highlands owner would have to claim that a loss of all economically viable uses of the land occurred, and this is likely a decision left to the discretion of the courts.[229]

Merely removing one possible use of land is not sufficient to find a taking.[230] Additionally, there are many exemptions that still allow for development throughout the Highlands Region.[231] Landowners may still build homes, improve existing homes, and complete development that was approved before the Act was passed.[232] While these exemptions would prevent a developer from purchasing land to build a large residential development,[233] it must be remembered that there is no constitutional guarantee to receive the best price for your property or purchase land for development.[234]

In addition to TDRs, the Highlands Council and Highlands proponents should also look to "one-to-one mitigation" as means to reduce potential law suits.[235] The New Jersey Supreme Court has upheld statutes and permits allowing limited development where "the activity [did] not result in a net loss of wetland acreage."[236] Similar opportunities could arise in the Highlands Region by allowing a land-

228. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 332 (2002).

229. *Palazzolo*, 533 U.S. at 649-650.

230. *See, e.g.*, *Penn Cent. Transp. Co.*, 438 U.S. at 136-37 (showing plaintiffs had other possible uses, therefore, no taking occurred); *Gardner*, 593 A.2d at 261 (denying plaintiff's takings claim because the plaintiffs had continued beneficial use of property despite Pinelands Act regulations).

231. *Highlands Act*, *supra* note 2, § 13:20-28.

232. *Id.*

233. *Id.* However, municipalities may still seek approval from the Highlands Council to develop a high-density residential area. *Id.* § 13:20-6(s).

234. Kieselbach v. Comm'r, 317 U.S. 399, 404 (1943) (stating "[t]he just compensation constitutionally required is not the same thing as the sale price of a capital asset.").

235. *In re* Freshwater Wetlands Prot. Act Rules, 852 A.2d 167, 178-179 (2004).

236. *Id.*

owner in the preservation area limited development rights, and then relocating the preservation restrictions to undeveloped land in the planning area. This would also allow for the flexibility that was missing in *Lucas*, and eventually led to Mr. Lucas recovering over $1.5 million dollars from the state of South Carolina.[237]

D. Goes too Far

Justice Holmes's ambiguous "goes too far" statement has been the bane of lawyers, judges, and academics since it was written. The bright line rule of physical takings has only been replicated in regulatory taking jurisprudence in *Lucas*,[238] and offers little guidance for Highlands opponents who will need to argue that New Jersey has stepped beyond the boundaries of its regulatory authority. "Goes too far" could be interpreted as not only economic losses, but also where the government has exceeded their authority.[239]

It is a foundation of zoning law that an ordinance can only be declared unconstitutional if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[240] The State, contrary to popular opinion in New Jersey, did not rush to impose the Act on the landowners in the Highlands Region.[241] The Highlands Act has a special permit proc-

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237. DAVID LUCAS, LUCAS VS. THE GREEN MACHINE: LANDMARK SUPREME COURT PROPERTY RIGHTS DECISION BY MAN WHO WON IT AGAINST ALL ODDS 250 (Alexander Books 1995); WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 61 (Harvard University Press 1995).

238. *See Lucas*, 505 U.S. at 1015 (stating the categorical rule that a taking occurs when a regulation removes all economically viable use of the subject property).

239. The government's police power derives from Locke's Executive Power – "the power each of us has in the state of nature to secure his rights." This power is legitimate because it was given to the government by the people when we bound ourselves as a nation under the Constitution. The government's rights are given, and limited, by the rights extended to them to secure rights while respecting the rights of other. The police power cannot be used for protecting the general good. Cato Handbook for Congress, 148 (Cato Institute, 2002), *available at* http://holtz.org/Library/MarketLiberal/CatoHandbookForCongress2002.pdf.

240. *Euclid*, 272 U.S. at 395.

241. *Environmentalists Expose Sprawl Lobby Fiction On Highlands Bill*, DAILY RECORD (Morristown, NJ), Apr. 18, 2004 (stating that the Highlands Region has been the subject of study for the past 15 years. Governors Kean, Florio and McGreevey have appointed panels, the Highlands Region has been studied twice by the U.S. Forest, the State Planning Commission, Skylands Task Force, Highlands Working Group and private entities).

ess to allow development to continue until the Master Plan is finalized,[242] and even if the New Jersey Supreme Court found a delay in the preparation of the Master Plan, temporary moratoria have been upheld as constitutional because they allow governments and agencies to make decisions without haste.[243]

Highlands Act opponents will likely fail to show that the Act is *ultra vires* because both the United States and New Jersey Supreme Courts have upheld similar acts.[244] While the Court in *Mahon* only mentioned that *if* the government regulation "goes too far" it will affect a taking, the New Jersey Supreme Court, in *Morris County Land Improv. Co.*,[245] found the government went too far when its zoning police power did not provide sufficient power to enforce a regulation.[246] The State should not have any problems with exceeding its police power because the State's authority comes from the New Jersey Constitution,[247] and caselaw limitations are minimal.[248]

The *Penn Central* ad hoc analysis seems best suited to determine if the Highlands Act "goes too far" because it focuses on "factual inquiries"[249] that carefully examine the facts while balancing specific interests.[250] A Highlands Act ad hoc analysis may focus on what rights are affected, if the government had the authority to diminish or remove the right, and what rights still remain.[251] Deborah Post's right to sell Riamede Farm to a developer is diminished under the Highlands Act,[252] but the right to build homes for immediate relatives remains unaffected.[253] She may be allowed to sell her development rights to a developer who would use them in a pre-approved

242. *Highlands Act*, *supra* note 2, § 13:20-33.

243. *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 335.

244. *Id.* at 341-42; *Gardner*, 593 A.2d at 253, 256.

245. *Morris County Land Improv. Co.*, 193 A.2d at 239.

246. *Id.* at 243-44.

247. N.J. CONST. art. III, para. 1; *id.* art. IV, sec 6, para 2.

248. *Pheasant Bridge Corp*, 777 A.2d at 339 (stating zoning laws may not be arbitrary, capricious, or unreasonable).

249. *Penn Cent. Transp. Co.*, 438 U.S. at 124.

250. *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring).

251. *Penn Cent. Transp. Co.*, 438 U.S. at 136-37 (finding that although the plaintiff's right to develop had been properly diminished under New York City's zoning power, the plaintiff still had rights remaining that barred plaintiff from recovering).

252. *Highlands Act*, *supra* note 2, § 13:20-28 (stating no exemption for selling property to developers). Reducing the amount of development in the Highlands Region was a goal of the legislators. *Id.* § 13:20-2.

253. *Id.* § 13:20-28.

location[254] while continuing with farming and engaging in agritourism on the property she currently owns.[255] Additionally, New Jersey is acting within their police power to protect natural resources through legislation like the Highlands.[256]

V. CONCLUSION

The New Jersey legislature has the constitutional authority to set aside lands for specific uses, and may do so as long as it is not arbitrary, capricious, or unreasonable.[257] This includes the authority to create and enforce legislation that, like the Highlands Act, creates zoning laws based on environmental standards. While "[a]ppropriation is the first step in the series of means and end which lead to the preservation of mankind,"[258] appropriating land under the Highlands Act is a first step to preserving land and natural resources in New Jersey. The State of New Jersey has the authority to designate lands into zones through its zoning power,[259] and to preserve the Highlands Region through a well-designed regional master plan.

The Highlands Act will likely reduce the number of ways property owners may use their land. However, this diminution does not automatically lead to a compensable loss under the United States or the New Jersey Constitutions.[260] The Highlands Act directly advances its stated purpose to protect valuable natural resources, particularly

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254. *See id.* § 13:20-13.

255. *See id.* § 13:20-2. (stating "that in order to preserve the agricultural industry in the region, it is necessary and important to recognize and reaffirm the goals, purposes, policies, and provisions of the 'Right to FARM Act,' P.L. 1983, c. 31 (C. 4:1C-1 et seq.) and the protections afforded to farmers thereby.").

256. *Gardner*, 593 A.2d at 257 (holding "the preservation of agriculture and farmland constitutes a valid governmental goal." (*construed in* N.J. CONST. art. VIII, § 1, ¶ 1(b)).

257. *Pheasant Bridge Corp.*, 777 A.2d at 339 (quoting Bow & Arrow Manor, Inc. v. Town of W. Orange, 307 A.2d 563, 567 (N.J. 2001)).

258. JAMES TULLY, A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES 121 (Cambridge University Press 1980).

259. N.J. CONST. art. III, para. 1; *id.* art. IV, § 6, para. 2.; *N.J. State League of Municipalities*, 708 A.2d at 710.

260. *Mahon*, 260 U.S. at 413 (holding that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.").

through the limitation of residential development.[261] If the law does not "go too far" or "take everything," then there is no compensable loss for the Highlands property owner to claim. Parties contemplating potential Highlands lawsuits should examine the jurisprudential style of the New Jersey Supreme Court to understand why they are likely starting with one strike against them.[262]

Although Deborah Post may not be singled out to bear the burden of Highlands Preservation alone, the courts would likely find against her in litigation because of her options available under the Highlands Act.[263] The Act has not denied her an economically viable use of her land. She may continue to farm, engage in agritourism, and even build and sell homes to her immediate family members on her property.[264] Value is retained in the property by the ability to build a single-family home for personal use (or an immediate family member),[265] TDRs,[266] and development achieved through potential use of "one-to-one mitigation."[267] Deborah Post, and other Highlands Act opponents may want to follow the lead of eminent domain reformers by seeking state legislation to reduce the state's power for regulatory takings.[268] Legislators have shown a willingness to enact reform for eminent domain,[269] and New Jersey landowners may be able to further protect their land use rights and property values through the same legislative process that removed them.

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261. *See Gardner*, 593 A.2d at 257.

262. *See Morris County Land Improvement Co.*, 193 A.2d at 243-44; *Orleans Builders & Developers*, 453 A.2d at 208-09; *Gardner*, 593 A.2d at 257.

263. *Highlands Act*, *supra* note 2, § 13:20-28; Holloway & Guy, *supra* note 91, at 234 n.15 (citing generally *Suitum*, 520 U.S. at 741-42 (recognizing that transferable development rights (TDR) have utility and value under the Takings Clause)); *see also Penn Cent. Transp. Co.*, 438 U.S. at 137 (finding that TDR's have value in mitigating the impact of a regulation).

264. *Highlands Act*, *supra* note 2, § 13:20-28.

265. *Id.*

266. Holloway & Guy, *supra* note 91, at 234 n.15 (citing generally *Suitum*, 520 U.S. at 741-42 (recognizing that transferable development rights (TDR) have utility and value under the Takings Clause)); *see also Penn Cent. Transp. Co,* 438 U.S. at 137 (finding that TDRs have value in mitigating the impact of a regulation).

267. *In re* Freshwater Wetlands Prot. Act Rules, 852 A.2d at 179 (N.J. 2004).

268. G.M. Filisko, *Voters Trump Court on Eminent Domain,* NATIONAL REAL ESTATE INVESTOR, Jan. 1, 2007, at 64 (highlighting the states that have taken action after Kelo to reduce the state's eminent domain power).

269. Valerie L. Brown, James P. Condon, D. Todd Sidor & Laurie Weresow, *Pending Legislation: Eminent Domain*, NEW JERSEY LAWYER, Sept. 11, 2006, at Capitol Report 11.

Although some feel the New Jersey Supreme Court has been too deferential to the New Jersey legislature when it comes to takings issues,[270] they should remember that governing and rulemaking is based on losing some freedoms to receive some protections and order.[271] Hopefully the small freedoms lost under the Highlands Act will lead to the protection of open space and clean water for many years to come.

270. Bradshaw, *supra* note 98, at 466.

271. John Locke (Stanford Encylopedia of Philosophy), 3.3 The Social Contract Theory, *available at* http://plato.stanford.edu/entries/locke/ (Locke believed that legitimate civil government was created by "the explicit consent of those governed.").