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January 2, 2009

Dear Mayor:

New Jersey Farm Bureau began its challenge to the NJDEP rules for the Highlands Preservation Area immediately upon their adoption in the spring of 2005. The appeal contesting the rules was filed on the basis that the DEP was arbitrary and capricious in calculating the septic density standards for the region. Our position is that the DEP's requirement for 25 acres/88 acres is unjustifiably large. The case was heard by the Appellate division of the Superior Court of New Jersey in early 2008 with the opinion favoring the Farm Bureau appeal rendered last summer.

The July 22, 2008 opinion by the Appellate Division remanded the Farm Bureau challenge for an evidentiary hearing before the Office of Administrative Law (OAL), which was instructed to issue findings of fact and conclusions of law within 100 days of the opinion. On September 26, 2008, the Appellate Division extended the time to complete the evidentiary hearing until March 27, 2009.

The current schedule is: the OAL hearing will be conducted January 13-19, 2009. The Farm Bureau and NJDEP will thereafter be given approximately two weeks to submit post-hearing briefs. The OAL is expected to issue its findings of fact and conclusions of law approximately two weeks after that by mid-February, 2009. NJDEP will then have until March 27, 2009 to complete the remand, meaning, to take whatever action (e.g., supplemental rule proposal, etc.) that it considers to be appropriate or necessary in light of the OAL's findings. The case will then go back to the Appellate Division for final disposition. Although it is difficult to predict exactly what will be back before the Appellate Division in the spring, we would expect that the Appellate Division will try to take its final action before its summer recess begins in June.

We at the Farm Bureau feel that it is very important for all of the municipalities within the Highlands Preservation Area that are currently going through the process of plan conformance be aware of the challenge, and of the possibility that the septic density standards of 88 and 25 acres may be changed as a result of this ongoing appeal. As you know, these original standards are now the basis for Highlands compliance zoning amendments.

In the July 22, 2008 decision, Judge Skillman wrote: "The Farm Bureau has raised substantial questions regarding the reasonableness of the methodology that the DEP used in establishing the septic density standards... Therefore, Farm Bureau should be afforded the opportunity for an evidentiary hearing to contest the validity of these standards." Naturally, Farm Bureau is hopeful that the OAL will agree that the DEP has overstepped its bounds.

If you would like further information, contact Nicki Goger of our staff.

Sincerely,

Richard Nieuwenhuis,
President

Cc: All Highlands Preservation Area mayors
All Highlands Preservation Area planning board chairs
John Weingart, Eileen Swan - NJ Highlands Council
New Jersey Department of Agriculture