

REAL ESTATE/TRANSACTIONAL LAW  
**Update**

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## Highlands Act Challenge Goes to Round II

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an attorney.

On November 18, 2005 the Honorable Theodore Bozonelis issued a bench opinion in OFP, LLC vs. The State of New Jersey dismissing OFP's challenge to the Highlands Water Protection and Planning Act, P.L. 2004, Chapter 120 (the "Highlands Act"). OFP has filed an appeal and the case is pending in the Appellate Division and awaiting briefing.

OFP's property is located in Washington Township, Morris County and consists of in excess of 90 acres. OFP had brought an action challenging the Highlands Act on its face and as applied to OFP's property alleging that the preservation area in the Highlands Act was improperly and impermissibly drawn to include OFP's property and challenging the "science" supporting the Highlands Act. OFP had also challenged the retroactivity provision of the Highlands Act as OFP had obtained its final permit in the gap period – the period between March 29, 2004 and the adoption of the Highlands Act on August 10, 2004. OFP had obtained preliminary subdivision approval on its property to construct 26 single family homes in 2000 and spent four years litigating various roadblocks designed to stop the project. The only outstanding permit as of March 29, 2004 was a NJDEP Potable Water Supply Permit which ultimately issued on May 14, 2004. OFP also challenged the Highlands Act as being invalid and void on its face or invalid as applied to OFP. OFP's

Complaint also included an allegation that the application of the Highlands Act resulted in the taking of OFP's property without just compensation and that the Highlands Act violated OFP's due process rights under the United States Constitution and the New Jersey Constitution.

The State of New Jersey filed a motion to dismiss OFP's Complaint and the motion was eventually converted to a motion for summary judgment. Judge Bozonelis dismissed OFP's facial claim based on a finding that the Highlands Act has a legitimate public purpose and also dismissed OFP's as applied claim as "unripe" because OFP had not exhausted administrative remedies.

After Judge Bozonelis issued its initial opinion on November 18, 2005, OFP filed a timely motion for reconsideration on the ground that the trial court's decision failed to identify a rational relationship between the legislation and the public purpose and that OFP could not be required to exhaust administrative remedies when the State had not even adopted the procedural/substantive rules necessary for OFP to pursue an administrative remedy. An administrative remedy for OFP depends on the adoption of Transfer Development Rights ("TDR") regulations and no TDR regulations exist. On February 3, 2006, Judge Bozonelis denied the motion for reconsideration and the case is currently on appeal in the Appellate Division.

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Please direct any questions about the contents of this issue, or about a specific fact situation to any of our Real Estate/Transactional attorneys:

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