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OFP, LLC, a New Jersey Limited Liability Company Plaintiff/Appellant, v. THE STATE OF NEW JERSEY, Defendant/Respondent.	SUPREME COURT OF NEW JERSEY Docket No. 61,621 Civil Action Appeal from the Superior Court of New Jersey, Appellate Division, Docket No. A-3190-05T1 Sat below: Hon. Stephen Skillman, P.J.A.D. Hon. Joseph F. Lisa, J.A.D. Hon. John S. Holston, Jr. J.A.D.

BRIEF OF AMICUS CURIAE NEW JERSEY HIGHLANDS COALITION

The New Jersey Highlands Coalition ("Highlands Coalition") respectfully submits this brief amicus curiae urging the Court to affirm the Appellate Division's decision rejecting the several legal challenges by OFP, L.L.C. ("OFP") to the New Jersey Highlands Water Protection and Planning Act ("Highlands Act" or "Act").

PROCEDURAL HISTORY AND STATEMENT OF THE FACTS

The Highlands Coalition incorporates by reference the Procedural History and Counterstatement of Facts of Respondent, the State of New Jersey.

PRELIMINARY STATEMENT

The Highlands Coalition is an assembly of non-profit environmental advocacy groups aligned to advocate for the protection, preservation, and enhancement of the water, forests, wildlife, farmland and other natural, historic and cultural resources of the New Jersey Highlands, and to enhance the sustainability of natural and human communities and the quality of life for current and future generations. More specifically, the Highlands Coalition seeks to safeguard the water resources, ecological integrity, and biodiversity of the New Jersey Highlands, promote the development and implementation of a strongly protective Highlands Regional Master Plan, and ensure strict enforcement of the Highlands Water Protection and Planning Act and other applicable regulations. Accordingly, the Highlands Coalition has a strong interest in ensuring that this baseless challenge to the Highlands Act is rejected.

OFP attacks the decision of the Appellate Division on essentially two grounds. First, OFP contends that the Appellate Division erred in ruling that OFP's regulatory takings claim was not ripe on the ground that OFP failed to obtain a final and definitive decision from the N.J. Department of Environmental Protection ("NJDEP") about what development the department would allow on the property. Second, OFP contends that the Appellate Division erred in rejecting the argument that the Highlands Act is "manifestly unjust" because the Legislature made it effective on March 29, 2004, four and one-half months before the law was enacted. Because there is no merit to either of these arguments, this Court should affirm.

The Highlands Coalition seeks to assist the Court in resolving OFP's legal arguments by addressing the merits of these arguments in some detail. In addition, the Highlands Coalition seeks to assist the Court in understanding the larger context of this case by (1) describing the threat to the Highlands area and the State's water supplies from uncontrolled sprawl development and how the Highlands Act responds to this threat and (2) discussing the extensive research that has been conducted in New Jersey and around the country on the effects of comprehensive land use regulatory programs on private property values. In addition, following up on this Court's recent decision in Oberhand v. Director, 193 N.J. 558 (2008), the Highlands Coalition urges the Court to reconsider the validity of the

manifest injustice test as a separate, extra-constitutional standard for the review of retroactive legislation and recommends that the Court conclude that this test has no proper place in New Jersey law.

SUMMARY OF ARGUMENT

As a preliminary matter, the Highlands is an essential source of pubic drinking water and contains numerous other valuable natural resources, the area is seriously threatened by unregulated sprawl development, and the Highlands Act represents a reasonable and comprehensive strategy for addressing this threat while safeguarding the legitimate interests of private property owners.

The Appellate Division correctly concluded that OFP's taking claim was not ripe. To present a ripe claim, a claimant must first obtain a final and definitive decision from government regulators on what development they will allow. Here, the Highlands Act authorizes owners like OFP who believe they have suffered a taking to seek a hardship waiver. OFP failed to seek a waiver under the Act and, therefore, has not obtained a final and definitive decision that supports a ripe claim.

In an effort to rebut the conclusion that its claim is not ripe, OFP contends that the NJDEP did not issue regulations for the waiver process immediately upon enactment of the legislation. Apart from the fact that immediate issuance of the regulation was not mandated pursuant to N.J.S.A. 13:20-31a, the State has consistently

taken the position that OFP could have applied for a waiver without the regulation being in place. Thus, the absence of the regulation was no barrier to OFP ripening its claim.

OFP also contends that the Highlands Act required the Highlands Council to establish a Transferable Development Rights ("TDR") program pursuant to N.J.S.A. 13:20-13 and that the Council's delay in doing so just yet makes OFP's taking claim ripe. The Court must reject this argument because the Act does not establish a deadline for the establishment of the TDR program and, in any event, the pending status of the TDR program provides no excuse for OFP's failure to seek a waiver from the permitting requirements of the Act pursuant to N.J.S.A. 13:20-33b(3).

OFP seeks to bolster its ripeness argument by contending that the Highlands Act requires the TDR program to provide full compensation for every regulatory burden created by the permitting program and that, in the absence of such complete compensation, the permitting program necessarily results in a taking. This argument is mistaken because the Act does not contemplate that the TDR program will necessarily provide 100% compensation. Furthermore, under the Takings Clause, the government may enact regulations without necessarily paying for every negative impact.

Constitutional considerations aside, the Highlands Act is fundamentally fair. The Act limits potential uses of private property, but all owners in the Highlands also

benefit from the Act's protections. Well-established economic principles, as well as substantial empirical evidence, demonstrate that significant economic benefits accrue to land owners subject to comprehensive land use regulations. In addition, in crafting the Act the State has bent over backwards to promote fairness to land owners; in addition to the TDR program, the Act includes important exemptions from the regulations in N.J.S.A. 13:20-28 and directs the use of tens of millions of dollars of state funds for land acquisition.

The Act's modest transition provision, between the March 29, 2004 deadline for grandfathering under the Act in N.J.S.A. 13:20-28a(3), and the Act's adoption in August, 2004, does not result in a "manifest injustice." This provision helps to advance the Act's important public health and environmental protection goals while imposing only a modest and reasonable burden on land owners.

Finally, for the reasons expressed by Justices Barry Albin and Virginia Long in the recent Oberhand case, the Court should reconsider the validity of the manifest injustice test as a separate, extra-constitutional standard for the review of retroactive legislation. This Court has never explained or justified the separate manifest injustice test. This extra-constitutional fairness test emerged in the Court's case law in the mid-1980's as the result of an apparent misreading of prior precedent, and the doctrine needlessly duplicates (and perhaps inappropriately expands

upon) the protection against unjust and arbitrary retroactive legislation already provided by the United States and New Jersey Constitutions. This test has no proper place in New Jersey law.

ARGUMENT

A. The Highlands Act Pursues the Goals of Safeguarding Critical Drinking Water Supplies and Protecting Other Exceptional Natural Resources in a Reasonable and Balanced Fashion.

The fate of the New Jersey Highlands – an area of approximately 860,000 acres in the northwest part of the State – is a matter of exceptional importance to current and future residents of New Jersey. The Highlands is a vital source of drinking water to over half of New Jersey's residents. N.J.S.A. 13:20-2; see also, Thomas A. Borden, Using regional planning to protect public trust resources, 237-Dec N.J. Law. 31, 33 (2005). The Highlands also contains numerous exceptional natural resources, including large areas of contiguous forest, wetlands, and important habitat for many species of plants and animals. Id. But sprawling commercial, industrial and residential development is currently placing the Highlands at risk. Id. The Highlands Water Protection and Planning Act is an effective yet carefully tailored response to the development pressures threatening this still relatively natural area of our crowded state. It is long overdue.

The need for public action to protect the Highlands has been recognized for over a century, dating back to the 1907 report of the Potable Water Commission, which concluded that "These watersheds should be preserved from pollution at all hazards for upon them the most populous portions of the State must depend for water supplies." See New Jersey

Highlands Council, Final Draft Regional Master Plan 4 November 2007) (quoting the 1907 report). The modern effort to protect the Highlands dates from a 1992 report prepared by the U.S. Forest Service, in cooperation with New Jersey officials, that reaffirmed the importance of the Highlands region and documented the serious unprecedented threat from sprawl development. U.S. Forest Service, New York-New Jersey Highlands Regional Study (1992). In 2002, the U.S. Forest Service issued an update of this report, documenting an accelerating rate of development in the Highlands region. New York-New Jersey Highlands Regional Study: 2002 Update.

On September 19, 2003, in response to these reports as well as growing public support for action to protect the Highlands, Governor James McGreevey issued Executive Order No. 70 establishing a 19-member Highlands Task Force. The task force was "charged with making recommendations to the Governor and the Legislature regarding ways to protect and enhance the quality of life in the Highlands Region by addressing measures to preserve natural resources while simultaneously providing opportunities for economic growth." New Jersey Highlands Council, Final Draft Regional Master Plan, at 8. The recommendations of the task force led to the enactment on August 10, 2004, of the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-1, et seq.

The Highlands Act perforce adopted a regional planning approach, because the Highlands' irreplaceable resources are

threatened by uncontrolled sprawl development. The New Jersey Legislature found that

> . . . since 1984, 65,000 acres . . . of the New Jersey Highlands have been lost to development; that sprawl and the pace of development in the region has dramatically increased, . . . that the Highlands, because of its proximity to rapidly expanding suburban areas, is at serious risk of being fragmented and consumed by unplanned development; and that the existing land use and environmental regulation system cannot protect the water and natural resources of the New Jersey Highlands against the environmental impacts of sprawl development. [N.J.S.A. 13:20-2].

The Highlands Act established a 15-member New Jersey Highlands Protection and Planning Council, N.J.S.A. 13:20-4, and directed the Council to prepare a Regional Master Plan that would restore and enhance the resources of the Highlands region. N.J.S.A. 13:20-6, -10. In carrying out this effort, the Council conducted dozens of public hearings and received thousands of public comments. In November 2006, the Council published a draft Regional Master Plan and, in view of the large volume of public comments received, in November 2007, published a proposed final draft Regional Master Plan. On March 27, 2008 the Council adopted Resolution No. 2008-8 setting a schedule of public hearings which will allow the Council to adopt a final Regional Master Plan at its July 17, 2008 meeting. The final plan will have numerous components including smart growth policies, a transfer of development rights program, a transportation plan, and procedures governing local participation as well as coordination and consistency. See, N.J.S.A. 13:20-11. The Council's work, as well as the

proposed draft Regional Master Plan and the public comments received by the Council, are available at http://www.highlands.state.nj.us/.

In view of "the imminent peril that the ongoing rush of development poses for the New Jersey Highlands," see N.J.S.A. 13:20-2, the Highlands Act also established immediate, interim standards for development within the so-called Preservation Area of the Highlands. N.J.S.A. 13:20-30. The Preservation Area, which is subject to the permitting requirements of the Act, consists of nearly 415,000 acres located in 52 municipalities within the seven Highlands counties.

Property owners seeking to construct a "Major Highlands Development" in the Preservation Area (as defined in N.J.S.A. 13:20-2) must apply to the New Jersey Department of Environmental Protection ("NJDEP") for a Highlands permit. N.J.S.A. 13: 20-33. Highlands permits must prohibit major development within 300 feet of any open waters, N.J.S.A. 13:20-30(b)(1), and the quality of all waters must be maintained, restored or enhanced, in accordance with the applicable Category One anti-degradation standards.[1] Id., (b)(2), (b)(5). The NJDEP is only authorized to issue a permit after finding that the project under review "would have a de minimis impact on water resources," and after

[1] A Category One designation for a body of water offers a special level of protection from measurable changes in water quality because of clarity, color, scenic setting, and other characteristics of aesthetic value, and for exceptional ecological significance, recreational significance, water supply significance, or fisheries resources. N.J.A.C. 7:9B-1.4.

considering "increases in stormwater generated, increases in impervious surfaces, increases in stormwater pollutant loading, [and] changes in land use . . . ." N.J.S.A. 13:20-34(a)(1). In addition, NJDEP must make specific findings of fact, based on an adequate record, that the project would cause "minimal feasible interference with . . . natural resources at the site and within the surrounding area, and minimal feasible individual and cumulative adverse impacts to the environment both onsite and offsite," id. (a)(2), and "minimum feasible alterations or impairment" of wetlands and other water-related features. Id. (a)(3).

At the same time, in recognition of the fact that the Highlands Act imposes significant new land use restrictions, the Legislature included in the Act numerous provisions designed to lighten the regulatory burden and help sustain and enhance private property values in the region. The Act provides that a property owner can seek a hardship waiver in various circumstances, including when he believes that the normal application of the law would result in a constitutional taking. Id. 13:20-33. The Act also includes a provision allowing any land owner to build a single family home on any vacant property as well as reconstruct and expand (at least in a limited way) any existing structure. N.J.S.A. 13:20-28a(1), -a(2), -a(4) and -a(5). In addition, the Act mandates the development of a Transferable Development Rights program, under which property owners in the Preservation Area will be permitted to sell development

credits to land owners outside the Area. N.J.S.A. 13:20-13. Finally, the Act directs that the State make targeted use of funds in the Green Acres Preservation Trust Fund to finance the purchase of land in the Highlands from willing sellers. N.J.S.A. 13:20-18; N.J.S.A. 13:20-19. See also, N.J.S.A. 13:8C-38j (allowing use of pre-Act appraisal dates for farmland).

B. The Appellate Division Properly Affirmed Dismissal of OFP's Taking Claim Because It Was Not Ripe.

The Highlands Coalition endorses the State's position that the Appellate Division properly ruled that OFP's taking claim was not ripe for adjudication.

A taking claim is not ripe until the claimant has pursued the regulatory review process to the point of obtaining a final and definitive position on what development the government will allow. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985); United Savings Bank v. State Department of Environmental Protection, 360 N.J. Super. 520 (App. Div.), cert. denied, 177 N.J. 574 (2003). The rationale for this requirement is that a court cannot know "how far" a regulation goes unless it knows with fair specificity how the regulation will be applied to the property. MacDonald, Summer & Frates v. County of Yolo, 477 U.S. 340, 348 (1986).

The Highlands Act explicitly grants land owners the opportunity to seek a hardship waiver from the Act's restrictions if they believe that the restrictions would

result in a constitutional taking. See N.J.S.A. 13:20-33 (b)(3); see also N.J.A.C. 7:38-6.8. But, as the Appellate court correctly noted, OFP has failed to pursue this option. As a result, OFP has failed to obtain a final and definitive decision from the NJDEP as to the permitted uses of its property that is a necessary prerequisite to a ripe taking claim.[2]

OFP makes several arguments in an effort to avoid the conclusion that its claim is not ripe. None has any merit. First, OFP contends that its failure to pursue a hardship waiver cannot render its claim unripe because the NJDEP regulations governing hardship waivers did not come into effect until May 9, 2005, see N.J.A.C. 7:38-6, nine months after the Act went into effect. 37 N.J.R. 2050(a)(June 6, 2005). However, OFP does not contend that the timing of the regulation's publication violated the Act, since the regulations themselves were approved by the NJDEP and made effective May 9, 2005, 270 days from the adoption of the Act as required by N.J.S.A. 13:20-31. Moreover, the State has consistently maintained that OFP could have sought a hardship waiver from the permitting requirements of the Act at any time, even prior to adoption of regulations. The State's position is correct because the hardship waiver is made available by the Act itself (N.J.S.A. 13:20-33b), and

[2] This Court has consistently interpreted Article I, Paragraph 20 of the New Jersey Constitution in conformity with the Takings Clause of the Fifth Amendment to the United States Constitution, see Mansoldo v. State of New Jersey, 187 N.J. 50, 58 (2006), and the Highlands Coalition knows of no reason to question that approach in this case.

the regulation merely restates it. Thus, the fact that NJDEP did not issue its implementing regulations immediately upon the Act's adoption gives OFP no excuse for not pursuing a hardship waiver.

Furthermore, even if OFP had been precluded from seeking a waiver until the waiver regulation was promulgated, this would have meant only a modest restriction on OFP's ability to seek permission to develop its property. Cf. Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 535 U.S. 302, 339 (2002) (rejecting a takings challenge based on the land use restrictions imposed during a multi-year development moratorium). OFP does not and cannot contend that any modest delay in its ability to obtain a waiver and develop the property during the period from the Act's adoption up to the adoption of the regulation could have caused a taking. In light of Tahoe-Sierra, such a claim would be completely untenable.

Second, OFP contends that it has a ripe claim because the Highlands Council has not yet established the TDR program called for in N.J.S.A. 13:20-13. OFP argues that the Highlands Act mandates that the TDR program, once implemented, will provide compensation for the "market value" of property interests affected by the Act. OFP further contends that such "complete compensation" is necessary in order to avoid a constitutional taking. As a result, according to OFP, the Highlands Council's alleged "default" in implementing the TDR program imposes an

immediate constitutional injury that supports a ripe taking claim. The Court should reject this argument, for several different reasons.

Contrary to OFP's position, the fact that the TDR program is not yet in place, standing alone, provides no basis for challenging the conclusion that OFP's taking claim is premature. As discussed, the critical point for the purpose of ripeness analysis is that OFP failed to pursue the waiver option. It is simply immaterial whether or not the TDR program has or has not been established yet.[3]

In addition, to the extent OFP contends that delay in implementing the TDR program violates the Act, that contention also provides no support for OFP's ripeness argument. In the first place, the argument is simply mistaken because the Act contains no specific deadline for implementation of the TDR program. Thus, even if a delay in meeting a statutory deadline could sometimes provide the basis for a taking claim, there was no statutory violation in this case.[4] Moreover, the alleged illegality of agency action, as opposed to its economic burdensomeness, does not

[3] OFP also suggests that the hardship waiver option is not actually available because that option is dependent upon OFP first seeking relief through the TDR program. But a land owner seeking relief is simply required to make a "good faith" effort to sell credits under the TDR program, see N.J.A.C. 7:38-6.8(g)2, and the present absence of a TDR program obviously excuses OFP from the obligation to explore the TDR option before seeking a waiver.

[4] OFP also suggests that the Act contemplates that the TDR program will be in place prior to publication of the Regional Master Plan. However, there is no actual deadline in the Act for development of the TDR program. The only specific deadline in the law is the requirement that the Highlands Council identify sending and receiving zones within 18 months of the Act's adoption, see N.J.S.A. 13:20-13(b), and the Council basically met that requirement. See State Brief in Opposition to Petition for Certification, at 7 n.5.

provide a basis for a taking claim. They are altogether different issues. See Pheasant Bridge Corp. v. Township of Warren, 169 N.J. 282 (2001) (a legally invalid zoning ordinance is not the type of "proper" governmental interference with property rights that can support a taking claim); see also Lingle v. Chevron USA, Inc., 544 U.S. 528, 543 (2005) (an "inquiry prob[ing] the regulation's underlying validity . . . is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose").

Finally, the premise of OFP's ripeness argument – that a property owner is entitled to complete compensation for every regulatory burden – is wholly mistaken. First, OFP is mistaken in arguing that the Highlands Act mandates a TDR program that will provide complete compensation for any regulatory restriction. As defined in the Act, and as described in the draft Regional Master Plan (available at http://www.highlands.state.nj.us/njhighlands/master/index.html), the Highlands TDR program will be driven by market forces and the value of development credits will be established by the actual market demand for credits in the receiving zones. Thus, the value of the TDR credits will inevitably fluctuate with market demand and may not provide full market-level compensation. Another reason the Highlands TDR program will not necessarily provide "market value" compensation for affected development interests is

that the Act leaves the establishment of receiving zones to the discretion of individual municipalities within and adjacent to the Highlands area. N.J.S.A. 13:20-13k. Because the ultimate scope and actual operation of the TDR program are highly dependent on the decisions of other government actors, it is difficult to predict what market value TDR credits will have.

That the Highlands TDR program is not designed to provide full compensation to affected property owners is hardly remarkable in light of the fact that the TDR program for the New Jersey Pinelands Region, another major protected area in the state, was designed in exactly the same way. See Gardner v. New Jersey Pinelands Comm'n, 125 N.J. 193 (1991) (observing that the TDR program under the Pinelands program may offset the burden imposed by regulations, "even if such transfers [do] not fully compensate it").

More fundamentally, OFP's theory that the public has a constitutional duty to indemnify property owners from any regulatory burden, no matter how modest, has no basis in history or legal precedent. To explain why this is so, it will be necessary to spend several pages laying out the basic elements of regulatory takings doctrine.

The Takings Clauses of the United States and New Jersey Constitutions were originally understood to apply only to direct appropriations of private property and physical invasions, and not to regulations of the use of property.

See Lucas v. South Carolina Coastal Council, 505 U.S. 1028 n. 15 ("early constitutional theorists did not believe the Takings Clause embraced regulations of property at all"); Litman v. Gimello, 115 N.J. 154, 161 (1989)("Traditionally, physical invasion was an indispensable element of a 'taking' claim."). See generally William M. Treanor, The Original Understanding of the Takings Clause and the Political Process, 95 Colum. L. Rev. 782, 782 (1995) ("The original understanding of the Takings Clause of the Fifth Amendment was clear on two points. The clause required compensation when the federal government physically took private property, but not when government regulations limited the ways in which property could be used.")

Beginning in the early part of the last century, the United States Supreme Court recognized that regulations in rare cases can be so burdensome that they should be regarded as the equivalent of appropriations or physical invasions. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). In accordance with the original understanding of the Takings Clause, regulatory takings analysis focuses on whether the "law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation." Tahoe-Sierra, 535 U.S. at 321-22 & n.17. In other words, the issue in a regulatory takings case is whether the regulation is so burdensome that it is the "functional[] equivalent of the classic taking in which government directly appropriates

[or occupies] private property." Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 539 (2005).

In modern takings doctrine, a regulatory taking claim must be analyzed in two steps, with the first question being whether the claimant can point to a protected "property" interest. See, e.g., Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998). This inquiry includes the question whether "background principles" of property or nuisance law bar a claimant from asserting a property entitlement to engage in the regulated activity to begin with. See Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992). Assuming a claimant can meet the threshold requirement of a protected property interest, the next question is whether the regulation is so burdensome that it amounts to a taking.

Under the broad umbrella of "functional equivalence," the United States Supreme Court has articulated two distinct standards for determining whether there has been a taking. First, the Court has established a virtually automatic liability rule for regulations that eliminate "all economically viable use." Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1028 (1992). The Court has emphasized that this rule only applies to regulations that result in "the complete elimination of a property's value." Lingle, 544 U.S. at 539; see also Tahoe-Sierra, 535 U.S. at 330. Courts have consistently rejected takings claims under Lucas when the restrictions do not literally destroy

all value. See, e.g., Cooley v. United States, 324 F.3d 1297 (Fed. Cir. 2003) (rejecting Lucas claim when property lost 98.8% of value).

Second, the United States Supreme Court has adopted the analysis articulated in Penn Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978), for regulations that stop one step short of destroying all value. Penn Central calls for an "ad hoc" analysis primarily focused on three factors: (1) the economic impact of the government action, (2) the degree to which the action interferes with reasonable, investment-backed expectations, and (3) the character of the government action. Id. at 124.

There is no precisely defined threshold of economic impact necessary to support a claim under Penn Central, but the courts routinely reject claims involving diminutions in value approaching 90% and above. See, e.g., Hadacheck v. Sebastian, 239 U.S. 394 (1915) (92.5% diminution); William C. Haas & Co. v. City & County of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (95% diminution); see also Pheasant Bridge, supra, 169 N.J. at 198-99 (2001) ("inverse condemnation requires total or substantial destruction of beneficial use of property").

The other traditional elements of regulatory takings doctrine focus on whether the regulatory restriction interferes with the owner's reasonable investment-backed expectations, see Commonwealth Edison v. United States, 271 F.3d 1327, 1348 (Fed. Cir. 2001) (en banc) (discussing this

takings factor in detail), and the "character" of the regulation, which takes into consideration both the comprehensiveness of the regulation, see, e.g., Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 640 (Minn 2007) (ruling that the character factor weighed in favor of the claimant because the regulation targeted a single property), and the degree to which the regulation is designed to protect the community from harm. See, e.g., M & J. Coal Co. v. United States, 47 F.3d 1148, 1154 (Fed. Cir. 1995); see also Goldblatt v. Hempstead, 369 U.S. 590 (1962) (rejecting takings challenge based on restrictions on sand and gravel operation designed to safeguard community's water supply).

For many years the United States Supreme Court stated that a claimant could also prevail under the Takings Clause by demonstrating that a regulation failed to "substantially advance" a legitimate governmental interest. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). See also Gardner v, New Jersey Pinelands Comm'n, 125 N.J. 193 (1991) (invoking and applying the Agins "substantially advance" test). However, in Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005), the Supreme Court, in a unanimous decision, repudiated this ostensible takings test, observing that this type of allegation raises an issue under the Due Process Clause rather than the Takings Clause. As this Court recently recognized, Lingle substantially alters the

landscape of regulatory takings doctrine. See Mansoldo v. State of New Jersey, 187 N.J. 50, 59 (2006).

Against this legal background, it is absurd for OFP to contend that the public cannot impose any restriction on land use without providing compensation, whether in the form of TDR credits or otherwise. Indeed, the United States Supreme Court said many years ago 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." Lingle, 544 U.S. at 538 (quoting Mahon, 260 U.S. at 413). This understanding of takings doctrine undergirds the Supreme Court's frequent statements that one should not view the Takings Clause as a bar to the kind of comprehensive land use planning and regulation that New Jersey has undertaken for the Highlands. See Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (affirming that "[t]he right to improve property, of course, is subject to the reasonable exercise of state authority, including the enforcement of valid zoning and land use restrictions") (emphasis added). See also Dolan v. City of Tigard, 512 U.S. 374, 396 (1994) ("Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization. . . .").

In accord with these general pronouncements, this Court and other courts across the country have rejected takings challenges to regional land protection programs similar to the Highlands program. In particular, in Gardner v. New

Jersey Pinelands Comm'n, 125 N.J. 193 (1991), this Court rejected a taking challenge to a Pinelands regulation limiting development to one residence per 40-acre agricultural tract, observing that the fact that permitted uses "do not equal the former maximum value of the land in a less- or un-regulated state is not dispositive, for there exists no constitutional right to the most profitable use of property." Id. at 215. See also, e.g., Seven Islands Land Co. v. Maine Land Use Regulation Comm'n, 450 A.2d 475 (Me. 1982) (rejecting taking claim based on regulations adopted by the Maine Land Use Regulation Commission); Horizon Adirondack Corp. v. State, 388 N.Y.S.2d 235 (N.Y. Ct. Cl. 1976) (rejecting taking claim based on Adirondack Park Agency land use regulations); Murray v. Columbia River Gorge Comm'n, 865 P.2d 1319 (Or. Ct. App. 1993) (rejecting taking claim based on land use regulations adopted pursuant to Columbia River Gorge National Scenic Area Act).

In sum, there is no support for OFP's argument that the United States and/or New Jersey Constitutions are intended to provide complete immunity for land owners from any and all regulatory burdens. To the extent that this argument represents a premise of OFP's position that it has a ripe claim based on the fact that the Highlands Council has not yet established the TDR program, the Court must reject this argument.

C. The Highlands Program is Designed to Produce a Reciprocity of Advantage that Benefits All Land Owners in the Region and the Highlands Act Includes

Several Provisions Designed to Support and Enhance Private Property Values.

The unwillingness of the courts to hold that comprehensive regional land use programs result in takings does not simply reflect the longstanding limits of constitutional takings doctrine. It is also reflects the difficulty of establishing whether such programs have any negative impact, much less an unfairly adverse impact, on private property values. As the United Stated Supreme Court observed in Tahoe-Sierra, "[l]and-use regulations are ubiquitous and most of them impact property values in some tangential way-often in completely unanticipated ways." 535 U.S. at 324.

Understandably, perhaps, an individual land owner may view a regulatory restraint on her ability to profit from developing her property as a purely negative burden. But this view ignores the fact that where, as here, a regulation applies comprehensively across a broad region, a land owner benefits from application of the regulation to all others in the region. As the United States Supreme Court has explained, comprehensive land use regulations create a "reciprocity of advantage" in which each owner is simultaneously burdened and benefited by the restrictions. Id. at 341 (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. at 415); see also Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491 (1987) ("While each of us is burdened somewhat by [use] restrictions, we, in turn, benefit greatly from the restrictions that are placed on

others."). This Court recognized this principle in Gardner, observing that "Gardner's neighbors in Upland Agricultural Areas are burdened by exactly the same restrictions, and other land owners in the Pinelands must abide by comparable regulations as part of an integrated comprehensive plan designed to benefit both the region and the public." 125 N.J. at 213.

Land use regulations produce reciprocal benefits for several different reasons. Regulations restricting neighboring properties can benefit an owner by preserving the amenities that make a community an attractive place to live, work, and invest. Conversely, land use regulations can constrain activities that threaten public health and the environment and that would undermine property values in the community. In some instances, land use regulations simply serve to separate uses, neither of which is necessarily harmful per se, but which may nonetheless conflict, such as commercial agriculture and residential development. Finally, land use regulations can support and enhance property values by limiting the total amount of development in an area, thereby increasing the market value of the individual development opportunities that remain. For example, a land owner may feel burdened by a regulation limiting the number of houses he can construct on a parcel of property. But if the regulation imposes the same restriction on many other properties, the effect will be to

increase, perhaps substantially, the value of each building lot available for development.

None of this is to deny that land use regulations can adversely affect property values or that regulations, even comprehensive ones, can potentially "take" private property in the constitutional sense. The point is simply that generally applicable land use regulations have a mix of negative and positive effects, the net effect on property values is difficulty to predict, and there is no a priori reason to assume that the net effect is necessarily negative, much less seriously negative.

In takings litigation, claimants typically rely on appraisers' estimates of the value of the property "before" (without the regulation) and "after" (with the regulation) to gauge the effect of the restriction. In light of the considerations discussed above, this approach, though relatively easy to apply in practice, systematically overstates, often extravagantly, the actual adverse effect (if any) of a restriction on property value. This approach asks, in effect, how much the claimant's property would increase in value if the restriction were lifted as to that property alone but all other properties in the area remained subject to the restriction. In other words, it generates an estimate of the windfall a claimant would receive if she, and she alone, were relieved of the obligation to comply with the regulations. In contrast, an economically rigorous measurement of the effect of land use regulation on property

values would require calculating what a particular property would be worth, not simply if the regulation were lifted from that property, but if the regulation applied to no one in the community. This type of calculation, while sometimes employed in long-term academic studies, is quite infeasible in the context of individual takings litigations.

The upshot is that an estimate, using the "before" and "after" approach, that a land use regulation reduced the value of a particular property by, say, 50%, does not actually reveal whether an owner has suffered a net economic loss. Apart from the arguments based on the language and original understanding of the Takings Clause, this economic insight helps explain why the courts have declined to find a taking unless, using the before and after method, the evidence shows a very substantial change in value. Absent a very severe reduction in value under this method, courts cannot be confident that the claimant has suffered any unfairness at all, much less an unfairness of constitutional dimension. See, e.g., Agins v. City of Tiburon, 447 U.S. 255, 262 (1980) (rejecting a taking claim based on stringent development restrictions, observing that "[t]here is no indication that the appellants' 5-acre tract is the only property affected by the ordinances," and therefore the claimants "will share with other owners the benefits and burdens of the city's exercise of its police power")."

What is more, if the public paid for every apparent "reduction" in property value of 50% using the before and

after method, the property owners would reap an undeserved financial windfall at public expense. This is because, assuming all or most of the rest of the community remains subject to the restrictions, the "before" figure actually represents, not the value of the property in the pre-regulatory state, but the value of a special exemption from the regulations that apply to everybody else in the community.

This theoretical understanding of how regulatory restrictions affect property values has been confirmed by numerous academic empirical studies documenting that land use restrictions do not negatively affect property values. Most of these studies, rather than relying on appraisers' estimates of property values, are based on so-called hedonic analyses using actual property sales data. For example,

- A study of property values in the New Jersey Pinelands concluded that the Pinelands Protection Act had no statistically significant adverse effect on the value of restricted rural lands. The study found a significant differential in the appreciation of developed and vacant lands, with developed properties appreciating at a faster rate. On the other hand, the study found that the value of the most restricted lands within the Pinelands area increased in value over the twenty year study period somewhat more than the value of similar vacant lands outside the Pinelands area. W. Patrick Beaton, The Impact of Regional Land-Use Controls on Property Values: The Cost of the New Jersey Pinelands, 67 Land Econ. 172 (1991).

- A study of the effect of downzoning for the purpose of agricultural land preservation in Maryland concluded that the effect of downzoning was either higher land value for the downzoned properties or little or no appreciable effect on their market value. Rob Etgen et al., Downzoning:

Does it Protect Working Landscapes and Maintain Equity for the Land-owner?, a report submitted to the Maryland Center for Agro-Ecology Inc. 2003) (available at www.agroecol.umd.edu/ files/sarahdownzoning/pdf.

- A study of lakefront zoning restrictions in northern Wisconsin concluded that larger minimum lakefront requirements for second-home residential development resulted in a net increase in lakefront property values. Fiorenza Spalatro & Bill Provencher, An Analysis of Minimum Frontage Zoning to Preserve Lakefront Amenities, 77 Land Econ. 469 (2001).

- An analysis of the effect of development restrictions on agricultural land in three Maryland counties (Calvert, Carol, and Howard) found no statistically significant evidence that the restrictions adversely affected sales values. Cynthia Nickerson & Lori Lynch, The Effect of Farmland Preservation Programs on Farmland Prices, 83 Am. J. Agric. Econ. 341 (2001), and finally,

- A study of sales prices of undeveloped properties in Baltimore County, Maryland, between the City of Baltimore and Pennsylvania, found no difference in the value of land zoned for one house per five acres versus one house per 50 acres. Applied Data Resources, Inc. on behalf of the Maryland Environmental Trust, Report to the Valley Planning Council on the Trading Value of RC-2 Zoned Land Compared with RC-4 Zoned Land in Northern Baltimore County (1996).

In marked contrast to the findings in these studies and numerous others reaching similar conclusions,[5] OFP asserts that the value of "lost/impaired development rights" as a result of the Highlands Act "has been estimated at almost $15 billion." Reply Brief, at 9-10. In support of this assertion, OFP cites an article published in the New Jersey

[5] These and similar studies are described in detail in Georgetown Environmental Law & Policy Institute, Property Values and Oregon Measure 37: Exposing the False Premise of Regulation's Harm to Landowners, Appendix B (2007) (available at http://www.law.georgetown.edu/gelpi/current_research/documents/GELPIMeasure37Report.pdf).

Law Journal Id. at 10, citing 190 N.J.L.J. 422 (October, 22, 2007). The New Jersey Law Journal article in turn refers to an "expert report" on the subject attached to briefs filed in another lawsuit challenging the Highlands Act.[6] The Highlands Coalition has reviewed a copy of this report, prepared by the real estate advisory services firm of Holzhauer & Holstein, L.L.C., entitled "Impact of the Highlands Water Protection and Planning Act and Act Rules on Property Values Within the Preservation District."

Apart from the important fact that this "expert study" has not actually been introduced into evidence in this case, the study is utterly lacking in credibility and presents another example of an inflated estimate of the negative effect (if any) of land use restrictions in the Highlands area. First, the report is labeled on the cover as having been produced in "Limited-Restricted Format," which, according to the Uniform Standards of Professional Appraisal Practice (available at http://commerce.appraisalfoundation.org/html/USPAP2008/index.htm), means that the study is intended for use by the client only (in this case, Warren County) and is not intended to be relied upon by third parties for any purpose, much less considered as authoritative in a judicial proceeding. In addition, so far as the Highlands Coalition

[6] County of Warren et als. v. NJDEP et als, Superior Court of New Jersey, Law Division, Docket No. MER-L-1021-07 (Defendant's motion to Dismiss Complaint For Failure to State a Claim Pursuant to R. 4:6-2(e) granted by Order dated January 19, 2008; Plaintiffs' motion for Reconsideration denied April 11, 2008).

can determine, unlike the studies discussed above, this study did not rely on actual property sales data. Instead, the study apparently relied on extrapolations from appraisers' estimates of market value and appraisals prepared for the purpose of valuing agricultural easements for the State Agricultural Development Committee ("SADC"). The study includes no demonstration that the development restrictions under the Highlands Act are comparable to SADC easement restrictions, or that the appraisals prepared for the SADC are based on actual measurements of the effect of easement restrictions on private property values. For all of these reasons, there is no reason for the Court to place any weight on the study cited by OFP.

What is the likely effect of the regulatory restrictions being imposed under the Highlands program on the value of OFP's land and other properties in the Highlands area? The short answer is that the Highlands Act is undoubtedly exerting a mix of negative and positive impacts and the net effect is uncertain and unpredictable. On the one hand, the Highlands Act has reduced the previously permitted density of development, thereby potentially exerting a negative effect on land values. On the other hand, the Highlands Act was carefully crafted to ensure that the Act did not eliminate all economically viable uses of the land, including the property held by OFP. In particular, in addition to providing the hardship waiver option and calling for the establishment of a TDR program,

as discussed below, the Act includes provisions guaranteeing that each land owner can build a single family home on any vacant property and also can reconstruct and expand (at least in a limited way) any pre-existing structure. N.J.S.A. 13:20-28. For the reasons discussed above, both because of the protections provided by the Act, and the scarcity of development opportunities created by the Act, the value of individual development opportunities and of existing structures within the Highlands area will be higher than they would be in the absence of the Highlands Act. The empirical studies discussed above indicate that the private marketplace often places such a high value on the amenities preserved by comprehensive regulations that even stringent restrictions may have little or no net adverse effect on property values. Only time will tell whether that turns out to be the case in the Highlands, but it is apparent that there is no a priori reason to assume that the consequence of the comprehensive Highlands regulations will be negative.

Furthermore, quite apart from the reciprocal burdens and benefits created by the regulatory regime, the Highlands Act includes several additional measures that eliminate any genuine risk of constitutional takings and promote fairness to land owners. In particular, the Legislature has directed that the State make targeted use of money in the Green Acres Preservation Trust Fund to finance the purchase of land in the Highlands area from willing sellers. N.J.S.A. 13:8C-26(n). According to the State, "[s]ince August 10, 2004,

the DEP Green Acres Program has acquired over 100 properties in municipalities wholly or partially in the Preservation Area, at a total cost of nearly $63 million." State Brief in Opposition to Petition for Certification, at 9. In addition, the planned TDR program, even though not yet in place and not designed to guarantee full "market value" compensation, can generate significant financial payments to land owners in the Highlands. Both of these initiatives undoubtedly have had and will continue to exert upward pressure on property values in the Highlands area, counteracting, at least to some degree, whatever negative effect the regulatory restrictions may be having on property values.

As discussed, OFP has no basis for asserting a ripe temporary taking claim based on the Highlands Council's schedule for implementing the TDR program. Beyond that, however, it is questionable whether the delay in implementing the TDR program has even adversely affected property values relative to the values that will likely prevail once the program is implemented. The Highlands Act directs the Highlands Council to adopt a TDR program and the Highlands Council is working diligently to develop that program. The fact that the TDR program will be in place by July, 2008 is itself likely having a positive affect on property values in the Highlands area. The mere fact that full implementation of the program may take additional time should not blind reasonably astute land owners to the

benefits that will be available to them down the road. Cf. Tahoe-Sierra, 535 U.S. at 341 (observing that property values around Lake Tahoe might well have increased during the development moratorium pending preparation of a more effective protection program for the lake, "because property values throughout the Basin can be expected to reflect the added assurance that Lake Tahoe will remain in its pristine state.")

To be sure, if OFP were able to pursue its 26-unit subdivision, it would reap a substantial windfall relative to its neighbors who have not sought development permits or who are behind OFP in the development review process. But, for the reasons discussed, that windfall would largely represent the value of a special exemption from the regulations that apply to others in the community. At the same time, OFP is eligible to pursue some limited, but potentially quite lucrative development under the regulations. In addition, OFP's property values are undoubtedly benefiting from the targeted use of Green Acres land acquisition funds in the area. Moreover, OFP has the prospect of eventual eligibility to sell TDR credits. Taking into account these facts, in addition to the serious threats posed by development to the State's water supplies and other Highland resources, it would be impossible to conclude based on the current record, that OFP has been treated unfairly, much less that its constitutional rights are being violated.

The Highlands Act is a regionally significant important piece of legislation, which protects water supply and other exceptional natural resources while conscientiously addressing concerns about potential unfairness to land owners. In addition to ensuring that the Act will not result in actual constitutional takings, the State has taken additional steps, which go well beyond the constitutional minimum, to sustain and support property values within the Highlands area. The Court should firmly and unequivocally reject OFP's taking challenge to this reasonable and balanced exercise of the State's police power authority.

D. The Act's Modest Transition Provision Does Not Violate Either Due Process Or The Manifest Injustice Test.

The Highlands Coalition urges the Court to affirm the dismissal of OFP's challenge to the Highlands Act's modest transition provision.

The Due Process Claim. In the trial court and before the Appellate Division, OFP contended that the Act's transition provision results in a due process violation. OFP appears to have abandoned this argument because it did not brief it in its Petition for Certification. In any event, the claim borders on the frivolous and should be rejected.

As the Court explained in Nobrega v. Edison Glen Associates, 167 N.J. 520 (2001), a due process challenge to retroactive legislation is evaluated under a deferential "rational basis" test. Retroactive legislation satisfies

due process "simply by showing that the retroactive application of the legislation is itself justified by a rational legislative purpose." Pension Benefit Guaranty Corp. v. R.A. Grey, 467 U.S. 717 (1984); Nobrega, 167 N.J. at 543-44.

Here, as the Appellate Division explained, the "evident legislative" purpose behind the transition provision was "to prevent a rush by land owners to obtain development approvals while the Act was proceeding through the legislative process." OFP, L.L.C. v. State of New Jersey, 395 N.J. Super. 571, 593 (App. Div. 2007). "[T]his retroactive application of the Act constitutes a rational means of pursuing a legitimate legislative purpose." Id.

The basic reason legislatures routinely use retroactive transition periods is to prevent the game-playing, injustice and injury to public welfare that results when a regulatory measure is on the horizon but has not yet been enacted. Sometimes, without short and specifically tailored retroactivity provisions, those who are able to take advantage of acting during the period between the inception of a legislative proposal and its completion can gain an unfair advantage. This advantage is most often contrary to the public policy goals of the legislation that is in the works. It is entirely legitimate for the Legislature to impose a short and well-considered retroactivity provision in order to avoid this undesirable consequence of the

unavoidable fact that deliberating over and enacting legislation takes a certain amount of time.

This Court and the United States Supreme Court have repeatedly upheld modestly retroactive transition provisions of this type. For example, in Klebanow v. Glaser, 80 N.J. 367 (1979), the Court rejected a due process challenge to retroactive application of a tax on capital gains realized during the period between introduction and passage of the legislation imposing the tax. See also Pension Benefit Guaranty Corp., supra (rejecting a due process challenge to provision of federal pension legislation retroactively applying withdrawal liability on employers withdrawing from pension plans during the five month period preceding enactment of the legislation); Landgraf v. USI Film Products, 511 U.S. 244, 267-68 (1994) (citing legislative provisions designed "to prevent circumvention of a new statute in the interim immediately prior to passage" as one of the kinds of "retroactive provisions [that] often serve entirely benign and legitimate purposes"). All of these precedents undermine OFP's due process claim.

Contrary to OFP's suggestion, the United States Supreme Court decision in Eastern Enterprises v. Apfel, 524 U.S. 498 (1998), does not support its due process claim. First, only one member of the Court, Justice Anthony Kennedy, concluded that the Coal Industry Retiree Health Benefit Act violated the federal Due Process Clause (though another four justices believed the Act violated the Takings Clause). Second, and

more importantly, the retroactive effect of the legislation was far greater in both the temporal dimension and in terms of economic impact than the Highlands Act. The legislation in Eastern Enterprises required plaintiff to pay tens of millions of dollars to cover the heath care costs of retired coal workers where the company had fulfilled all of its contractual commitments to its employees and had exited the coal business several decades earlier. The kind of massive disruption of long-settled expectations in Eastern Enterprises is dramatically different from the four and one-half month transition period in this case between the March 29 ,2004 deadline for grandfathering under the Act and its adoption in August, 2004.

The Manifest Injustice Claim. Apart from its due process argument, OFP continues to press the argument that the transition provision in N.J.S.A. 13:20-28a(3) -- the March 29, 2004 deadline for grandfathering from the permit requirements of the Act -- results in manifest injustice. This alternative theory, which is very closely related to the due process argument, requires "a weighing of the public interest in the retroactive application of the statute against the affected party's reliance on previous law and the consequences of that reliance." Nobrega v. Edison Glen Associates, 167 N.J. 520, 547 (2001) (quoting Nelson v. Board of Educ. of Tp. of Old Bridge, 148 N.J. 358 (1997)). Rooted in "equitable concerns," Edgewater Inv. Associates v. Borough of Edgewater, 103 N.J. 227, 239 (1986), the manifest

injustice test has been interpreted to support invalidation of retroactive legislation even when there is no due process violation. See Nobrega. In other words, the manifest injustice test apparently authorizes more searching judicial review, at least to some degree, than the constitutional test. The court should reject this "extra-constitutional" analysis once and for all.

Regardless of what test the court uses, the Highlands Act does not result in manifest injustice to OFP. On the one hand, as explained in section A, the Act's development restrictions unquestionably serve important public health and environmental protection purposes. Moreover, as discussed above, making the Act effective as of the date of introduction of the legislation is an entirely traditional and reasonable approach to prevent the game-playing and injury to the public welfare that would otherwise take place.

In comparison, the burden imposed on OFP by the Act's effective date is quite modest. OFP has a very weak reliance claim given that the municipal development approvals it obtained prior to the adoption of the Highlands Act did not confer blanket immunity from future policy changes needed to address health and safety concerns. See OFP, L.L.C. v. State, N.J. Super. at 594-95, citing N.J.S.A. 40:55D-49(a) (allowing municipalities to modify preliminary approvals of development for reasons of public health and safety). As the Law Division explained, "[t]he public

health concerns are paramount in the legislative findings for the Highlands Act and Plaintiff's reliance factor is thus tempered accordingly." Id. In addition, OFP is not being singled out by the transition position; its position is "not materially different" from that of other owners in the Highlands area who also did not receive necessary development approval prior to adoption of the Act and who now unquestionably must comply with this new law. OFP, 395 N.J. Super. at 594-95. Finally, any burden on OFP is substantially mitigated, if not wholly offset, by the hardship waiver option and other provisions of the Act designed to mitigate the effects of the regulatory restrictions. Any legislation requires line-drawing, and in choosing to draw the line for permit grandfathering purposes at the date of the Act's introduction in March, 2004, rather than four and one-half months later when it was adopted, the Legislature did not inflict manifest injustice upon OFP or any other property owner in the Preservation Area.

E. The Court Should Repudiate the Extra-Constitutional Manifest Injustice Test.

The more fundamental issue raised by the manifest injustice claim is whether the Court should continue to apply this test as an extra-constitutional inquiry, separate and apart from the constitutional due process inquiry into fairness and justice, in reviewing retroactive legislation. Largely for the reasons recently expressed by Justices Barry Albin and Virginia Long, in separate opinions in Oberhand v. Director, 193 N.J. 558 (2008), the Highlands Coalition urges the Court to reconsider the manifest injustice test and to conclude that it has no proper place in New Jersey law as a separate, extra-constitutional test. This case is a good vehicle for definitively resolving the validity of this test because, assuming the Court agrees that OFP has abandoned its due process challenge, OFP's challenge to the retroactivity of the Act can be resolved on this basis alone.

First, a review of the Court's precedents reveals that the Court has never explained or justified the existence of this separate, extra-constitutional manifest injustice test. Indeed, with all due respect, the test appears to trace back to a simple misreading of earlier precedent. So far as the Highlands Coalition can determine, the manifest injustice test first appeared in the decisions of this Court as a freestanding substantive constraint on legislative power in Department of Environmental Protection v. Ventron Corp., 94

N.J. 473 (1983). In that case the Court stated: "[w]hen the Legislature has clearly indicated that a statute should be given retroactive effect, the courts will give it that effect unless it will violate the constitution or result in manifest injustice." Id. at 499 (emphasis added).

The Ventron Court invoked three precedents, none of which actually supported a separate, extra-constitutional manifest injustice test. Two of the cases recited the traditional rule that a statute cannot be given retroactive effect in violation of the Constitution. See Baldwin v. Newark, 38 N.J.L. 158, 159 (1875) ("Where the retrospective intention clearly appears on the face of a statute, the court will give it that effect, unless to do so would violate some constitutional provision."); Howard Savings Institution v. Kielb, 38 N.J. 186, 194 (1962) (referring to a "constitutional impediment" as the only relevant obstacle to retroactive laws). In the third case, the Court referred to the manifest injustice standard, but only as an aid for interpreting ambiguous statutory language and not as an independent basis for striking down retroactive legislation. See Gibbons v. Gibbons, 86 N.J. 515 (1981).

It seems clear, as suggested by the Ventron Court's reliance on the earlier decision in Gibbons v. Gibbons, that the Court derived the manifest injustice test from the rule of statutory interpretation that legislation should be presumed to be prospective only, unless the Legislature has clearly indicated a contrary intent. See Oberhand, 193 N.J.

at 579-581 (Long, J. dissenting); see also id. at 576 n. 1 (Albin, J., concurring) ("I agree with Justice Long's analysis that 'manifest injustice' doctrine historically has been used as a canon of statutory interpretation when a court addresses an ambiguous statute and looks to divine legislative intent."). In the view of the Highlands Coalition, it is entirely accurate to conclude that New Jersey courts "came to misunderstand the rule of manifest injustice as one empowering them to rewrite clear legislative enactments regarding retroactivity," rather than as guide for interpreting ambiguous statutory language. Id. at 581 (Long, J., dissenting). In this case, the Legislature explicitly provided that the Highlands Act would take effect on the date of the legislation's introduction, obviating the need to consider how to apply the traditional presumption against retrospective legislation. See Oberhand, 193 N.J. at 580 (Long, J., dissenting) (quoting United States v. Schooner Peggy, 5 U.S. 103, 110 (1801) ("no court may contest its obligation, if the law is constitutional, to enforce [the Legislature's] intent to apply a statute retroactively")).

Second, the manifest injustice test serves little if any useful purpose because it so substantially overlaps with due process analysis. As the Court has noted, the two tests are closely "intertwined," Phillips v. Curiale, 128 N.J. 608, 623 (1992), and "similar." Id. at 626. See also Oberhand, 193 N.J. at 572 (quoting In re D.C. 146 N.J. 31,

58 (1996)) (stating that "our inquiry into whether there has been a "manifest injustice' is informed by our consideration of issues of constitutional due process"). Because the two tests overlap so significantly, the manifest injustice standard is a largely redundant application of due process analysis.

Third, to the extent the manifest injustice test may have had some limited application when the Constitution does not apply, the Highlands Coalition submits that this separate, extra-constitutional test represents an unwarranted expansion of the Court's judicial review authority at the expense of the legislative branch. See Oberhand, 193 N.J. at 582 (2008) (Long, J., dissenting) ("[B]y applying the mistaken interpretation of the doctrine of manifest injustice adopted in our prior case law, my colleagues have infringed upon the essential integrity of the legislative process by substituting their judgment for that of the Legislature.") (internal quotations omitted). The manifest injustice test calls for an examination of the relative costs and benefits of legislation that essentially duplicates the legislative policy making process. Moreover, the standard of review under this test is inherently intrusive; indeed the only plausible *raison d'être* for a separate, extra-constitutional test would be to provide a check on legislative authority when deferential due process review does not apply. Thus, both the content of the legal inquiry under the manifest injustice test and its

intrusiveness raise serious concerns about the legitimacy of this extra-constitutional test.

Finally, a separate manifest injustice test is problematic because this Court has declared that due process challenges under New Jersey law to retroactive legislation should be governed by federal standards, see Nobrega v. Edison Glen Associates, 167 N.J. 520 (2001), and it is clear that the federal standard for evaluating retroactive legislation does not include a manifest injustice test. The United States Supreme Court has ruled that the Due Process Clause represents not only the floor but also the ceiling for evaluating retroactive legislation, and that the federal courts cannot invalidate retroactive legislation based on a non-constitutional standard of fairness. See Landgraf v. USI Film Products, 511 U.S. 244, 267 (1994) ("Absent a violation of one of the[] specific provisions in the Constitution, the potential unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give a statute its intended scope."); see also Immigration & Naturalization Service v. St. Cyr, 533 U.S. 289, 316 (2001) ("Despite the dangers inherent in retroactive legislation, it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect.") (emphasis added). Accordingly, for this Court to retain the manifest injustice standard as an adjunct to due process analysis under New Jersey law would be in serious tension with the Court's determination

to apply the United States Supreme Court's due process standard in reviewing retroactive legislation.

The recent United States Supreme Court decision in Lingle repudiating the so-called "substantially advance" takings test provides a potential model for how the Court might address the manifest injustice test here. As discussed, for about twenty-five years (about the age of the manifest injustice test, as it happens), the United States Supreme Court took the position that a takings claimant could prevail by demonstrating that a regulation fails to "substantially advance" a legitimate governmental interest. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). In Lingle, a unanimous Court eliminated this test from takings doctrine, recognizing that it raised a due process issue rather than a takings issue. In the process, the Court overturned a Ninth Circuit decision ruling that a Hawaii gas station rent control law resulted in a taking on the ground that the law would likely fail to achieve its consumer protection goal.

The significance of Lingle for present purposes lies in the fact that the Court strongly condemned the District Court's overly intrusive review of the Hawaii statute using the substantially advance test. The District Court, without according any deference to the Legislature's policy judgment, concluded that Chevron should prevail because its economic evidence on the likely effectiveness of the rent-control legislation was more persuasive than that presented

by the State. Lingle, 544 U.S. at 532. The Supreme Court described this approach to constitutional review as "remarkable, to say the least, given that we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation." Id. at 545. The Court continued, "The reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions are by now well established, and we think they are no less applicable here." Id. As a result, as one commentator has observed, "Lingle actually may be more important for reemphasizing the need for [judicial] deference to [regulatory policy] judgments than in rejecting the Takings Clause as a textual basis for review." Peter Byrne, Due Process Land Use Claims After Lingle, 34 Ecology L.Q. 471, 475 (2007).

The relevance of Lingle to this case is straightforward. Like the "substantially advance" takings test, the manifest injustice test has no solid doctrinal footing and apparently entered the case law by happenstance. In addition, like the "substantially advance" test, the manifest injustice standard invites improperly intrusive judicial scrutiny of legislative judgments. It is of no moment that the "substantially advance" test involved a due process inquiry improperly transplanted into takings law, whereas the manifest injustice test has no constitutional foundation at all and is instead rooted in a traditional rule of statutory interpretation. Both theories involve

unwarranted expansions of deferential due process-type analysis, and the basic reason for rejecting both theories is the same. The United States Supreme Court began its opinion in Lingle stating, "[o]n occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase-however fortuitously coined." 544 U.S. at 531. This Court might consider borrowing that apt language in this case.

It bears emphasis that jettisoning the "manifest injustice" as a separate, extra-constitutional test would have no effect on the existing state constitutional protection against retroactive legislation that is "unjust and arbitrary." Doe v. Poritz, 142 N.J. 1, 108 (1995); see Oberhand, 193 N.J. at 578 (Albin, J., concurring) (relying on Doe v. Poritz to assert a constitutional basis for New Jersey's doctrine of fundamental fairness). If the retroactive application of legislation is manifestly unjust in a constitutional sense, this Court can, should, and undoubtedly will strike it down.

Eliminating the manifest injustice test as a separate test would not produce any wrenching change in New Jersey law. Over the twenty-five year life span of the manifest injustice test, the Court has applied this test "sparingly," Nobrega, 167 N.J. at 546, and has relied on the test to strike down retroactive legislation (and in one case a regulation) in only three instances. In two instances, retroactive application of the measure very arguably would

have constituted a constitutional due process violation. See id. at 545 (stating that the argument that the legislation "produced an 'arbitrary and irrational' result [under the Due Process Clause] has merit," but declining to resolve the case on constitutional grounds and instead invalidating the law's retroactive effect using the manifest injustice test); Oberhand, 193 N.J. at 574-79 (Albin, J., concurring) (supporting invalidation of retroactive application of the tax statute based on due process grounds). In the third case, State Troopers Fraternal Association v. State, 149 N.J. 38 (1997), it was arguably unnecessary for the Court to apply the manifest injustice test at all because, applying the normal presumption against retroactive application of a new legal rule, the Court probably should have read the ambiguous agency rule to be prospective only. See id. at 55 (describing the "record [as] not entirely clear" on whether the agency intended the rule to operate retroactively).[7]

[7] It is also noteworthy that all of the cases in which the Court has found a violation of the manifest injustice test involved egregious circumstances where retroactive application of the measure placed those caught in the transition at a serious disadvantage relative to both those subject to the prior legal rule and those subject to the new legal rule prospectively. See Oberhand, 193 N.J. at 587 (Albin, J., concurring) (retroactive application of tax statute "treat[ed] unequally the estates of only those people who had the misfortune to die between January 1 and June 30 of 2002"); Nobrega (striking down retroactive application of a statute reforming protections for purchasers of residences adjacent to waste sites where retroactivity would deprive plaintiffs of prior statutory and common law remedies and plaintiffs would not benefit from the new statute's notification process); State Troopers (refusing to give retroactive application to a regulation governing pay adjustments under a collective bargaining agreement where retroactivity would impose uniquely harsh burdens on employees who resigned from state employment during the transition period). In contrast to these cases, in this case applying the Highlands Act to OFP simply means that OFP will be subject to the same rules that apply to other land owners in the Highlands area who may wish to develop their

While this Court's prior decisions suggest that there is little if any difference between the manifest injustice standard and the due process standard, the Highlands Coalition urges the Court not only to jettison the manifest injustice standard as a separate test but also to forswear the phrase "manifest injustice" in describing the constitutional standard for evaluating retroactive legislation. This would make it clear that, to whatever extent the manifest injustice test may have authorized more intrusive judicial review of retroactive legislation than is authorized under either the United States or New Jersey Constitutions, eliminating the separate manifest injustice test will foreclose such intrusive review.

CONCLUSION

For the foregoing reasons, the Highlands Coalition urges the Court to affirm the decision of the Appellate Division.

Respectfully submitted,

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property in the future. See OFP, 395 N.J. Super. at 454-55. Thus, this case does not involve the kind of egregious circumstances in which the manifest injustice test has been applied in the past to invalidate retroactive legislation. For the reasons discussed above, these kinds of (relatively rare) cases can be adequately addressed under constitutional due process.

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