

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0923-08T1

TOLL BROTHERS, INC.,

Appellant,

v.

JON CORZINE, GOVERNOR and
THE NEW JERSEY HIGHLANDS
WATER PROTECTION AND
PLANNING COUNCIL, THE
COUNCIL ON AFFORDABLE
HOUSING, and THE NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL
PROTECTION,

Respondents.

Argued April 12, 2011 - Decided August 15, 2011

Before Judges Yannotti, Skillman and Roe.

On appeal from the Highlands Water
Protection and Planning Council.

Carl S. Bisgaier argued the cause for
appellant (Bisgaier Hoff, attorneys; Mr.
Bisgaier, Richard J. Hoff, Jr., Donna T.
Urban and Erin Patterson Gill, on the
briefs).

Barbara L. Conklin, Deputy Attorney General,
argued the cause for respondents (Paula T.
Dow, Attorney General, attorney; Nancy
Kaplen, Assistant Attorney General, of
counsel; Ms. Conklin, on the brief).

PER CURIAM

The Highlands Water Protection and Planning Act (the Highlands Act), N.J.S.A. 13:20-1 to -35, created a state agency, called the Highlands Water Protection and Planning Council (Highlands Council), N.J.S.A. 13:20-4, which was delegated responsibility for land use planning in the Highlands Region, consisting of nearly 800,000 acres of land in eighty-eight municipalities located in the northeast corner of New Jersey. One of the Council's primary responsibilities is the adoption of a regional master plan (RMP) for the Highlands Region. See N.J.S.A. 13:20-8(a).

On July 17, 2008, the Council adopted the RMP for the Highlands Region, and on September 5, 2008, it became effective upon its acceptance by the Governor.

Before adoption of the RMP, appellant Toll Brothers, Inc., the contract purchaser of an approximately eighty-four-acre parcel of land in the Borough of Pohatcong, which is in the Highlands Region, had obtained preliminary major subdivision approval for development of the site. After the RMP's adoption, Toll Brothers filed this appeal challenging its validity both on

general grounds and specific grounds relating to the designation of the subject property in the RMP.¹

Appellant's primary argument is that the designation of its property as being located in a "Conservation Zone -- Environmentally Constrained Sub-Zone" in the RMP is arbitrary, capricious and unreasonable and that the RMP is unconstitutional because it fails to provide for an adjudicatory hearing by which appellant may challenge this designation.

There is no question a property owner may challenge the validity of a zoning ordinance as applied to its property, and if that challenge presents contested factual issues, an evidentiary hearing is required. See Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 289-91 (2001), cert. denied, 535 U.S. 1077, 122 S. Ct. 1959, 152 L. Ed. 2d 1020 (2002); Sartoga v. Borough of W. Paterson, 346 N.J. Super. 569, 579 (App. Div.), certif. denied, 172 N.J. 357 (2002). However, the Highlands Council's adoption of the RMP did not result in a rezoning of appellant's property. Appellant's property remains subject to the Pohatcong zoning ordinance that was in effect before the Council's adoption of the RMP.

¹ Toll Brothers withdrew from the contract during the pendency of the appeal. The owner of the property, Jack Oberly, and his representative, Martin Resnick, filed a motion to be substituted as appellants, which we granted.

Appellant's property is located in the planning area of the Highlands Region. A municipality is not required to conform its master plan to the RMP with respect to the parts of the municipality in the planning area, but may elect to do so voluntarily. N.J.S.A. 13:20-14(f); N.J.S.A. 13:20-15(a). Pohatcong, which is located partially within the preservation area and partially within the planning area, has petitioned the Council for a determination of conformance of its master plan and zoning ordinances to the RMP (sometimes referred to as "plan conformance") with respect to the entire municipality, including the parts in the planning area. However, the filing of such a petition does not stay the effectiveness of Pohatcong's zoning ordinances. Consequently, if appellant's property is subject to a constraint on development as a result of its designation in the RMP, this is a result of Pohatcong having imposed some sort of de facto moratorium upon the effectiveness of its zoning ordinance rather than as a direct result of the Council's adoption of the RMP.

The Council's designation of appellant's property as being located in a "Conservation Zone -- Environmentally Constrained Sub-Zone" will not have any operative effect upon the zoning of that property unless and until the Council approves proposed revised ordinances to conform with the RMP, as a result of the

plan conformance process, and Pohatcong adopts those ordinances. At that point, Pohatcong's revised zoning ordinances would be subject to judicial review. See N.J.S.A. 13:20-22.

Furthermore, the Council seems to acknowledge that its final decision in the plan conformance process will be a final agency action that would be reviewable in accordance with Rule 2:2-3(a)(2). After that process is completed, there would be a more complete record than exists now to determine the reasonableness of the Council's designation of appellant's property in the RMP.

Under all these circumstances, appellant's challenge to the validity of the Council's designation of its property is premature. See K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep't of Env'tl. Prot., 379 N.J. Super. 1, 8-10 (App. Div.), certif. denied, 185 N.J. 390 (2005). Therefore, we dismiss that part of the appeal.

Appellant also argues that the RMP is unconstitutional because it does not include any procedural mechanism that allows private landowners to obtain variance relief. However, as previously discussed, the RMP does not rezone appellant's property. Appellant's property remains subject to the zoning provided under Pohatcong's zoning ordinance. Moreover, there is nothing in the RMP that would foreclose appellant from applying

to the Pohatcong Board of Adjustment for a use variance. See N.J.S.A. 13:20-34. In any event, appellant does not claim that there is some unique feature of its property that would warrant a use variance. Rather, appellant's claim is that the RMP's designation of its entire eighty-four-acre parcel is arbitrary, capricious and unreasonable, which would not provide a basis for a variance.

Appellant argues under Point IV of its brief that the RMP violates N.J.S.A. 13:20-8(a) because it fails to recommend adequate receiving zones for transfer development rights in the Highlands Region and fails to designate the development capacity of each receiving zone. This argument is similar to the argument we rejected in In re Adoption of Highlands Regional Master Plan, No. A-1054-08T1, which is being filed simultaneously with this opinion. We conclude for the reasons set forth in that opinion that the RMP does not violate N.J.S.A. 13:20-8(a) or any of the other provisions of the Highlands Act governing transfer development rights.

Accordingly, the part of the appeal challenging the designation of appellant's property as being located in a "Conservation Zone -- Environmentally Constrained Sub-Zone" is dismissed as premature. We affirm in all other respects.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION