

Legal experts say lawsuit a long shot

By **LARRY HIGGS**
Staff Writer

NEWARK — Legal experts at Rutgers School of Law give Hunterdon County freeholders poor odds of winning their proposed lawsuit challenging the constitutionality of the Highlands Preservation Act.

The Highlands bill, signed by Gov. James E. McGreevey in August, seeks to protect drinking water by banning development on land around headwaters of streams. It designates nearby, less-sensitive areas as locations for development.

Two law professors were asked to respond to the county's presumed legal contentions:

ARGUMENT:

The Highlands law violates the state constitution by infringing on the right of municipalities to regulate development and zoning. The freeholders contend that the Highlands law will require towns in the

preservation area to accept a regional master plan for development to be written by a 15-member Highlands council to be appointed by the governor. In addition, the freeholders contend that council preempt town officials from deciding on some applications to build in the Highlands region.

■ **Thomas A. Borden, Esq., associate clinical professor of law, Rutgers Environmental Law Clinic.**

"The Pineland and Meadowlands acts, which are similar to the Highlands Act and the Coastal Area Facilities Review Act, all have survived constitutional challenges on taking away home rule from towns.

"The way the New Jersey constitution is set up is that the concept of home rule isn't embedded in the constitution the way that towns think it is. New Jersey protects land use through various mechanisms where towns are delegated protection of land use. But the state retains

the authority to regulate land and does it through various measures.

"I'd say the law is well established that the state has the authority and responsibility to enact regional solutions where necessary and the constitution ultimately provides authority to regulate land use with the state and not the municipalities. The precedent is the Pinelands and the Meadowlands acts."

■ **John Payne, professor of law, Rutgers University Law School, Newark.**

"In New Jersey, you have the Coastal Area Facilities Review Act, the Meadowlands and Pinelands acts. All have been tested in various ways and upheld. The Highlands Act is patterned on these previous laws.

"This is not a substitute for careful, legal analysis, but I think the chances of it being found unconstitutional on that ground is not very likely.

"The specific authority will remain with the municipality,

but it must conform its local choices to the overall master plan. The way these programs work is the regional authority sets the guidelines and the local zoning could be anything the local government chooses, so long as it's not in violation of the regional master plan."

ARGUMENT:

The Highlands Council — a 15-member body appointed by the governor that will make development-related decisions in the Highlands development area — won't adequately represent Hunterdon County. Moreover, members should be elected or at least made to disclose their finances, like elected officials.

■ **Borden:** "When establishing a regional entity nothing in the New Jersey constitution requires mandatory participation. They (council members) are serving at pleasure of the governor.

"The Coastal Area Facilities

Review Act covers a broad area of land and that authority is given to the Department of Environmental Protection and to one (Department of Environmental Protection commissioner appointed by the governor. It would be a difficult attack. The state government has the ultimate authority to regulate land use. The governor has that power to determine that this particular part of New Jersey is so worthy of protection that a special council be created and be appointed by the governor."

■ **Payne:** "I don't think those are constitutional issues, those are political. That's a choice the legislature made, I can't see a court upset about the constitutionality of that. By definition, the more control local mayors have over it, the more home rule is respected and the happier local government will be. One reason why New Jersey looks the way it does today is so many local jurisdictions are making decisions about land use."