No. 25-181 DISTRICT 10

NORTH CAROLINA COURT OF APPEALS

****

JEFFERSON GRIFFIN,

Petitioner-Appellant,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS,

Respondent-Appellee,

and

ALLISON RIGGS,

Intervenor-Respondent-Appellee.

From Wake County

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REPLY BRIEF OF PETITIONER-APPELLANT

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Appellees ask this Court to let an important, close election be decided by illegal ballots. Doing so disenfranchises the millions of voters who are entitled to a fair election under the rule of law. The decision below should be reversed.

ARGUMENT

I. *James v. Bartlett* Is Not Distinguishable.

In *James v. Bartlett*, our Supreme Court excluded over 11,000 ballots that had been unlawfully cast by voters at the State Board's instruction. Appellees cannot distinguish *James*.

First, the November election in 2004 was not the first time the Board allowed out-of-precinct voting. The Board had allowed it in two primaries held in 2004, as the Board broadcast to the Supreme Court. Griffin Br. at 14 n.3. Twenty years later, the Board downplays those two 2004 primaries as "isolated episode[s]." Bd. Br. at 30. But those two primaries mean that the out-of-precinct voting in *James* was not new for the 2004 general election; it was the established practice leading up to the election. Yet that didn't prevent the Supreme Court from following the law and discounting the illegal ballots. *James v. Bartlett*, 359 N.C. 260, 270, 607 S.E.2d 638, 644 (2005).

Second, the Board argues that *James* did not order the exclusion of illegal ballots. Bd. Br. at 30. But that is what *James* plainly said when it "order[ed] the discounting of ballots." 359 N.C. at 270, 607 S.E.2d at 644. The Chief Justice and Justices Berger and Barringer have already indicated that they interpret *James* this way: "Every lawful vote must be counted; every illegal vote must be disregarded." *Griffin*

v. N.C. Bd. of Elections, 910 S.E.2d 348, 350 (N.C. 2025) (Newby, C.J., concurring) (citing *James*).

The Board tries arguing that the legislature's response to *James* should be "powerful evidence" to limit the *James* remedy. Bd. Br. at 31. The legislature's reaction is better described as a political power grab. As detailed in a School of Government autopsy on the 2004 election, everyone understood the Supreme Court's decision to require the exclusion of the unlawful ballots. Robert P. Joyce, *The Last Contested Election in America*, Popular Government, Winter 2007, at 47, https://www.sog.unc.edu/sites/default/files/articles/article5_8.pdf. The General Assembly then amended the laws to retroactively authorize out-of-precinct voting so the legislature could install its partisan preferences in office. *That* is changing the rules after an election.

II. *Godfrey* Does Not Permit Courts to Affirm Agency Decisions on Alternative Grounds.

Appellees cannot avoid *Godfrey*'s bar of their primary arguments.

First, Appellees belittle *Godfrey*—a binding decision from our Supreme Court—by calling it a "little-known" case that is just about "zoning." Bd. Br. at 36; Riggs Br. at 26-27. Those characterizations don't ring true.

Godfrey's pedigree is the federal *Chenery* doctrine, which *Godfrey* cited. *Godfrey v. Zoning Bd. of Adjustment of Union Cnty.*, 317 N.C. 51, 64, 344 S.E.2d 272, 280

(1986). In *SEC v. Chenery Corp.*, the Supreme Court announced a fundamental rule of administrative law: "[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." 318 U.S. 80, 95 (1943). That's the holding of *Godfrey*. 317 N.C. at 63-64, 344 S.E.2d at 279-80.

The U.S. Supreme Court has described the *Chenery* doctrine as "foundational" and "fundamental." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020); *Garland v. Ming Dai*, 593 U.S. 357, 369 (2021). Saying that *Godfrey* is a rule about zoning is like saying the doctrine of *Chevron* deference is a rule about air pollution. It seriously misstates the scope of the doctrine.

Chenery and *Godfrey* apply to legal questions, not just factual ones, as the Supreme Court has explained. *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001) (applying *Chenery* and explaining that federal agency erred in applying the wrong "legal standard"). *Chenery* itself was about "an erroneous legal conclusion." Amy R. Motomura, *Rethinking Administrative Law's Chenery Doctrine: Lessons from Patent Appeals at the Federal Circuit*, 53 Santa Clara L. Rev. 817, 826-27 (2013). Thus, "most courts apply *Chenery* to questions of law." *Id.* at 827.

Godfrey is no different. In *Frazier v. Town of Blowing Rock*, this Court applied *Godfrey* to bar an agency from seeking affirmance based on new interpretations of the

statute and ordinance at issue. 286 N.C. App. 570, 576-77, 882 S.E.2d 91, 96-97 (2022). As this Court made clear, the appeal raised "only issues of law," which this Court was reviewing "de novo." *Id.* at 95, 882 at 574. This was not "arbitrary and capricious" review as the Board mischaracterizes *Godfrey*. Bd. Br. at 37.

The Board's citations do not show that *Godfrey* is limited to factual issues. The Board cites two state-court decisions for the proposition that courts can review constitutional claims not presented to a state agency. *Id.* at 39. But in neither case was a court asked to affirm agency action for reasons different than those given by the agency; it was the non-agency party claiming that agency action violated the constitution. Besides, the primary legal theories that Judge Griffin has attacked with the *Godfrey* doctrine aren't constitutional doctrines at all. *Purcell* and the other time-based defenses raised for the first time during judicial review are equitable doctrines.

The Board (at 38) also inaccurately quotes a U.S. Supreme Court decision, *Morgan Stanley Cap. Grp. v. Pub. Util. Dist. No. 1*, 554 U.S. 527, 544 (2008). That case did not hold that *Chenery* doesn't apply to "issues of law," as the Board's description of the opinion suggests. In *Morgan Stanley*, the agency issued a decision holding that it had to apply a special utility-law presumption, that it had done so, and that respondents hadn't overcome the presumption. *Id.* at 542. On appeal at the Supreme Court, the agency "change[d] its tune," arguing that it didn't have to apply

that presumption if it didn't want to. *Id.* at 544. Although that change in argument would normally be foreclosed by *Chenery*, as the Court noted, the agency "lucked out": the Supreme Court agreed with the agency's original decision, that it had to apply the presumption. *Id.* The agency's change in position didn't matter.

That's equally true here. This Court should not consider Appellees' new justifications for the Board's decision. If the Court agrees with the reasons in the Board's original decision, it will affirm. But if those grounds are inadequate, *Godfrey* and *Chenery* do not permit consideration of alternative grounds.

Ultimately, the law-fact distinction is irrelevant given the policies advanced by the *Chenery* and *Godfrey* doctrines. The doctrines "promote[] agency accountability" by ensuring that the agency puts all its cards on the table when it acts. *Dep't of Homeland Sec.*, 140 S. Ct. at 1909. They ensure that the "reasons given" for agency action "are not simply convenient litigating positions." *Id.* (cleaned up). Were the rule otherwise, agencies would "upset the orderly functioning" of judicial review by "forcing both litigants and courts to chase a moving target." *Id.* (cleaned up).

Finally, the Court should reject Appellees' arguments that the Board really did rule on *Purcell* and their other *Godfrey*-foreclosed arguments. For its part, the Board offers just one citation. Bd. Br. at 36 (citing R p 30). This was part of the Board's legal analysis of the election protest statute, concluding (contrary to *Bouvier*

and *James*) that an election protest cannot be used to discount the votes of people who followed the Board's instructions when registering. (R pp 28-31.) That conclusion addresses just one of the three categories of protests, and it has nothing to do with timeliness or *Purcell*.[1]

Justice Riggs argues that *Godfrey* doesn't apply to her, since she did argue *Purcell* in the Board proceedings. She's doubly mistaken. *Godfrey* and *Chenery* aren't concerned with what other parties argued; the doctrine applies to bar *any* alternative argument for affirmance not found in the agency's decision. *Dep't of Homeland Sec.*, 140 S. Ct. at 1909 ("the problem is the timing, not the speaker").

Moreover, Justice Riggs, like the Board, never argued *Purcell* or timeliness doctrines. Justice Riggs says that labels for legal doctrines should be ignored—constitutional violations, *Purcell*, and laches are all "moniker[s]" for the same "point." Riggs Br. at 29. She cites nothing for such a broad assertion because that is not how the law works. Every legal doctrine has its own requirements and elements. Seeing that they cannot meet the requirements of any one doctrine, or show that they were

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1 The Board also cites its briefing at the Supreme Court, filed a month after the Board's decision. Bd. Br. at 36. Under *Godfrey* and *Chenery*, a court "cannot accept appellate counsel's post hoc rationalizations for agency action; for an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself." *Fed. Power Comm'n v. Texaco Inc.*, 417 U.S. 380, 397 (1974).

preserved, Appellees instead ask this Court to swirl them altogether and eschew legal analysis.

This Court should decline that invitation and apply *Godfrey*. If Appellees want *Godfrey* overturned, they must seek that relief from the Supreme Court.

III. *Purcell* Does Not Apply.

A. Appellees still come up short with *Purcell*.

Judge Griffin has invited Appellees to find any case applying *Purcell* either after an election or to a statutory election-protest remedy. They come up short.

The Board (at 33) points to *Andino v. Middleton*, 141 S. Ct. 9 (2020), saying that it applied *Purcell* when voting had begun. But *Andino* is a typical *Purcell* application, staying a district court's injunction that risked confusing voters and election administrators before an election ended. No one argues that this protest risks such harm, which is all that *Purcell* is concerned with. Griffin Br. at 55-56.

The Board then cites *Trump v. Biden*, 951 N.W.2d 568 (Wis. 2020), but that case never relies on *Purcell*. Instead, in a highly controversial move, the Wisconsin Supreme Court relied on laches in a split decision. *Id.* at 572. Justice Riggs also relies on a laches case. Riggs Br. at 20. But Appellees have abandoned laches, *infra* Argument § III.E, and it wouldn't apply anyway, Griffin Br. at 59-60.

B. *Pender County* does not solve the Appellees' problems.

Since the prohibition proceedings concluded, Appellees have claimed to have a *Pender County* defense, rather than a *Purcell* defense. But the name change doesn't improve Appellees' position.

First, calling this a *Pender County* defense does not solve the *Godfrey* problem. Neither Appellee argued *Pender County* to the Board, and the Board did not invoke that case in its decision.

Second, *Pender County* is, at best, a routine application of *Purcell* because it was an injunction that was stayed to prevent disruption of an upcoming election. The plaintiffs sought to enjoin use of a House district, whose boundaries were drawn in violation of the state constitution. *Pender Cnty. v. Bartlett*, 361 N.C. 491, 495, 649 S.E.2d 364, 367 (2007), Printed Record on Appeal at 8, *Pender Cnty.*, 361 N.C. 491 (No. 103A06), https://www.ncappellatecourts.org/show-file.php?document_id=65479. The trial court rejected the claim. *Pender Cnty.*, 361 N.C. at 497, 649 S.E.2d at 368. The Supreme Court reversed, finding a constitutional violation, and ordered that maps be redrawn. *Id.* at 510, 649 S.E.2d at 376. The Court also ordered that its injunction be stayed until after the 2008 general election to "minimize disruption to the *ongoing election cycle*." *Id.* (emphasis added).

Pender County is how *Purcell* typically works. When some election procedure is illegal, a court must decide whether to stay otherwise valid injunction relief to avoid disruption of a forthcoming election. But that does not speak to this case. There is no "ongoing election cycle" that could be disrupted. Griffin Br. at 55-56.

Third, Appellees have also overlooked that it makes no sense to talk about election protests under *Pender County*.

In *Pender County*, if an election protest had been filed before the election, instead of the injunctive lawsuit that actually was filed, then the protest would have been dismissed, since protests are post-election remedies.

The opposite counter-factual is equally problematic for Appellees. Assume that the election had gone forward with illegally gerrymandered districts, and then a candidate filed a protest after the election. The protest could not have sought correction of the election returns because that would have been impossible. The protest could not have established where the district lines would have been drawn, since that's up to the legislature. Even with redrawn district lines, the protestor could not know which candidates would be eligible to run because the new district lines would determine eligibility based on a candidate's residence. The only remedy that could have been granted by anyone was a new election with new (legal) district lines. That's the remedy granted by *Pender County*, 361 N.C. at 510, 649 S.E.2d at 376.

Ultimately, the issue in this case is not whether our courts would apply *Purcell* in an appropriate circumstance. The question is whether an appropriate circumstance exists after an election when a candidate files an election protest that complies with statutory timing requirements. There are no cases applying *Pender County* or *Purcell* to that circumstance. These cases do not answer any question before the Court.

C. *James* undermines the Appellees' *Purcell* argument.

In more ways than one, this case was foreshadowed two decades ago in *James*. What happened there is what happened here. The Board broke the law leading up to and during an election, and a candidate filed an election protest to exclude the unlawfully counted ballots.

Appellees' main point about *James* repeats a point made by Justice Dietz in the prohibition proceeding. Bd. Br. at 29-30. The Board argues that, in *James*, counting "out-of-precinct votes was unlawful under the election rules that existed at the time of the election," whereas here the Board "complied with the election rules existing at the time of the election." *Griffin*, 910 S.E.2d at 354 (Dietz, J., concurring).

The problem is the equivocal use of the word "rules." Appellees believe that the only rules that matter are the procedures the Board intended to follow in the run-up to the election. But the "rules" that really count are the constitution and the

lawful enactments of the legislature, just like the protestors successfully argued in *James*. The *James* Court did not ask what the "rules" were that the Board intended to follow in the 2004 election. The Court only asked, *what did the law require?* That's the right question under *James* because of the judiciary's "responsibility to 'say what the law is.'" 359 N.C. at 270, 607 S.E.2d at 644 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

D. Appellees have a policy disagreement with the election-protest statutes.

Allowing post-election challenges, the Board says, will disrupt election administration. Bd. Br. at 27. But the General Assembly has chosen to allow post-election challenges to election irregularities.

The Board argues that this Court should use *Purcell* to hold that Judge Griffin's protests cannot meet the "irregularity" requirement in the election-protest statutes. *Id.* at 25, 35. But the Board's argument has nothing to do with *Purcell*. Instead, the Board disagrees with how broadly our Supreme Court interprets the protest statutes. In 2024, in a unanimous opinion by Chief Justice Newby, the Supreme Court greenlighted election protests that challenge "categories of individuals" who are "categorically ineligible to vote, such as . . . nonresidents." *Bouvier v. Porter*, 386 N.C. 1, 4 n.2, 900 S.E.2d 838, 843 n.2 (2024). Protests can also be filed against particular individuals who are not "legally registered to vote." *Id.* (cleaned up). In the

prohibition proceeding, the Chief Justice indicated that Judge Griffin's arguments fall within the protest statutes. *Griffin*, 910 S.E.2d at 349 (Newby, C.J., concurring, joined by Berger and Barringer, JJ.).

These writings of the Chief Justice are a clear rebuke to Appellees and their *Purcell* theory. Even Justice Dietz recognizes that his "version of the *Purcell* principle" has never been adopted in this state. *Id.* at 354. If the election protest statutes are to be judicially invalidated, that should be left to the Supreme Court.

E. Appellees have abandoned laches.

In the superior court, the Board declined to make an affirmative case for laches. Instead, it merely analogized *Purcell* to laches. (Doc.Ex.II 191 ("*Purcell* is an election-law analog to laches.").) And before this Court, the Board still only argues by analogy, though now drawing the analogy to *Pender County*. Bd. Br. at 33.

And Justice Riggs has actually abandoned the argument. In the superior court, she made an affirmative case for laches. (Doc.Ex.II 303-04.) Now, she is only willing to say that some combination of time-related defenses—maybe or maybe not including laches—bars Judge Griffin's protests. Riggs Br. at 19-20. But Justice Riggs makes no affirmative case for laches in this Court. She does not even set out the elements of the defense.

Appellees are right to abandon laches. Although Justice Riggs accuses Judge Griffin of "quibbling" about the technical requirements for laches, the rule of law supports the even-handed application of legal principles. In a footnote, Justice Riggs insists that laches can apply in administrative proceedings. *Id.* at 19 n.4. But Judge Griffin never suggested otherwise. He explained that laches cannot apply to administrative *remedies*, regardless of the nature of the proceedings. Griffin Br. at 60. When allowed by statute, equitable relief can be granted during administrative proceedings, and laches could perhaps apply to an equitable remedy during such proceedings. But laches is not a defense to an *administrative remedy* created by statute, especially when the legislature has specifically set the time within which to file. *See SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods.*, 580 U.S. 328, 335 (2017) ("Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill.").

IV. This Court Has Jurisdiction to Decide the Federal Issues.

Judge Griffin explained in his opening brief that this Court has jurisdiction to decide federal issues and should exercise that jurisdiction. He explained that Appellees continually waived any right to an *England* reservation by litigating the federal issues first in the Board proceedings, then in the Supreme Court, and then in the superior court. He explained that an *England* reservation was unavailable in any

event, since *England* does not apply in the circumstances presented here. And this Court continues to have jurisdiction over all issues until the Supreme Court relinquishes jurisdiction and expressly sends any issue to federal court.

In their response briefs, Appellees mostly decline to engage on the issue.

For its part, the Board says that "[t]he adequacy of an *England* reservation is a federal-law issue that only the federal courts can resolve if this case returns to a federal forum." Bd. Br. at 83. The Board cites *England* for this proposition, but *England* says nothing like that.

Indeed, no Appellees has cited an authority to say that a state court cannot determine the effectiveness of an *England* reservation. Contrary to Appellees' assumption, many state courts have rejected state-court *England* reservations as ineffective. *See, e.g.*, *Los Altos El Granada Invs. v. City of Capitola*, 43 Cal. Rptr. 3d 434, 453 (2006); *VanWulfen v. Montmorency Cnty.*, No. 281930, 2009 WL 723806, at *13 (Mich. Ct. App. Mar. 19, 2009) [Add. 9]; *Town of Ponce Inlet v. Pacetta, LLC*, 226 So. 3d 303, 316 (Fla. Dist. Ct. App. 2017); *Lackland & Lackland v. Readington Twp.*, No. SOM-L-344-03, 2005 WL 3074714, at *59 (N.J. Super. Ct. Law Div. Nov. 16, 2005) [Add. 41].

If a state court decides that it has jurisdiction to decide an issue, including the effectiveness of an *England* reservation, that decision will be afforded preclusive

effect in federal court under the federal Full Faith and Credit Act, 28 U.S.C. § 1738, even if the federal court thinks it should have had exclusive jurisdiction to decide the claim or issue. *See, e.g.*, *In re Heckert*, 272 F.3d 253, 257 (4th Cir. 2001) ("The policy of full faith and credit is so strong that federal courts must give prior state judgments res judicata effect even where the original case involved some exclusively federal causes."); *SEC v. United Fin. Grp., Inc.*, 576 F.2d 217, 221 (9th Cir. 1978); *see generally* 18B Charles A. Wright et al., *Federal Practice and Procedure* §§ 4470, 4470.1 (3d ed. Westlaw 2024 update).

Second, Judge Griffin offers an update. After Judge Griffin filed his opening brief in this Court, noting that the district court had not modified his order to permit return to federal court, Appellees took action. The Board filed a "notice" in federal court that threatened to mandamus Chief Judge Myers if he did not immediately modify his remand order. State Bd.'s Notice of Fourth Cir. Mandate at 4-5, *Griffin v. N.C. State Bd. of Elections*, No. 5:23-cv-731 (Feb. 26, 2025 E.D.N.C.), https://storage.courtlistener.com/recap/gov.uscourts.nced.214953/gov.uscourts.nced.214953.32.0.pdf. On February 26, Chief Judge Myers entered an order modifying his prior remand order and retaining jurisdiction over federal issues. Order, *Griffin* (Feb. 26, 2025 E.D.N.C.),

https://storage.courtlistener.com/recap/gov.uscourts.nced.214953/gov.uscourts.nced.214953.35.0.pdf. But Chief Judge Myers added a caveat: "Nothing in this order should be construed as a limit upon the parties to invoke those federal issues in state court (subject to an appropriate *England*-reservation). *England v. Louisiana State Bd. of Med. Examiners*, 375 U.S. 411, 421-23 & n.13 (1964)." *Id.* at 2.

As the order makes clear, the parties are free to invoke the federal issues in this Court, and the invocation of the federal issues will turn on the effectiveness of "an appropriate *England*-reservation." *Id.* As the part of *England* cited by Chief Judge Myers notes, "the parties cannot prevent the state court from rendering a decision on the federal question if it chooses to do so." *England*, 375 U.S. at 421. And a party "who unreservedly litigates his federal claims in the state courts may thereby elect to forgo his own right to return to the District Court." *Id.* at 422 n.13.

A return to federal district court is improper and unnecessary. At the end of this state-court litigation, Appellees will have a federal forum for their federal issues: The U.S. Supreme Court. That is the only federal court with appellate jurisdiction over state courts. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005).

V. All Absentee Voters Must Present Photo Identification.

The provisions of Article 20 govern both absentee voting by both domestic and overseas voters, except when Article 21A expressly provides different rules for overseas voters. Article 20 imposes a photo identification requirement, and nothing in Article 21A exempts overseas voters from that requirement. Therefore, all absentee voters must provide photo identification. Appellees' efforts to avoid this simple syllogism are ineffective.

First, federal law has no place here. Federal law doesn't impose photo-identification for any elections. But states are free to do so, like ours has done. Appellees don't dispute that.

Second, Appellees' argument hinges on N.C. Gen. Stat. § 163-239 meaning the opposite of what its text says. The statute says that nothing in Article 21A modifies Article 20. That's Judge Griffin's argument: nothing in Article 21A modifies the photo-identification requirement in Article 20. But Appellees make the opposite argument: that Article 21A modifies Article 20's identification requirement despite not mentioning the requirement. That is the "strained" reading of this statute that Justice Dietz rejected. *Griffin v. N.C. Bd. of Elections*, 909 S.E.2d 867, 871 (N.C. 2025) (Dietz, J., dissenting).

Third, the focus by Appellees on the "this section" language in N.C. Gen. Stat. § 163-230.1(f1) ignores similar "this section" language throughout Article 20. As Judge Griffin explained, those other provisions obviously apply to Article 21A. Griffin Br. at 20; *see also* N.C. Gen. Stat. §§ 163-226.3, -227.1, -228(b)-(e), -232(c), 232.1(c)-(d), -232.2(c), -234, -236, -237(d5). The same is true of "this Article" language in Article 20, which also necessarily applies to Article 21A. N.C. Gen. Stat. §§ 163-232.1, -236, -237, -238. Appellees do not dispute the crossover application of these provisions, undermining their cramped reading of section 163-230.1(f1).

If the text is ambiguous, the Court can turn to legislative intent. Which is more likely: the legislature intended to require photo-identification for everyone, or that it exempted overseas voting, where fraud is most easily accomplished? Text, the history of photo-identification laws in North Carolina, and commonsense all point to an equal requirement for photo-identification.

VI. Never Resident Voting Is Unconstitutional.

The merits of this protest are not difficult. Only North Carolinians can vote in state elections. The constitution's residency clause can't be changed by statute. *Owens v. Chaplin*, 228 N.C. 705, 710, 47 S.E.2d 12, 16 (1948).

Appellees ask the Court to focus on procedural issues instead.

Outcome-determinative. Appellees argue that the number of votes at issue aren't enough to change the outcome of the election.

First, this argument is not properly before the Court under *Godfrey* because it was not the basis for the Board's decision. (R pp 37-40.)

Second, Judge Griffin was not required to know the total number of affected voters at the stage at which his protests were dismissed. The Board admits that it dismissed the protest at a stage akin to a Rule 12(b) dismissal, without considering any evidence. Bd. Br. at 78 n.13. But a notice-pleading standard does not require a protestor to allege or know in advance how many votes are affected by a systemic irregularity like this one. Nothing in the protest statutes requires the protest to identify the number of affected ballots. N.C. Gen. Stat. § 163-182.9 (content requirement for protest). A protestor only needs "probable cause" to believe that an outcome-determinative irregularity occurred at the preliminary-consideration stage. *Id.* § 163-182.10(a)(1). Judge Griffin never got to the later stage where he needed to show "substantial evidence" that the protest would be outcome-determinative *Id.* § 163-182.10(d)(2). In between these two stages, Judge Griffin would have been entitled to have the Board subpoena the necessary information about the number of affected voters. *Id.* § 163-182.10(c)(1). Thus, this is an issue for remand.

Facial challenge. The Board also argues this Court can't reach the merits because this protest is a facial challenge that must first be heard by a three-judge panel in superior court. Not so.

First, facial challenges get transferred only if the requirements of Civil Rule 42(b)(4) are met. *See* N.C. Gen. Stat. § 1-267.1(a). But under that rule, a transfer is appropriate only if the "complaint," "answer," or a "responsive pleading" contains a facial challenge to a state statute. N.C. R. Civ. P. 42(b)(4). This case came to the superior court as an appeal, not a civil action, N.C. Gen. Stat. § 163-182.11, so no one ever filed a complaint, answer, or responsive pleading. Besides, our Supreme Court has emphasized that appeals from agency decisions can involve facial challenges, and when they do, the appeals do not go to three-judge panels. *In re Redmond*, 369 N.C. 490, 495-96, 797 S.E.2d 275, 279 (2017).

Second, Judge Griffin never raised a facial challenge. Instead, he asked the superior court to construe the statutes to avoid constitutional infirmities. (T p 30:11-15; Doc.Ex.II 26.) Constitutional-avoidance arguments don't go to three-judge panels.

Finally, Judge Griffin's challenge is, at most, as applied. He hasn't challenged everyone who votes under UMOVA. He only challenges UMOVA to the extent it applies to Never Residents and allows them to vote in state elections.

VII. It's Unlawful to Count the Votes of People Who Did Not Lawfully Register to Vote.

A. Lawful registration is a requirement for voter eligibility.

The Board surprisingly argues that lawful registration is not a qualification for voter eligibility. Bd. Br. at 60. The Board reasons that registration can't be a qualification to vote because it appears in section 3 of Article VI, rather than sections 1 or 2. *Id.* But it's the text that matters. And the text states, "Every person offering to vote shall be at the time legally registered as a voter as herein prescribed and in the manner provided by law." N.C. Const. art. VI, § 3(1). Thus, if someone is not lawfully registered, he is not allowed to vote. The Board, notably, ignores our General Statutes that repeat this requirement. *See* N.C. Gen. Stat. §§ 163-82.1 (a), -54.

B. The Board has abandoned its original interpretation of section 163-166.12.

In its final decision, the Board claimed that subsections (a) and (b) of section 163-166.12 made drivers license and social security numbers optional for anybody who provided alternative identification when they voted. (Doc.Ex.I 5385-86.). The Board now concedes these subsections, which address alternative identification, apply only to voters who register by mail. Bd. Br. at 54.

The Board repositions its defense on section 163-166.12(d). Under that provision, if an applicant provides a drivers license or social security number that doesn't match government databases, then the applicant can vote if he provides alternative

identification. *Id.* This subsection is essentially an accommodation to account for bureaucratic error; it creates a presumption that a failed match was due to human error and, therefore, should not disqualify an applicant from voting (if they provide alternative identification). This accommodation, though, arises only if an applicant "has provided" one of the requisite numbers in the first place. N.C. Gen. Stat. § 163-166.12(d).

Thus, this accommodation only underscores that voters *must* provide a drivers license or social security number.

C. Appellees offer illogical interpretations of section 163-82.4(f).

Appellees propose several interpretations of section 163-82.4(f), which requires applicants to provide omitted information before they can vote. None of these interpretations are logical.

Appellees first argue that subsection (f) only "applies *before* a voter has been registered by a county board" and, therefore, doesn't prohibit a voter from registering and voting without such information. Bd. Br. at 61 (emphasis in original); *see* Riggs Br. at 59. This argument turns subsection (f) on its head. Appellees contend that subsection (f)—which clearly requires an applicant to provide omitted registration information before voting—somehow authorizes the applicant to vote without ever providing the information. That makes no sense.

Appellees' next argue that subsection (f) "only applies to a 'required item'" and a drivers license or social security number are not required items because they are only "request[ed]" under subsection (a). Bd. Br. at 61; *see* Riggs Br. at 59. This argument fails because ***all items*** listed in subsection (a) are "request[ed]" by the statute. *See* N.C. Gen. Stat. § 163-82.4(a). If the Court were to adopt Appellees' interpretation, applicants need not provide any information when registering to vote. They could submit a blank form and vote.

Justice Riggs also argues that subsection (f)'s requirement to provide omitted information is triggered only if a county board has successfully contacted the applicant to request the information. Riggs Br. at 59. But that's not what the statute says. Subsection (f) obligates a county board to contact applicants who (despite omitting certain information) provided enough details for the board to contact and notify the applicant. *See* N.C. Gen. Stat. § 163-82.4(f). A county board's duty to notify an identifiable applicant of omissions doesn't excuse the omissions.

D. Judge Griffin's protests establish probable cause of voters who were not lawfully registered.

Appellees and Amicus North Carolina Alliance for Retired Vetrans ("NCARA") contend that Judge Griffin hasn't shown probable cause to believe that any challenged voter failed to comply with the registration laws. *See* Bd. Br. at 17, 55-

59; Riggs Br. at 57; NCARA Br. at 3, 21. Judge Griffin's protests easily satisfy the probable-cause standard.

"Probable cause is a flexible, common-sense standard. It does not demand any showing that such a belief be correct or more likely true than false. A practical, non-technical probability is all that is required." *State v. Zuniga*, 312 N.C. 251, 262, 322 S.E.2d 140, 146 (1984).

Judge Griffin's list of voters establishes a high probability that the identified voters were ineligible to vote. The Board has admitted that, for years, it did not require applicants to provide a drivers license or social security number. *See* Griffin Br. at 39-40. And Judge Griffin filed a protest based on data—from the State Board—identifying voters who did not have a drivers license or social security number in the Board's voter-registration system. (Doc.Ex.I 313-14 ¶¶ 8-15.) What more is needed to create a common-sense probability that these voters were unlawfully registered?

The Board itself explains that "the state voter registration system" is "'the official voter registration list for the conduct of all elections in the State.'" Bd. Br. at 55 (quoting N.C. Gen. Stat. § 163-82.10(a)); *accord* Riggs Br. at 61 (system is official record of registration). That's consistent with the General Assembly's command that the Board have a "statewide computerized voter registration list and database" that "shall serve as the single system for storing and managing the official list of

registered voters." N.C. Gen. Stat. § 163-82.11(a). If the state's "official registration list" shows a voter missing a driver license or social security number, there is a probability that the voter did not provide such when registering.

E. The Board cannot tell whether tens of thousands of voters were lawfully registered.

The problem isn't with Judge Griffin's protest. The problem is with the State Board's registration list.

As NCARA explains, the State Board has revealed that its official voter registration list is riddled with "errors . . . for a number of reasons." NCARA Br. at 34. For instance, some numbers could have been "erroneously removed" and "archived elsewhere." *Id.* The Board speculates that there could be even more errors in the voter registration list, such as the list showing missing numbers for voters who might have registered before 2004 or provided the numbers in a prior application. *See* Bd. Br. at 56, 58.

To be clear, the Board's explanations for the thousands of missing numbers are, at this point, speculation.[2] (Doc.Ex.II 227-31 ¶¶ 10, 14-15 (explaining that "[i]n

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2 The Board attached an affidavit to its superior court brief. The affidavit is not appropriate for consideration. *See O.S. Steel Erectors v. Brooks*, 84 N.C. App. 630, 634, 353 S.E.2d 869, 872 (1987) (limiting review of agency decision to examination of administrative record). Judge Griffin nevertheless responds to the Board's characterizations of the affidavit.

all likelihood" many numbers might have been removed because of mismatches; and stating that county boards would have to investigate why other voters were missing numbers). Another explanation for why the numbers are missing is that the voter never provided the numbers. The problem for the Board is that it doesn't know why the identified voters lack this information. The answer should be in the Board's voter-registration list—but it isn't.

Now, the Board could have notified these voters before the election and given them a chance to cure the problem. But it didn't. The Board decided it was just better to let everybody vote and not worry about it. Doing so violated the law.

VIII. Judge Griffin's Protests Are Not Procedurally Defective.

Appellees claim the State Board's rulemaking powers allow the Board to compel Judge Griffin to serve copies of the protests on voters. *See* Bd. Br. at 47-48, 51; Riggs Br. at 33. They are wrong.

The Board's power to "prescribe forms for filing protests" appears in a section dealing with the filing of a protest—*i.e.*, a protest's contents and timing. N.C. Gen. Stat. § 163-182.9. The power to create a "form," therefore, is limited to dictating a protest's contents (consistent with the statute)—it doesn't include the power to impose a service obligation.

Likewise, the Board's power to "promulgate rules providing for adequate notice to parties" appears in a section dealing with a county board's consideration of a protest. *Id.* § 163-182.10. The statute states the county board "shall give notice of the protest hearing" and that "[e]ach person given notice shall also be given a copy of the protest." *Id.* § 163-182.10(b). Clearly, a county board has the statutory duty to give notice and a copy of the protest to affected voters. The power to create rules about providing notice, therefore, is limited to instructing a county board on performing this duty—it doesn't include the power to impose this duty on a protestor. Notably, the protests in this case never progressed to the point that any board had to provide notice.

Justice Riggs also objects that the notice provided by Judge Griffin is constitutionally insufficient because the postcard says that the voter's "vote may be affected" by one or more protests. *See* Riggs Br. at 31. But the postcard's statement is both accurate—because, until a protest is upheld, it is unknown whether the vote will be affected—and sufficient—because it tells the voter what is at issue. Justice Riggs also objects that the method of service required voters to "sift through spreadsheet printouts" that were posted online. *Id.* at 32. But Justice Riggs's solution would be to deliver hardcopies of those spreadsheets to voters. That would have been more burdensome because the papers would not have been electronically searchable.

Justice Riggs' final argument is that Judge Griffin's notice in this case should satisfy a higher due-process standard than was established in the seminal case, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306 (1950). *See* Riggs Br. at 34. But whether the recipients of notice are voters (as here) or trust beneficiaries (as in *Mullane*), the constitutional standard is the same: the notice must be "reasonably certain to inform those affected." 339 U.S. at 315. Justice Riggs offers no case suggesting otherwise. Moreover, her demand that Judge Griffin should "locate the challenged voters" is confusing, *see* Riggs Br. at 34; nobody contends that Judge Griffin failed to mail his notice to the registered addresses of all identified voters.

IX. All Protests Filed by Judge Griffin Comport with Substantive Due Process.

Secured Families Initiative ("SFI") argue that Judge Griffin's protests seek relief that violates the substantive due process requirements of the Fourteenth Amendment. *See* SFI Br. 4-7. In support, SFI cites a series of inapposite cases.

First, none of these cases address the *Anderson-Burdick* test, which is the test that the North Carolina Supreme Court and the U.S. Supreme Court use to scrutinize any burden on the right to vote. *See, e.g.*, *Libertarian Party of N.C. v. State*, 365 N.C. 41, 47-48, 707 S.E.2d 199, 203-04 (2011).

Second, since 2001, the right to vote in North Carolina has been subject to the right of a person to file a post-election challenge to the vote. The votes cast in the

cases cited by SFI are substantively different, because those votes were not subject to a post-election challenge. Indeed, SFI fails to identify a single case holding that substantive due process was violated by a court discounting an unlawful vote as part of a post-election challenge that was permitted by statute.

The Board, for its part, emphasizes that the Supreme Court in *Lattimore* reversed its prior rulings and held that a registrar's failure to properly register a voter would not disqualify the voter, and that this precedent continued into the twentieth century. *See* Bd. Br. at 39-47. But in each of those cases, the registrars had failed in *the registrar's duties*, after the voters themselves had fully followed the statutes. *E.g.*, *State v. Lattimore*, 120 N.C. 426, 26 S.E. 638, 639-40 (1897) (registrar failed to administer oaths and perform registration himself). Here, the protests concern voters failing in their statutory duties to provide information required from them.

Moreover, the Board is simply mistaken to argue that "the same fact pattern" found in *Lattimore* should result in the same outcome today. Bd. Br. at 47. Today, the facts are different. There is no registrar who failed to comply with his statutory duty; there are incomplete registrants who voted despite a statute saying they cannot vote without providing certain information. N.C. Gen. Stat. § 163-82.4(f). Today, the law is different. Candidates and voters have a statutory right to challenge, after an election, the lawfulness of a voter's registration. *See id.* §§ 163-182.9, -182.10.

Today, the precedent is different. In *James*, the Supreme Court disqualified thousands of voters who unlawfully voted at the instruction of election officials. 359 N.C. at 270, 607 S.E.2d at 644.

X. The Protests Do Not Seek Remedies That Violate the Equal Protection Clause.

Appellees have not shown a violation of the equal protection clause of the state or federal constitutions.

As our Supreme Court has confirmed, judicial "analysis of the State Constitution's Equal Protection Clause generally follows the analysis of the Supreme Court of the United States in interpreting the corresponding federal clause." *Blankenship v. Bartlett*, 363 N.C. 518, 522, 681 S.E.2d 759, 762 (2009); *see Cnty. Success Initiative v. Moore*, 384 N.C. 194, 214, 886 S.E.2d 16, 33 (2023).

Justice Riggs argues that Judge Griffin's photo-identification protests violate the equal protection clause because they identify voters in only four of North Carolina's 100 counties. Riggs Br. at 46. Justice Riggs, though, fails to explain how her argument overcomes the holding in *S.S. Kresge Co. v. Davis*, 277 N.C. 654, 661, 178 S.E.2d 382, 386 (1971), which establishes that challenging one person for violating the law, but not others, does not create an equal protection violation. *See* Griffin Br. at 74-76. Justice Riggs cites no authority for her argument.

Justice Riggs also objects to the incomplete-registration protests because they identify only early and absentee voters. Riggs Br. at 63-64. Justice Riggs, though, fails to explain how these two groups of voters are similarly situated.[3] *See* Griffin Br. at 75. She also does not address *Kresge* or cite any authorities for this argument either.

SFI simply claims that *Kresge* is irrelevant. SFI Br. at 9-10. But the well-established rule in *Kresge* applies here as much as anywhere. SFI also argues that the decision in *Bush v. Gore* proves an equal-protection violation here. SFI Br. 9-10. But in *Bush v. Gore*, the counties were arbitrarily accepting disputed ballots. 531 U.S. 98, 105-06 (2000). Here, the state is adjudicating the protests pursuant to a uniform, statutory standard. Under SFI's reading of *Bush v. Gore*, a citizen could not challenge a known felon voter in one county without identifying and challenging felon voters in all other counties. That cannot be the law.

XI. The Court Should Remand to the State Board with Clear Instructions for Handling the Votes at Issue.

The Board states that additional factfinding is necessary for the protests identifying incomplete registrants. Bd. Br. at 76 n.12, 79 n.14. Given the disarray in the Board's records, Judge Griffin agrees that evidentiary hearings will be required to

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3 Indeed, if they were similarly situated, that would likely invalidate the legislature's allowance for early voters to vote out of precinct, while limiting election day voters to in-precinct voting.

determine whether the voters identified by the Board's original data were, or were not, lawfully registered to vote. The Board's records need an audit. The Court should direct the Board to determine whether the voters who are missing numbers in the official voter registration list were, or were not, lawfully registered.

The Board does not argue that an evidentiary hearing is required for the protests concerning overseas-no-identification voters and Never Residents. *See id.* at 76-78. There is no need to conduct an evidentiary hearing on the no-identification voters; nobody has ever disputed that those voters never provided photo identification. But for Never Residents, there is still outstanding information regarding the number of such voters: since the protests were filed, a few counties have come forth and identified over 100 additional Never Residents. Griffin Br. at 8 n.2. But most county boards have yet to share this data, so there are certainly more. The Court should direct the Board to collect records from all the counties and determine the total number of Never Residents who unlawfully voted in the election.

That said, the right remedy for any unlawful votes is not open to debate. In *James*, the Supreme Court held that, for votes cast in violation of the election laws, the remedy was to "order the discounting of ballots." 359 at 270, 607 S.E.2d at 644; *see Griffin*, 910 S.E.2d at 350 (Newby, C.J., concurring) ("Every lawful vote must be counted; every illegal vote must be disregarded." (citing *James*)). Therefore, the

Court's order should be that, upon remand, the Board is required to discount any unlawful votes and retabulate the election result accordingly. If Appellees disagree with the *James* remedy, then they will have to ask the Supreme Court to overturn *James*.

CONCLUSION

Judge Griffin respectfully requests that the Court reverse the decision of the State Board and order the Board to retabulate the vote with all unlawful ballots excluded.

This the 3rd day of March, 2025.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

Pursuant to this Court's Rule 2 order, counsel certifies that this brief contains no more than 7,500 words (excluding the cover, caption, index, table of authorities, signature block, certificate of service, and this certificate of compliance) as reported by the word-processing software.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was electronically filed and served this day by email as follows:

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This the 3rd day of March, 2025.

/s/ Craig D. Schauer
Craig D. Schauer

No. 25-181 DISTRICT 10

NORTH CAROLINA COURT OF APPEALS

****

JEFFERSON GRIFFIN,

Petitioner-Appellant,

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS,

Respondent-Appellee,

and

ALLISON RIGGS,

Intervenor-Respondent-Appellee.

From Wake County

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ADDENDUM

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Addendum Pages:

2005 WL 3074714
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Law Division.

LACKLAND AND LACKLAND, a New Jersey Partnership, and Wilmark Building Contractors, Inc., a New Jersey Corporation, Plaintiffs,

v.

READINGTON TOWNSHIP, Readington Township Planning Board, and Readington Township Board of Health, Defendants.

No. SOM–L–344–03.
|
Nov. 16, 2005.

Findings of Fact and Conclusions of Law

ASHRAFI, J.

General Findings of Fact[1]

1 Additional findings of fact that are specifically applicable to the several issues in dispute are contained within the court's Conclusions of Law as to each issue.

***1** 1. This is an action in lieu of prerogative writs brought by the owner and a contract purchaser of a 265–acre tract against Readington Township, its Planning Board, and its Board of Health. The primary objective of the plaintiffs' cause of action is to set aside the "down-zoning" of their property in 1998 as part of a newly-created Agricultural Residential Zoning District and to permit development of the tract with single-family homes at a higher density than permitted by that zoning ordinance. Plaintiffs also seek to invalidate certain municipal regulations pertaining to septic approvals. In two of the nine counts of their Second Amended Complaint, plaintiffs also sought money damages and attorney's fees alleging violations of their Federal and State Constitutional rights.

2. This court held a bench trial over 33 days from November 29, 2004, to February 15, 2005. Testimony was taken from 26 witnesses, 14 of whom were experts. Hundreds of exhibits were admitted in evidence, including numerous maps, charts, and photographs, many expert and agency reports, and approximately 25 hours of tape recordings. Early during the trial, the court and counsel took a tour of the Township along a route agreed to by the parties in accordance with *Lazovitz v. Board of Adjustment,* 213 *N.J.Super* . 376 (App.Div.1986). After the trial, each side was granted time to propose findings of fact and conclusions of law. Those proposals were submitted on or about April 15, 2005 and replies and objections on or about April 29, 2005. The submissions encompassed the equivalent of about 900 double-spaced pages.

3. After reviewing the initial submissions, this court determined that better-focused submissions were needed to resolve the disputed issues of the case. After a case management conference, the attorneys agreed upon a series of issues to be addressed by the court. The court then issued a scheduling order, and subsequently the parties submitted revised and re-formatted proposed findings and conclusions in August and September 2005. This decision is largely derived from the parties' submissions and accepts their designation of issues to be decided.

A. The Parties

4. Plaintiff Lackland and Lackland ("Lackland") is a partnership of two brothers that has owned parts of the subject tract since the early 1970s. Plaintiff Wilmark Building Contractor, Inc. ("Wilmark") is a corporation owned by Mark Hartman, a home builder and resident of Readington Township. Mr. Hartman has been engaged in developing land and building homes in Readington and neighboring municipalities for the past 25 years. Wilmark entered into contracts with Lackland in 1995 and 1996 for the development of the subject tract upon fulfillment of certain conditions and approvals. The conditions and approvals not having been attained, the contracts expired in 1999.

5. Defendant Readington Township is a rural community located in the east-central portion of Hunterdon County along its boundary with Somerset County. Readington Township is bounded by Clinton, Raritan, and Tewksbury Townships in Hunterdon County and by Bedminster, Branchburg, and Hillsborough Townships in Somerset County. The largest of Hunterdon County's 26 municipalities, Readington Township includes a land area of 47.6 square miles or approximately

11.1% of Hunterdon County's total land area of 430.1 square miles. *See* D280 (Trial exhibits are referenced by their P or D number). Interstate Highway 78, U.S. Route 202, and U.S. Route 22 are highway corridors running through the Township. *See* D255. Existing land use by coverage area reveals the largely undeveloped and agricultural character of two-thirds of Readington Township. At the same time, suburban residential subdivision patterns are found throughout the Township, with a concentration of residential uses in the center of the Township and along the eastern border. *See* D255.

***2** 6. The Township has a mixture of 17 zoning districts, which include AR–Agricultural Residential, SSR–Steep Slope Residential, RR–Rural Residential, R1–Residential, VR/SC–4–Village Residential/Senior Citizen 4, PND–Planned Neighborhood Development, PND1–Planned Neighborhood Development, PND/SCV–Planned Neighborhood Development/Senior Citizen Village, SC–Senior Citizen, SC–2–Senior Citizen 2, SC–3–Senior Citizen 3, B–Business, VC–Village Commercial, RO–Research–Office–Manufacturing, RO–1–Research–Office–Manufacturing, ROM1–Research Office and ROM2–Research Office. *See* D287B.

B. Allegations of the Complaint

7. In a multi-count Second Amended Complaint (D365), plaintiffs challenge the validity of land use ordinances adopted by the Readington Township Committee establishing the Agricultural–Residential Zoning District (AR District) (D33); allege that the Township's zoning ordinances in issue were adopted with the intent to lower property values to facilitate acquisition of plaintiffs' property by the Township at reduced values; allege that the Township's ordinances effected a regulatory taking of plaintiffs' property; challenge the open space provisions of the subject ordinances; allege that the Township's zoning ordinances in issue constitute inverse spot zoning, were not drawn with reasonable consideration of the character of plaintiffs' property and its peculiar suitability for development, and violated plaintiffs' right to substantive due process of law under the United States and New Jersey Constitutions; and allege that the zoning of plaintiffs' property was in a manner inconsistent with the development of existing properties. They also challenge Board of Health ordinance provisions governing septic suitability approvals, including provisions requiring two acceptable soil profile pits and one acceptable permeability test in both a primary and reserve septic disposal area. (D365). Defendants denied all the material allegations of the Second Amended Complaint.

8. At the end of plaintiffs' case in chief at trial, this court dismissed all remaining claims against the Readington Township Planning Board. In addition, at the end of their case, plaintiffs abandoned any claims for money damages, stating that they were reserving those claims for parallel federal lawsuits that they have brought against the same defendants and others. In response, defendants sought dismissal with prejudice of plaintiffs' claims for money damages. The nature of dismissal of plaintiffs' monetary claims was reserved for decision together with the final judgment on the entire case.

C. The Lackland Property

9. Lackland is the owner of two adjoining parcels in the southern third of Readington Township designated on the tax map as Block 64, Lots 26 and 40. Lot 26 is approximately 110 acres in size and Lot 40 about 155 acres, for a combined total of approximately 265 acres. The two lots have been treated as a single parcel.

10. The property lies between Pleasant Run Road on the north and Barley Sheaf Road on the south. Lot 40 has minimal frontage on Pleasant Run Road and no development plans seek to place an access road there. The northern frontage of the original Lackland property was reduced in approximately 1989 when Lot 41 was subdivided from the rest of the tract and acquired by the defendant Township as Green Acres Open Space. Lot 26, the southern section of the tract, has frontage on Barley Sheaf Road along its southerly lot line. Any development on the combined Lots would be reached by means of an access road from Barley Sheaf Road.

***3** 11. The combined tract is irregularly shaped extending approximately 7,700 feet, or almost a mile and a half, in a north-south direction from Pleasant Run Road to Barley Sheaf Road. It is approximately 2,000 feet, that is, approaching half a mile, wide at its middle. Lot 26 is narrower than Lot 40 because a subdivision known as Century Road exists along the easterly property line of Lot 26. Lot 40 extends over the northerly end of the Century Road subdivision. There is an easement providing for the extension of Century Road north to provide access to Lot 40.

12. A stream known as the Pleasant Run flows along the northern end of Lot 40 from the west to the east and generally parallel to Pleasant Run Road. Two smaller, unnamed, intermittent streams flow towards the easterly property line of Lot 40.

13. As to topography, the property undulates with high points in the west-central portion of Lot 40 and slopes towards the north and south. The highest elevations are about 260 feet along the westerly boundary line in the central portion of the property. Between the two highest elevations along the western boundary, the land slopes to the east. From the northern most high point, the property slopes downward in a northerly direction towards the Pleasant Run stream along the northern portion of the property. Again, from this high point in the west-central portion of Lot 40, the property forms a gentle ridgeline by generally sloping towards Barley Sheaf Road, in a southwesterly direction towards an adjoining property and also in a northwesterly direction towards other adjoining properties. The lowest elevation is approximately 160 feet, which occurs at the far northeastern corner of the property in the proximity of Pleasant Run. The second lowest elevation is approximately 180 feet at the opposite southwestern corner of the property at Barley Sheaf Road. The property has slopes of varying degrees ranging from near flat along the ridgeline to more than 25 percent. The steepest slopes are in the areas of and along the intermittent streams. For the most part, the property has slopes ranging from near zero to almost 7 percent.

14. Lot 40 is almost entirely wooded with a deciduous forest. The southern end of Lot 26 in the vicinity of Barley Sheaf Road is covered with thick brush, and the vegetation in the rest of Lot 26 is described as successional fields. Lot 26 consists of mostly Klinesville and Reaville soils, and 85%–90% of Lot 40 is comprised of various Penn soils. 29.4% of the Lackland property is comprised of prime agricultural soils, and 40.9% is comprised of soils of statewide importance, as those terms are defined by the United States Department of Agriculture. D287G. Collectively, these soils constitute almost 70% or 179.2 acres of the Lackland property. Substantial portions of Lot 26, however, have soils that are rated “severe” for purposes of septic disposal suitability, thus making it more difficult to place septic disposal systems on the property.

***4** 15. There are three prominent man-made features within the northern third of the property. A 60–foot Transcontinental Gas Pipe Line Easement traverses the northern most portion of Lot 40, running in an east-west direction. Also in the northern portion of the property and south of the gas pipeline easement is a 200–foot wide Public Service Electric and Gas right-of-way easement for high-tension electric transmission power lines. Parallel to and immediately south of the PSE & G right-of-way is a 100–foot wide Jersey Central Power and Light easement.

16. Historically, the Lackland property had been used for agricultural purposes. As shown by 1962 aerial photographs, D22A and D23A, Lot 26 contained a farmhouse, barns, and pasture land. Lot 40 contained trees planted in straight lines. But use of the property for active agricultural purposes has been sporadic over the last 40 years. The property has been granted farmland assessment for taxing purposes.

17. Several subdivisions of single-family dwellings now border the southern sections of the property, in particular, around Lot 26. The lots in these subdivisions are generally a minimum of 3 acres, and they are located on, among others, Century Road, Farmersville Road, and Barley Sheaf Road. In criticizing the Ordinance, one of plaintiffs' expert planners, Mark Remsa, prepared a study establishing that within 2,000 feet of the Lackland property, 43% of the properties are single family residential with an average lot size of 3.4 acres. He also determined, however, that 25% of the properties are in some type of agricultural use, 5% are open space, and 25% are vacant woods. Block 64, in which the Lackland property is located, is composed of 43% single family residences, 22% agricultural, 7.4% open, and 28% woods. Mr. Remsa's calculations were based on the number of lots, not the number of acres of farmland, open space, or residential uses in the area surrounding the Lackland property.

D. The AR Zoning District

18. In late December 1998, Readington Township adopted zoning Ordinance 43–98, which the plaintiffs have challenged in this litigation. The Ordinance created a new zoning district called the Agricultural Residential Zoning District (“AR”). It rezoned more than 15,000 acres, or about 50%, of the Township. 56% of the AR District or 8,494.9 acres are farmland, 9.9% or 1,506.5 acres are open space, and 34.1% or 5,163.6 acres are devoted to other uses, including residential development. *See* D287D.

19. The AR District occupies three areas within the Township separated by two highway corridors. The most northern portion of the District is located north of Route 22 adjacent to the border of Tewksbury and Bedminster Townships. The most southern portion is located southeast of the Village of Three Bridges adjacent to Hillsborough Township. The “core” of the AR District stretches from the southern boundary of Readington Township with Raritan Township to Readington and Pulaski Road in the center of Readington Township to the western boundary at Clinton Township. The

Lackland property is in the core of the AR. *See* D287 and Zoning Map D287B.

***5** 20. The Readington Township Planning Board recommended the AR District in the 1998 Master Plan Amendment, asserting that it would balance the opportunities for residential development in the Township with the superseding goal of facilitating farmland preservation, open space retention, preservation of natural resources, and the maintenance of the Township's rural character. *See* D49, page V–30–32. As shown by the evidence at trial, Readington Township has a long-standing history of preserving open space and farmland.

21. The Agricultural Retention and Development Act, N.J.S.A. 4:1C–11 *et seq.*, promotes agriculture through the creation of County Agricultural Development Boards and the establishment of Agriculture Development Areas ("ADA"). The Hunterdon County Agriculture Development Board sets forth criteria to define parcels for inclusion in its ADA. The Lackland property has been a part of the Hunterdon County ADA since its creation in 1983. *See* D49, page V–29. The last modification of the ADA pertinent to this case occurred in 1988.

22. The new AR District was established only in those areas of the Township previously zoned Rural Residential District (RR) that were also within the Hunterdon County ADA. In fact, the AR District is coterminous with the ADA in Readington Township and no properties *not* within the ADA were rezoned to AR. Being located within the ADA was the prime determinant of whether a property was rezoned from the prior RR designation to AR. Defendants performed no new land use study in conjunction with their adoption of the ADA as the AR Zoning District. There was no determination or confirmation by the defendants that the properties within the ADA still complied with the ADA criteria or fulfilled the purpose and goals of the ADA.

23. The New Jersey State Development and Redevelopment Plan generally divides the State into five planning areas: Urban (PA1); Suburban (PA2); Fringe (PA3); Rural (PA4); and Environmentally Sensitive (PA5). Substantially all of the AR District in Readington is mapped under the Rural Planning Area (PA4) or Rural Environmentally Sensitive Planning Area (PA4B). D50, D131. The only exceptions are a small piece of the northernmost portion of the AR District which is in the State Plan's Suburban Planning Area (PA2) and a small piece in the northwestern corner of the AR Core which is in the State Plan's Fringe Planning Area (PA3). *See* D287Q. The northerly portion of the Lackland property, comprising most of Lot 40 is mapped under the State Plan as Planning Area 4 and the southerly portion of the property comprising Lot 26 and a portion of Lot 40 is mapped under the State Plan as PA4B, Rural Environmentally Sensitive. *See* D287Q. The intent of the State Plan for the Rural and Environmentally Sensitive Planning Areas is to channel development towards Centers and preserve the Environs, with contiguous agricultural lands, environmentally-sensitive open lands and greenways. The Lackland property is in the Environs of PA4 and PA4B. There are no Centers in Readington Township's AR Zoning District.

***6** 24. The AR District is not an exclusively agricultural district. The principal permitted uses include single family detached dwelling units, farms, parks and public and private open space. *See* D33.

25. The AR District is not in a sewer service area of the Township and the disposal of wastewater is dependent upon individual sub-surface sewerage disposal systems commonly referred to as on-site septic systems. *See* D49, page V8–9.

E. The Zoning Change

26. The zoning in effect for the Lackland property and 80% of Readington Township before the defendants adopted Ordinance 43–98 was known as the Rural Residential Zone ("RR"). Among other provisions, the RR Zone permitted density or "lot yield" to be calculated based upon one home for every 3 acres. As applied to the Lackland property and other large tracts in the RR District, the RR Zone also required that the newly created lots be "clustered" on 1 ½ acre lots. This requirement meant that 50% of the Lackland tract (approximately 132 acres) had to be left as open space and the new homes clustered within the remaining 50% on lots no smaller than 1 ½ acres (or 65,000 square feet) in size.

27. The RR Zone also required that the 50% open space set-aside area contain at least 45% of what is referred to as "unconstrained" land, leaving not more than 55% of the unconstrained lands for placement of the homes. The term "unconstrained" lands is defined by the Township ordinance as the area of the tract that does not contain flood plains, wetlands, and steep slopes. Each of the individual 1 ½ acre cluster lots was required to contain at least 65,000 square feet of "unconstrained" land. Therefore, any "constrained" land within a building lot had to be in addition to the 1 ½ acres of "unconstrained" land. Thus even *before* adoption of

the AR Zone, these provisions of the RR Zoning District placed substantial limitations on the density and number of new homes, even in the cluster format, that might be built on the Lackland tract.

28. Because the Lackland property is not within a sewer service area, any proposed new home had to be developed with its own individual well and septic system. Therefore, not all so-called "paper lots" on the preliminary development lot layout map of the tract could actually be developed with a new home because not all such lots could obtain well water or be approved for a septic disposal system. The 1998 Master Plan Amendment recognized that most of the soils in the Township have a high water table (less than five feet) and a shallow depth to bedrock. These two factors combine to restrict severely the use of these soils for on site septic systems. The Township's soils are derived largely from underlying Brunswick shale. The Lackland property also has Klinesville and Reaville soils. *See* D287K, D255A and the Hunterdon County Soil Survey (D99). The Klinesville and Reaville soils are rated as "severe" under the Hunterdon County Soil Survey for on-site disposal of sewerage.

***7** 29. Ordinance 43–98 adopted in December 1998 modified the provisions of the RR Zoning regulations applicable to the Lackland property. The AR Zone requires that "lot yield" or density be based upon one home for every 6 acres instead of the RR Zone's 3 acres, thus reducing the potential zoning lot yield and development rights by 50%. The AR Zone also increased the percentage of open space to be set aside in large tracts from 50% to 70% (about 185 instead of 132 acres of the 265–acre Lackland tract). The AR Zone also increased the percentage of "unconstrained" lands that had to be within the open space set aside from 45% to 65%, leaving only 35% of the "unconstrained" lands for the proposed new homes and their individual wells and septic systems. Consequently, the change from the prior RR Zone regulations to the current AR Zone regulations reduced the development potential of the Lackland property. At trial, the parties disputed through expert testimony how much the new AR Zoning designation reduced the development potential of the Lackland property.

F. Development Efforts

30. Although documentary evidence shows prior preliminary plans to subdivide the Lackland property through the 1980s and early 1990s (D474, D479, D482, D483, D496, D501, D504), testimony at trial was vague regarding Lackland's prior development efforts. The evidence at trial suggests a number of lot layout sketch maps and some septic suitability testing but no substantial development plans before 1995, when Lackland entered into contingent contracts with Wilmark.

31. In the fall of 1995, Mr. Hartman of Wilmark approached David Lackland regarding the possibility of purchasing the property subject to Wilmark being able to obtain and receive subdivision and other necessary approvals and permits to develop the property. Wilmark was allowed to do some soil investigation consisting of percolation ("perc"), or permeability, tests on the property before contracts were written and executed.

32. After conducting preliminary testing, Lackland and Wilmark entered into two written contingent contracts, both dated April 17, 1996, one for each of Lots 26 and 40. D74, D75. Both contracts required Wilmark to pursue at its own cost and within certain time limits the approvals necessary for Wilmark to subdivide and develop the properties.

33. The purchase price was contingent upon the number of lots for which Wilmark ultimately received approval, the price being calculated at $40,000 for each of the approved lots. The contracts also contained an option for Wilmark to pay $1,000,000 for each of Lots 26 and 40 if the number of approved lots did not reach certain minimums.

34. Wilmark obtained a lot layout plan for Lot 26, dated July 22, 1996, prepared by Semester Consultants and showing a proposed 33–lot subdivision. D115. In April 1996, Mr. Hartman appeared before the Planning Board and obtained what he described as "sketch plat approval." T57:1–2. Mr. Hartman acknowledged that sketch plat approval is merely an attempt to work out an understanding of what his needs and the Township's needs were and to try to come together on a working plan for development of the tract. T57:5–9.

***8** 35. Because the "checklist" for Planning Board applications then required prior septic approvals, Wilmark undertook further permeability or "perc" testing on the tract from June 1996 to March 1997 based on the location of lots in the Semester Consultants lot layout map. Mr. Hartman testified that he had difficulty arranging for a Township witness for these perc tests. T61, T68:22–23. Among other reasons, this additional testing was required because of a reserve area requirement in the Township's septic ordinance. T57–T60.

36. According to Mr. Hartman, some time after March 1997, he appeared before the Readington Township Board of Health with respect to applications for septic suitability locational approvals pertaining to proposed building lots on Lot 26. T82:3–5. The Hunterdon County Department of Health reviewed the test data and reported its findings to the Township Board of Health. T83:11–13. The Readington Township Board of Health, prompted in particular by one of its members, Julia Allen, made additional demands on Wilmark. It also cancelled some meetings, thus causing delays in Wilmark's efforts to obtain approvals for septic systems on the proposed lots. T83:11–13.

37. Mr. Hartman recalled that in June 1997 the Board of Health did not approve any of the proposed building lots on Lot 26 because of the absence of wet season testing. T86:5–9. Wet season testing is done between January and April. In June 1997, Ms. Allen demanded wet season testing and her motion to that effect was approved by the Board of Health. T84:4–7. Wilmark did wet season testing in January 1998. T89:1–3. Beginning in May 1998, the Board of Health held meetings concerning the Wilmark applications. Mr. Hartman also testified that Ms. Allen questioned the sufficiency of the wet season testing results he produced because of alleged drought conditions the previous fall. Ultimately, the Board of Health denied septic approval for proposed building lots 1 and 5 on Lot 26. Mr. Hartman testified that these denials were in spite of approval by the County Department of Health. Then, in September 1998, the Township adopted a new Ordinance governing test methods. T97:24. According to Mr. Hartman, the new Ordinance made it even more difficult to obtain septic suitability approval than before. Rather than pursue further testing under the new Ordinance, Wilmark joined with Lackland to file this lawsuit in February 1999.

38. Although Wilmark sought preliminary septic approvals and non-binding "sketch plat approval," it never made application to the Planning Board for any subdivision or site plan approvals. T97:24. Mr. Hartman testified, without specificity as to date, that he orally requested that the Planning Board waive the then-existing requirement for Board of Health septic suitability locational approval and was advised that such a waiver could not be given. Mr. Hartman acknowledged that he was not on the agenda before the Planning Board when he purportedly sought this waiver. T98:17–25. According to Mr. Hartman, he never made application to the Planning Board for development approvals because of the expense involved in making such submissions without having pre-approval of perc tests. T99. In an earlier ruling in this case, on February 4, 2000, the Honorable John H. Pursel, J.S.C., invalidated the requirement contained in Section 906.2.41 of the Township's completeness Ordinance that a property owner or developer obtain septic suitability approvals from the Board of Health before a subdivision or site plan application would be considered by the Planning Board.

***9** 39. The contingent contracts between Wilmark and Lackland expired in February 1999 because of Wilmark's inability to obtain any approvals except for septic approvals for two proposed building lots. Therefore, Wilmark no longer has any rights in the Lackland property. Its standing to pursue this lawsuit was limited in a pretrial ruling of the court to a general challenge to the zoning ordinance because of Wilmark's past and continuing property interests and development efforts in Readington Township.

40. Lackland acknowledges that its property is worth far more today than it was under the expired agreements with Wilmark. Real estate values in general have increased dramatically in the area. The court heard no testimony about the present market value of the property.

G. Covert Tape Recordings

41. Frustrated by his failure to obtain approvals, Mr. Hartman engaged the services of an attorney, Jerome Balloratto, who was not representing him in this case. Mr. Balloratto, in turn, engaged the services of two private investigators to conduct a covert investigation of the members of the Readington Township Committee and Board of Health. Between July 1999 and October 2001, the two investigators, posing as husband and wife interested in buying a large tract in Readington Township for purposes of open space preservation, met with and spoke to Julia Allen and other members of the Township Committee and Board of Health. They covertly recorded their conversations. Plaintiffs placed in evidence approximately 25 hours of these transcribed tape recordings. Plaintiffs allege that the tapes show purposeful obstruction of plaintiffs' development plans motivated by a desire to depress the value of the land and make it more easily available for Township acquisition for open space preservation.

Conclusions of Law and Additional Findings of Fact

I. Facial Validity of Ordinance 43–98 Establishing the AR Zone

A. Standards of Review of Zoning Ordinance

42. The power to adopt zoning regulations derives from the State, which has delegated zoning power to municipalities under the Municipal Land Use Law (MLUL), *N.J.S.A.* 40:55D–62. *Rumson Estates, Inc. v. Mayor and Council of Borough of Fair Haven,* 177 *N.J.* 338, 349 (2003); *Manalapan Realty L.P. v. Township Committee of Manalapan,* 140 *N.J.* 366, 380 (1995); *Riggs v. Long Beach Township,* 109 *N.J.* 601, 610 (1988). "[T]he delegation of zoning authority to municipalities 'shall be liberally construed' in a municipality's favor." *Rumson Estates,* 177 *N.J.* at 351 (*citing N.J.* Const. art. 4, § 7, ¶ 11; *D .L. Real Estate Holdings v. Point Pleasant Beach Planning Bd.,* 176 *N.J.* 126, 132 (2003)).

43. The purposes of the MLUL are explicitly listed in the legislation, *N.J.S.A.* 40:55D–2. Zoning regulations must advance one or more of those purposes. *Rumson Estates,* 177 *N.J.* at 350. A zoning regulation must also be substantially consistent with the land use plan element and the housing plan element of the municipality's master plan. *Manalapan Realty,* 140 *N.J.* at 380.

***10** 44. The law governing review of a challenged zoning ordinance is well settled. There is a "tightly circumscribed" judicial role in reviewing zoning regulations enacted by a municipality. *Harvard Enterprises, Inc. v. Board of Adjustment of Township of Madison,* 56 *N.J.* 362, 368 (1970); *accord Pascack Assoc. v. Mayor of Washington,* 74 *N.J.* 470, 481 (1977); *Bow & Arrow Manor v. Town of West Orange,* 63 *N.J.* 335, 343 (1973); *Kozesnick v. Township of Montgomery,* 24 *N.J.* 154, 167 (1957). A zoning ordinance is presumed valid and may only be overturned if the ordinance is "clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute." *Bow & Arrow Manor,* 63 *N.J.* at 343; *accord Rumson Estates,* 177 *N.J.* at 350; *Zilinsky v. Zoning Bd. of Adjustment of Verona,* 105 *N.J.* 363, 368 (1987); *Taxpayers Assoc. of Weymouth Township v. Weymouth Township,* 80 *N.J.* 6, 20 (1976); *Kramer v. Board of Adjustment of Sea Girt,* 45 *N.J.* 268, 296–97 (1965). It is a demanding burden for an opponent to meet. *Mt. Olive Complex v. Township of Mt. Olive,* 340 *N.J.Super.* 511, 533 (App.Div.2001). Reviewing courts are not concerned with the wisdom of an ordinance; if the ordinance is debatable, it should be upheld. *Rumson Estates,* 177 *N.J.* at 350–51; *Bow & Arrow Manor,* 63 *N.J.* at 343. The functions of the legislative bodies and the judicial forums are distinct. The wisdom of a particular course chosen by a governing body is reviewable only at the polls.

> It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. *It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely* because the court would have done it differently or *because the preponderance of the weight of the expert testimony adduced at a trial is at variance with the local legislative judgment.* If the latter is at least debatable, it is to be sustained.

Mt. Olive Complex, 340 *N.J.Super.* at 533 (*quoting Bow & Arrow Manor,* 63 *N.J.* at 343) (emphasis added). Consequently, a court may not nullify an ordinance even where expert evidence at trial weighs against adoption of the ordinance. Rather, a challenging plaintiff must overcome the strong presumption of validity of the ordinance and prove at trial that the ordinance is arbitrary, capricious, or unreasonable, or plainly contrary to fundamental principles of zoning.

45. In *Riggs v. Long Beach Township,* 109 *N.J.* at 611–13, the Supreme Court of New Jersey identified four "objective criteria" by which the validity of a zoning ordinance is to be judged:

> 1) Does the ordinance advance one of the purposes of the MLUL set forth in *N.J.S.A.* 40:55D–2?
>
> ***11** 2) Is the ordinance substantially consistent with the Land Use Plan Element and the Housing Plan Element of the Master Plan or designed to effectuate such plan element?
>
> 3) Does the ordinance comport with constitutional constraints on the zoning power, including those pertaining to due process, equal protection, and the prohibition against confiscation?
>
> 4) Was the ordinance adopted in accordance with statutory and municipal procedural requirements?

46. In this case, the last of these four listed criteria in *Riggs* is not particularly relevant. Plaintiffs argue generally that the Readington Township Committee and Planning Board hastily adopted Ordinance 43–98 and the 1998 Master Plan

Amendment as a result of State legislation making funding available to municipalities for open space acquisition. They do not contend, however, that the defendants' actions violated particular procedural requirements of the MLUL or local ordinances.

47. As to the second *Riggs* criterion, the Planning Board determined at its December 14, 1998 meeting that the AR Ordinance is consistent with the 1998 Master Plan Amendment. D364, Bates 1934–35. Additional discussion of the criteria listed in *Riggs* is contained in conjunction with the several separate arguments raised by plaintiffs.

B. Purposes of Ordinance 43–98

48. Plaintiffs primarily challenge Ordinance 43–98 on the ground that the purpose of the Ordinance is improper and not permitted under the MLUL. Plaintiffs contend that Readington Township enacted the AR Zone Ordinance to reduce the lot yield or development rights of large, undeveloped tracts in the Township and, consequently, to decrease the value of those large tracts within the ADA that defendants had previously identified and targeted for acquisition or preservation. Plaintiffs rely upon the holding of *Riggs v. Long Beach Twp.*, 109 *N.J.* 601, that a municipality has no authority to use zoning regulations to depress land values to facilitate their acquisition.

49. In *Riggs,* Long Beach Township sought to purchase an unimproved tract for open space preservation. When it could not agree with the owner on a purchase price, it restricted the development rights on the tract through a zoning ordinance so that it could acquire the property at a lower price. The Supreme Court said, "As the objective facts make clear, the unswerving purpose of the municipality from beginning to end has been to acquire the property for open space without paying a fair price." *Id.* at 617. That purpose was contrary to the authority delegated by the State Legislature to municipalities in the MLUL to regulate land use through zoning laws. Therefore, Long Beach Township's ordinance limiting the tract's development rights was unlawful.

50. Plaintiffs argue that as part of its 20–year history of aggressive open space preservation, Readington Township had previously targeted the Lackland property and other large tracts for acquisition or preservation through some other means. As of October 1995, the Readington Township Greenways Work Group had identified the Lackland property as one of the large tracts recommended for open space preservation. D292, App.C, Bates 36091. Plaintiffs contend that the covert tape recordings with Township Committee and Board of Health members show that the defendants desired to preserve the Lackland property as "farmland" but that lack of money stymied defendants until the Garden State Preservation Trust Act ("GSPTA") (D353) in 1998 made funds available. They contend that GSPTA money was available only for properties located within an ADA, and the defendants' use of the ADA boundaries to designate the AR District in Readington Township shows that the real purpose of downzoning through Ordinance 43–98 was to depress land values for acquisition with GSTPA funds.

***12** 51. Plaintiffs argue that when defendants learned in early to mid–1998 of the money to become available to them in 1999 only for properties within an ADA, they began a race on September 28, 1998 to amend the Master Plan for the already preordained ordinance to be adopted using the ADA as the new downzoned AR District. The Amendment to the Master Plan (D49) was approved on November 23, 1998, and Ordinance 43–98(D33) on December 21, 1998 (D380).

52. Plaintiffs presented the testimony of one of their planning experts, Creigh Rahenkamp, that the true purpose of the AR zone is to "downzone" properties within the ADA to reduce and suppress their land values and thus to make it easier for the Township to acquire or preserve targeted properties and "stretch the dollars" being made available to the defendants for such purposes. Mr. Rahenkamp cited several quotations from the minutes of the public hearings as supporting his opinion. For example, Mr. Rahenkamp pointed to a statement made by Philip Caton, the Township's planning expert, during a September 28, 1998 Planning Board meeting, in which Mr. Caton said:

> [T]here are a variety of ways to stretch those available dollars even though as Julie [Allen] indicated this is a unique moment in terms of funding where, you know, we're right about to enter a new realm presumably of farmland preservation funding and open space funding and so, the dollars are going to increase presumably but even with that then, you know, the question is how can we stretch those dollars to the greatest extent possible.

(Quoted in Rahenkamp Report, D63, Bates 33377, *citing* Meeting Transcript not placed in evidence in this case). Mr. Rahenkamp also pointed to the statements of Julia Allen during the public hearing of September 28, 1998:

> And in fact, it's imperative, if we are to preserve a meaningful amount of farmland, we have to do better.

> It's taken us 10 years, we saved our first farm in 1987. We've got 1,960 acres preserved. If we continue at this rate, we're just going to have a sea of development and we're not going to save our farmlands. We've got to do something different. We are about as aggressive as we can be with this present Township Committee. I mean, we're—we've not quite but almost accommodated every voluntary participant in the program.

(D63, Bates 33378).

53. In further support of his opinion that the real purpose of the zoning was to reduce property values improperly, Mr. Rahenkamp pointed to a statement by Mayor Wall during the December 21, 1998 public hearing of the Township Committee at which Ordinance 43–98 was adopted. Mayor Wall said:

> We are at a very critical time in Readington. We aggressively chase Farmland Preservation, aggressively. We send letters to people, everyone knows who owns land in this town. That's what we do. They know the door is always open. But we are in a battle right now with developers. You've seen them in this room. Every piece of property that we try to negotiate on this year, we are fighting a developer. The economy is good. They are all here. All the big guys are here. And if we don't take this opportunity now, we are going to lose a tremendous amount of critical land.

***13** (D63, Bates 33378). Mr. Rahenkamp concluded from these statements that the municipal officials felt that a drastic change was necessary because voluntary participation in the preservation-acquisition program had been exhausted. He testified that Ordinance 43–98 only furthered the purpose of preserving large open lands by devaluing them so that their development value was sufficiently low to induce the owner to sell either the land or the remaining development rights to the municipality.

54. Plaintiffs argue that further proof of this improper purpose arises from inclusion of the Lackland property in the Township's Open Space Inventory and Recommendations for Preservation (D292). This argument is not persuasive. Identification of the Lackland property, among others, in Appendix C to the Open Space Inventory (D292, Bates 36091) and the Inventory's subsequent inclusion in the 1996 Master Plan Re–Examination Report is understandable because of its size and unimproved status. The Open Space Inventory simply identifies properties recommended for preservation. Inclusion of a property in the Open Space Inventory does not obligate the Township to acquire property. Its inclusion in the Re–Examination Report did not create any obligations. Preparation of a Re–Examination Report is governed by *N.J.S.A.* 40:55D–89. The Open Space Inventory did not create any obligation on the part of the Township or show anything improper as to the purpose of Ordinance 43–98.

55. The AR Ordinance resulted from recommendations for establishment of the AR District in the 1998 Master Plan Amendment. The AR District is not an exclusive agricultural district. It permits residential development, farms, and public and private open space and parks, as well as conditional and accessory uses compatible with permitted residential development and farm uses. Sections 148–15(B)(C), D33. The stated multiple purposes of the AR Zone are to preserve agricultural lands and the rural character of the Township and to protect groundwater, forested areas, wetlands, flood plains, surface water quality, and other natural features. The AR Zone District seeks to permit residential development compatible with these goals.

56. The Township's professional planner, Philip Caton, explained the background leading to the 1998 Master Plan Amendment and detailed its farmland preservation and environmental protection goals and objectives, Land Use and Conservation Plan Elements, and consistency with the Hunterdon County Growth Management Plan, Hunterdon County Agriculture Development Area, and State Development and Redevelopment Plan. D49 at page III–7, V–26–32 and VIII–4,6,13. Mr. Caton also referenced consistency with the 1998 Draft Strategies for Managing Growth Report from the Hunterdon County Growth Management Task Force discussed in the 1998 Master Plan Amendment. That report recommended enhanced efforts to preserve farmland and employment of land use policies and ordinances to accomplish this objective. The predominance of farmland, open space, and sensitive environmental resources in the AR District is shown by the "photographic tour" (D315) that the defendants introduced in evidence and the 1998 Master Plan Amendment (D49). The photographs of the area submitted in evidence by plaintiffs as part of the expert report of Mark Remsa (D142, Bates 35251–80) are consistent with that description. Both sets of photographs are useful evidence of the characteristics of the Lackland property and its surrounding area, as confirmed by the tour of the Township that this court and counsel took during the trial in accordance with *Lazowitz v. Board of Adjustment,* 213 *N.J.Super.* 376.

***14** 57. The 1998 Master Plan Amendment (D49) identified the zoning purposes advanced by the AR District under the MLUL, including *N.J .S.A.* 40:55D–2(c), (e),(g),(i) and (j). (D49 at VIII–3–4). These purposes include: (c) providing adequate light, air and open space; (e) establishment of appropriate population densities to contribute to the well being of persons, neighborhoods and communities, and preservation of the environment; (g) providing sufficient space and appropriate locations for a variety of agricultural, residential and open space uses; (i) promoting a desirable visual environment through creative development techniques such as clustering; and (j) promoting conservation of open space and valuable natural resources, and prevention of urban sprawl and degradation of the environment through improper use of land.

58. The Township's 1998 Master Plan Amendment, recommending establishment of the AR District, and the implementing Ordinance 43–98(D33), are also consistent with the vision, goals, policies and strategies of the State Plan for its Rural (PPA4) and Rural Environmental Sensitive (PA4B) Planning Areas, which largely encompass the AR District and specifically encompass the Lackland property. The intent of the State Plan for the Rural and Environmentally Sensitive Planning Areas is to channel development towards Centers and preserve the Environs, with contiguous agricultural lands, environmentally-sensitive open lands, and greenways. The Lackland property is in the Environs of PA4 and PA4B. Except for portions in the Fringe Planning Area, there is no public water or sewer in the AR District. The AR District has no Centers. Prime agricultural soils (6,013 acres or 39.7%) and soils of statewide importance (5,041.9 acres or 33.2%) dominate the AR District. D287F.

59. Mr. Caton and the Township's other professional planning experts analyzed the zoning of surrounding municipalities, including Branchburg, Bedminster, Tewksbury, Clinton, Raritan and Hillsborough Townships, and found a high degree of compatibility between the zoning in those municipalities and the AR District.

60. The 1998 Master Plan Amendment was also the subject of a voluntary Consistency Review (D56 and D57) by the Office of State Planning. The purpose of the review was to evaluate consistency of local planning with the State Plan. References in the Consistency Review commend the Township's planning and are relevant to the AR District. Illustrative references include:

(a) Readington Township has been a pioneer in municipal planning efforts. The recent 1998 Master Plan Amendments indicate that proposed densities were determined by using planning tools supported by the State Plan. D57, Bates 33322.

(b) Readington Township has done a yeoman's task of planning for the preservation of its farmland, open spaces, and other natural features, particularly in the completion of its 1998 Master Plan Amendments. D57, Bates 33326.

(c) Innovative planning techniques, such as clustering, are used to encourage farmland preservation and minimize potential conflicts with residential development. D57, Bates 33332.

***15** (d) The Township's use of carrying capacity analyses modeling to determine minimal zoning densities, which is recommended by the State plan, is exemplary ... Readington's use of mandatory clustering provision to protect farmland is also laudable. D57, Bates 33336.

(e) Readington's Master Plan elements, goals, objectives and recommendations, particularly those contained in the recent 1998 Master Plan Amendments, are consistent with the PA4 land use, economic development, natural resource, conservation, agriculture and farmland preservation policy objectives. D57, Bates 33336.

Although by Resolution dated February 2, 2000, the State Planning Commission, deleted the statement that the Master Plan of Readington Township is generally consistent with the State Development and Redevelopment Plan (P121), that deletion does not mean the opposite, that the Master Plan is inconsistent.

61. Mr. Caton testified the AR District is a reasonable and logical evolution of the Township's long-standing pursuit of these sound planning goals, which have been part of its master planning history, including the 1979 Open Space Master Plan, D397, 1990 Master Plan, D310, 1995 Greenways Plan, P82 and 1998 Master Plan Amendment, D49. The Township has a long history in farmland and open space preservation dating back to the 1970's. The Township's experts gave extensive testimony on this subject, and plaintiffs' planning experts, Mr. Rahenkamp, Helen Heinrich, and Mark Remsa, also acknowledged that history. The adoption of the AR Ordinance was a further evolution of that process. It was geared to controlling residential development in a manner that protects and preserves land suitable for agriculture and

environmental protection. Nothing in the MLUL or case law proscribes such policies or equates those policies to an improper purpose. By decision issued just recently on September 22, 2005, the Appellate Division recognized in a similar context that preservation of agricultural lands by another Hunterdon County municipality was an appropriate goal of local officials in their zoning regulations. *New Jersey Farm Bureau, Inc. v. East Amwell Township,* 380 *N.J.Super.* 325 (App.Div.2005).

62. Mr. Caton discussed how the Land Use and Conservation Plan Elements of the 1998 Master Plan interact. The Conservation Plan evaluated a variety of natural features and characteristics of the Township including topography and slope, geology and groundwater, soils, wetlands, flood plains and agriculture. Preservation of groundwater quality was a key consideration in the recommendation for the AR District. Referring to the Geology Map in the 1998 Master Plan Amendment (D49, I–2), Mr. Caton testified that the predominant geological formation underlying the Township is Brunswick shale, which severely affects the location and design of septic systems. The Trela–Douglas Nitrate Dilution Model was used, among other planning tools, to evaluate carrying capacity and residential density recommendations for the AR District to advance the goal of protection of groundwater resources.

***16** 63. In addition to Mr. Caton, the testimony of the Township's other planning experts, Michael Sullivan and Francis Banisch, addressed the proper purposes of the AR Ordinance found in *N.J.S.A .* 40:55D–2: 1) to encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals and general welfare; 2) to secure safety from fire, flood, panic, and other natural and manmade disasters; 3) to provide adequate light, air, and open space; 4) to ensure that the development of individual municipalities does not conflict with the development and general welfare of neighboring municipalities, the county, and the State as a whole; 5) to promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities, and regions and preservation of the environment; 6) to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial, and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens; 7) to promote a desirable visual environment through creative development techniques and good civic design and arrangements; and 8) to promote the conservation of historic sites and districts, open space, energy resources, and valuable natural resources in the State and to prevent urban sprawl and degradation of the environment through improper use of land. *See* D255, D256, D287 and D288.

64. Plaintiffs rely upon *Sartoga v. Borough of West Paterson,* 346 *N.J.Super.* 569 (App.Div.2002), but like *Riggs,* the facts of *Sartoga* are significantly different from those in this case. In *Sartoga,* the Borough of West Paterson rezoned land immediately adjacent to the City of Clifton to allow high density residential development in an environmentally sensitive area. The Appellate Division reversed summary judgment in favor of the Borough and remanded the case for trial. The Appellate Division concluded that the issue of whether the rezoning was sound could not be resolved on summary judgment. There was expert opinion from the plaintiffs challenging the reasonableness of the rezoning based upon the presence of environmental constraints, raising an issue for trial as to the propriety of high density development. In contrast, trial was held in this case and the sound planning rationale of the AR District and its suitability to the Lackland property was established and documented at trial.

65. Nor do the covertly taped conversations prove plaintiffs' claims as to the alleged improper purpose of the AR Ordinance. The plan of the private investigators was to engage the individual members of the governing body in conversations about the Lackland property, Wilmark, and Mr. Hartman. Plaintiffs contend that the taped conversations proved their allegations that the Township's land acquisition and zoning policies were purposely intended to depress the value of land to enable the Township to purchase land for preservation, including the Lackland property. In context, the tapes do not support those assertions. They contain no "smoking gun" admission of such a purpose and are otherwise too vague on this subject to attribute that improper purpose to the Township Committee in enacting the Ordinance.

***17** 66. In *Riggs v. Long Beach Township,* the Supreme Court said:

> If an ordinance has both a valid and an invalid purpose, courts should not guess which purpose the governing body had in mind. *See United States v. O'Brien,* 391 *U.S.* 367, 383–84, 88 *S.Ct.* 1673, 1682–83, 20 *L.Ed.2d* 672, 684 (1968). If. however, the ordinance has but one

purpose and that purpose is unlawful, courts may declare the ordinance invalid.

109 *N.J.* at 613. In that case, the singular purpose of the downzoning ordinance was clear, to reduce the value of a particular parcel for government acquisition. The same cannot be said here. While the evidence presented by plaintiffs shows motivation to preserve open space, it does not follow that Ordinance 43–98 was adopted for the specific unlawful purpose of depressing land values to facilitate acquisition or preservation. Rather, all the legitimate purposes described in Mr. Caton's testimony may also be fulfilled by the ordinance.

67. Plaintiffs have not met their burden of showing that Ordinance 43–98 is arbitrary, capricious, or unreasonable because it was enacted for an unlawful purpose.

C. The AR District Coterminous with the ADA

68. Plaintiffs' next major contention is that Ordinance 43–98 is arbitrary, capricious, and unreasonable because the boundaries of the new AR District were taken directly from the Hunterdon County designation of Agricultural Development Areas without any study, analysis, or logic other than for the funding purposes previously discussed.

69. The Agricultural Retention and Development Act (ARDA), *N.J.S.A.* 4:1C–11—48, established "county organizations to coordinate the development of farmland preservation programs within identified areas where agriculture will be presumed the first priority use of the land." *N.J.S.A.* 4:1C–12(c). Agricultural Development Boards in each county created under *N.J.S.A.* 4:1C–14 may identify and recommend an area as an ADA if it meets specific criteria. *N.J.S.A.* 4:1C–18.

> An ADA was defined as that area identified by a county Board pursuant to N.J.S.A. 4:1C–18 and certified by the SADC [State Agriculture Development Committee] after its review of Board submissions. N.J.S.A. 4:1C–13(a); N.J.A.C. 2:76–1.6(a). The Board must submit its resolution minutes and a comprehensive report to the SADC, N.J.A.C. 2:76–1.5, and the SADC must find that the Board's analysis and criteria are "reasonable and consistent with the provisions of this subchapter." N.J.A.C. 2:76–1.6(b). The SADC then presents its findings and recommendations for certification, certification with conditions or denial of certification to the Secretary of Agriculture. N.J.A.C. 2:76–1.7.

Township of South Brunswick v. State Agriculture Development Committee, 352 *N.J.Super.* 361, 364–65 (App.Div.2002). *N.J.S .A.* 4:1C–18 also provides:

> The Board may, after public hearing, identify and recommend an area as an agricultural development area, which recommendation shall be forwarded to the county planning Board. The Board shall document where agriculture shall be the preferred, but not necessarily the exclusive, use of land if that area:
>
> ***18** a. Encompasses productive agricultural lands which are currently in production or have a strong potential for future production in agriculture and in which agriculture is a permitted use under the current municipal zoning ordinance or in which agriculture is permitted as a nonconforming use;
>
> b. Is reasonably free of suburban and conflicting commercial development;
>
> c. Comprises not greater than 90% of the agricultural land mass of the county;
>
> d. Incorporates any other characteristics deemed appropriate by the Board.
>
> Approval of the agricultural development area by the Board shall be in no way construed to authorize exclusive agricultural zoning or any zoning which would have the practical effect of exclusive agricultural zoning, nor shall the adoption be used by any tax official to alter the value of the land identified pursuant hereto or the assessment of taxes thereon.

70. The Hunterdon County Agricultural Development Board originally established the ADA for all municipalities within Hunterdon County in 1983 and revised the designations in 1988. The ADA in Readington Township is shown on a map marked in evidence as D287L. The 1998 Amendment to the Master Plan in Readington Township "mirrored" the ADA for the purpose of "agricultural preservation" and "environmental protection."

71. Plaintiffs argue that "blind adoption of the 20–year old [sic] ADA is why the AR Zone violates the requirement § 62 of the MLUL that 'The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and encourages the most appropriate use of land." ' They contend that defendants did not separately verify the appropriateness of the ADA for

use as a zoning district, and that Mr. Caton testified that no analysis was done to determine whether the lands within the ADA still met the criteria and purposes of an ADA.

72. According to plaintiffs, Mr. Caton instead analyzed "the extent of the relationship between the ag development area ["ADA"] and various funding sources." When asked how the AR Zone mirroring the ADA furthers the 1998 Amendment to the Master Plan purpose of "environmental protection", Mr. Caton responded:

> The Hunterdon County ADA opens the door to the township's access to State funds with which to purchase development rights and, thereby, preserve farmland, to utilize State funds for fee simple purchases of farms by the State Ag Development Committee, and to access water and soil conservation grants under the eight year program. It also permits the township to access money for planning incentive grants under the Farmland Preservation program.
>
> So to the extent that the ADA provides opportunity for the township to access that range of capital with which to preserve farmland and open space for that matter, it furthers the goals—the environmental protection goals of the Master Plan.

Tr. 01/31/05 pm, p. 43. Plaintiffs argue that this testimony shows the singular purpose of using the ADA boundaries for the AR Zone District and that the Township improperly chose to "overlay" the ADA onto the RR Zone, resulting in the AR Zone being "carved out" of the RR Zone wherever the ADA was coterminous with the RR.

***19** 73. Plaintiffs contend that another of Readington Township's expert planners, Michael Sullivan, admitted that: (a) all studies regarding the AR Zone were done after Ordinance 43–98 had been adopted; (b) no analysis as to compliance with the ADA criteria was ever done; (c) the delineation of the AR Zone was not controlled by soil classification; (d) no land use analysis was done in 1998 supporting the adoption and use of the ADA for the AR Zone District; (e) no analysis was ever done comparing properties within the ADA/AR Zone against those outside of the ADA and left as RR Zone; (f) no analysis was done differentiating farmland parcels within the ADA and farmland parcels outside the ADA. Another of defendants' experts, Francis Banisch, testified that he did not know that the defendants had conducted no analysis when they adopted the ADA as the AR Zone District.

74. Most of the AR District is mapped under the State Plan as the Rural and Rural–Environmentally Sensitive Planning Areas, PA4 and PA4B, whose goals, intent, and policies are agricultural preservation and environmental protection. The substantially co-extensive borders of the State Plan's Rural and Rural Environmentally Sensitive Planning Areas, PA4 and PA4B, the County ADA, and the Township's AR District are shown in the Zoning Map (D287B), Agriculture Development Area Map (D287L), and State Planning Area Map (D287Q).

75. In *Mt. Olive Complex v. Township of Mt. Olive*, 340 *N.J.Super.* 511, 538 (App.Div.2001), the Appellate Division held that "a municipality's voluntary compliance with the State Plan should be a significant factor in a reviewing court's determination respecting the validity of a zoning or rezoning ordinance." *Mt. Olive* comprehensively discussed the significance of the State Plan in assessing the reasonableness of local planning judgments. It recognized that:

> [a] major goal of the State Plan is to halt suburban sprawl, characterized as a pattern of development that destroys the character of the cultural landscape, is inefficient in terms of public facilities and services and devoid of the sense of place that has long defined the character of life in New Jersey.

Id. at 541. Although the State Plan is not intended to validate or invalidate any municipal code or zoning ordinance, (*see N.J.A.C.* 17:32–6.1(b)), the *Mt. Olive* Court nevertheless acknowledged that the MLUL requires municipalities to include in their master plans a statement indicating the relationship of the proposed development of the municipality to the State Plan. *Id. See also N.J.S.A.* 40–55D–28d(3). Focusing specifically upon the Rural Planning Area (PA4), *Mt. Olive* states those areas are "meant to identify productive farmland," where development and infrastructure are discouraged. *Id.*

76. The evidence in this case shows that the AR Ordinance in Readington Township was designed to conform to the State Plan. *Mt. Olive* said that:

> ***20** We do not hesitate to conclude that a municipality may consider and rely on the State Plan in redesigning its land use regulations ... Consequently, the municipality's voluntary adherence to the State Plan guidelines may support a determination that amendment to its zoning

regulations advance the purposes of zoning defined by the M.L .U.L.

Id. at 542, 544–45 (*citing* Sod Farm Associates v. Springfield Township Planning Board, 298 *N.J.Super.* 84, 86 (Law Div.1995), which sustained the rezoning of plaintiffs' property to 3–acre zoning in part because of the Township's reliance on the State Plan guidelines). The Appellate Division also recognized in *Kirby v. Township Committee of the Township of Bedminster,* 341 *N.J.Super.* 276 (App.Div.2000), the significance of the State Plan in assessing the reasonableness of local planning judgment. The Appellate Division said that the State Plan is reasonable to consider "as supporting the planning judgment of Bedminster." 341 *N.J.Super.* at 287. Consistency of the AR District with the State Plan's intent for its Rural and Rural–Environmentally Sensitive Planning Areas (PA4 and PA4B) is a factor demonstrating the reasonableness of the AR Ordinance

77. Mr. Caton testified that in evaluating the appropriate boundary for the AR District, the Township's planning consultants looked at a number of sources for guidance, including State and Hunterdon County planning documents. The objective was to create planning consistency at the local level with Hunterdon County and State planning. According to Mr. Caton, in the 1998 Master Plan Amendment, the Land Use Element recognized the relationship between the recommendation for establishment of the AR District and the Hunterdon County ADA boundary because the ADA boundary reflected a policy established by Hunterdon County with respect to areas given priority for agricultural use. Since one of the objectives of the AR District was to advance the Township's agricultural goals, the use of the ADA boundary was a logical and legitimate planning tool in his opinion. Its use was no different from the Township's use of the State Plan for policy guidance, as it relates to the goals of agricultural preservation and environmental protection, in defining the location of the AR District.

78. The ADA boundaries were also important to the Township in constructing the boundaries of the AR District because they represented Hunterdon County's conclusion as to where agriculture should be maintained. Because the ADA had been the subject of Hunterdon County and State review and certification as to where agriculture should be protected, the Township's planning consultants believed it was appropriate to utilize that information as a factor in defining the AR Zone boundaries.

79. Mr. Caton also explained that criteria for an ADA under *N.J .S.A.* 4:1C–11 *et seq.* include lands that have the following characteristics: (1) minimum contiguous 250 acres; (2) predominance of prime agricultural soils and soils of statewide importance; (3) lack of intrusion of non-agricultural uses; and (4) not within a sewer service area. All these criteria match the character of the AR District, including the Lackland property. Mr. Caton also saw a correlation between a property's qualification for funding opportunities for farmland preservation, by being classified within an ADA, and the AR District's multiple objectives, which included furthering farmland preservation and environmental protection.

***21** 80. The Readington Township Planning Board recommended use of the ADA boundaries, and the Township Committee adopted those boundaries for the AR District, with sufficient reason and justification. Plaintiffs have not pointed to any statute, regulation, or case that says that the Committee *could not* use the ADA boundaries to determine zoning districts. Furthermore, the latest revision of the ADA by the Hunterdon County Agricultural Preservation Board had occurred just 10 years, not 20 years, before the 1998 Master Plan Amendment and adoption of Ordinance 43–98 in Readington Township. That time period is not so remote to make use of the ADA boundaries arbitrary, capricious, or unreasonable, or to mandate an independent study of the ADA criteria.

81. Defendants' expert, Francis Banisch, explained that in doing master planning for other municipalities, he also used the Hunterdon County ADA as a planning tool. He identified, as an example, East Amwell, whose Amwell Valley Agricultural Zoning District was recently upheld by the Appellate Division. *New Jersey Farm Bureau, Inc. v. Township of East Amwell,* 380 *N.J.Super.* 325. The defendants' experts stated that use of the ADA was an appropriate underpinning for a zoning district whose objectives included agricultural retention and environmental protection.

82. There was nothing wrong or illegal with respect to the Township's planners utilization of the ADA to guide them with respect to recommendations for establishment of the AR District. The evidence was clear that the AR District is not an exclusive agricultural zone and use of the ADA in the planning process does not violate the Agricultural Retention and Development Act, *N.J.S.A.* 4:1C–11 *et seq.,* or any other statute or case law. Plaintiffs cite no law to support their claim

that use of the ADA in planning for the AR District was impermissible or violates any law.

83. The Township's use of the ADA in defining the boundaries of the AR Zone was not arbitrary, capricious, or unreasonable.

D. Additional Challenges

84. Plaintiffs also raise a number of other challenges to the AR Ordinance. They argue that all of these deficiencies together prove that the Ordinance is arbitrary, capricious, and unreasonable on its face.

(i) Pre–Existing Non–Conforming Uses

85. Plaintiffs contend that adoption of the AR Zone did not take adequate account of existing land use in the Township. Plaintiffs' expert, Creigh Rahenkamp, testified about the disparate land uses within the AR Zone and concluded that adopting that Zone ignored existing character and development not only around the Lackland property but throughout the AR Zone. Plaintiffs rely upon *Zampieri v. Township of Rivervale,* 29 *N.J.* 599 (1959), in which the Supreme Court invalidated an ordinance increasing front setback requirements in a commercial district where 15 out of 35 existing structures would not conform to the new requirement. The Supreme Court concluded that the physical condition of the district was such that the pre-existing structures set the pattern for the district. Under those circumstances, the ordinance establishing the increased setback was unreasonable as applied to this district.

***22** 86. Mr. Rahenkamp concluded that the new zoning district was arbitrary, capricious and unreasonable on its face because it "lumped" together areas of land uses that did not reflect the existing character of the properties within the district, in violation of *N.J.S.A.* 40:55D–62. In support of this conclusion, Mr. Rahenkamp pointed to the significant number of non-conforming lots that were created because the standards of the zoning ordinance were contrary to the manner in which the district had already developed. Mr. Rahenkamp opined that Ordinance 43–98 disregarded the actual characteristics of the AR Zone District and attempted to "preserve" a use which no longer exists and is contrary to the existing pattern of uses in the AR District.

87. In response, defendants dispute the accuracy of Mr. Rahenkamp's data. They argue that Mr. Rahenkamp included previously existing non-conforming lots under the prior RR District. There were 1,164 non-conforming lots under the prior RR Zone, and the number of additional lots that became non-conforming as a result of the AR Ordinance was 442, comprising less than 1,600 acres, only 10.25% of the 15,533 acres in the AR District. D287T. The AR Ordinance protects nonconforming lots by grandfather provisions at Section 148–15(E)(3)(D33), and Section 148–54(D67). Referencing the AR lot calculation map (D287L), the Township's planning experts explained that a visual inspection of the 442 lots shows that they are predominantly in subdivisions approved under the RR Zone 3–acre standards, many being just over 3 acres, and some between 3 acres and 6 acres. Use of a grandfather provision to protect non-conforming lots is recognized in *Dalton v. Ocean Township,* 245 *N.J.Super.* 453, 460 (App.Div.1991).

88. The number of non-conforming properties and the amount of land area affected was not so extensive that it invalidates Ordinance 43–98.

(ii) Nitrate Dilution Model

89. Plaintiffs contend that Readington's use of a so-called "nitrate dilution model" to justify 6–acre zoning was an arbitrary justification and was also not supported by consistent opinion testimony from its experts. The nitrate dilution model allegedly assesses the capability of the soil to absorb wastewater and, therefore, informs planners regarding the appropriate density of development that will require individual wastewater disposal, that is, septic systems.

90. According to plaintiffs, during the December 21, 1998 public hearing regarding adoption of Ordinance 43–98, D–380 and D–386, p. 46, Bate 2703, Mr. Caton said that lot sizes of 3.5 to 5.7 acres were indicated by the nitrate dilution model. Plaintiffs argue that the defendants did no analysis justifying their arbitrary choice to use 6–acre lots and thereby to cut the density and development rights in half for only the ADA within the Township. There was no correlation between the 3.5 to 5.7 acres for all non-sewered areas with the allegedly arbitrary choice of 6 acres per lot for only those properties within the ADA.

***23** 91. Furthermore, plaintiffs argue that defendants' expert, Matthew Mulhall, testified that the nitrate dilution model supported lots of 2.2—2.5 acres under the NJ Trela–Douglas model, and approximately 4–acre lots according to the United States Geological Survey. Plaintiffs say that Mr. Mulhall later changed his opinion to say that 1.5–acre cluster lots would also be supported by the nitrate dilution model.

92. Defendants respond that Mr. Caton explained communications between his office and Robert Canase of the New Jersey Department of Environmental Protection concerning use of the Trela–Douglas Nitrate Dilution Model. In his October 6, 1998 letter (D647), Mr. Canase said that the "NJGS [New Jersey Geological Survey] recommends that the Trela–Douglas Nitrate Dilution Model be used, in combination with other factors, to determine appropriate residential densities. Surface water quality objectives, farmland preservation, current zoning density and other planning objectives should also be used in making decisions on appropriate zoning. The model does provide a useful tool for approximating appropriate density to achieve groundwater quality objectives." Mr. Canase in his November 5, 1998 letter (D650) said that nitrate dilution modeling should not be used as the sole basis for zoning decisions. Mr. Caton and Mr. Sullivan understood from these communications that nitrate dilution modeling was appropriate to consider in evaluating residential density.

93. Nitrate dilution was not the sole basis for recommending the AR District in the 1998 Master Plan Amendment. Nitrate dilution modeling is an appropriate planning tool, along with other considerations. Its use to support the Planning Board's recommendation and the Township Committee's adoption of the AR District was not arbitrary, capricious, or unreasonable.

(iii) 70% Open Space Set–Aside

94. The AR Zone requires that large tracts such as plaintiffs' property contain a minimum of 70% of the gross tract area as open space, and that the open space shall consist of a minimum of 65% of the unconstrained tract area as defined in the Ordinance. The Ordinance also provides that rights-of-way or cartways of any existing or proposed public or private streets are not to be included in the calculation of the minimum required open space area. Section 148–15(E), D33. Plaintiffs contend that the increase of the open space set-aside from the previous 50% in the RR Zone to 70%, with 65% of the unconstrained land included, was arbitrary and unreasonable. Mr. Rahenkamp testified that the AR Zone arbitrarily increased the percent of unconstrained lands to be set aside from 45% to 65% and that this set aside the best lands most likely to be suitable for septic systems.

95. Mr. Caton explained how the 70% set-aside for farmland or open space in the AR Ordinance implements the recommendations of the 1998 Master Plan Amendment. The 70% set-aside requirement applicable to a 40 acre parcel yields a 28 acre farm, suitable for a viable agricultural operation. The increase in the open space set-aside from 50% under RR to 70% under AR was a proportional response to the change in density. Open space may be utilized for agriculture, recreation, or conservation or passive open space. Section 148–15(F), D33. In mandatory clusters, the open space regulations state that agriculture is the preferred open space use and, where practical, to the extent that land intended for open space uses is being farmed, it should remain as farmland. Section 148–15(F)(3), D33. Nothing in the AR Ordinance (D33), however, mandates that the open space be used for agriculture. The Township's planning experts, Messrs. Caton, Sullivan and Banisch, rejected the notion, advanced by Mr. Rahenkamp, that the Planning Board could deny an application simply because the applicant elected to utilize the open space for recreation, conservation, or passive open space instead of for agriculture.

***24** 96. Mr. Caton also explained the requirement of 65% unconstrained tract area in the AR open space provisions and how it advanced the farmland preservation and environmental protection goals in the 1998 Master Plan Amendment. To achieve the objective of preserving farmland, open space and natural features, the 65% standard is designed to provide a proportional share of constrained and unconstrained land within the open space. The Planning Board learned through various versions of the cluster ordinance, which dates back to 1984, that unless a standard was established for an unconstrained tract area within the open space, constrained land areas would likely be exclusively used as open space and would not facilitate preservation of farmland because the constrained area in the open space would be environmentally sensitive.

97. These explanations are sufficient to establish a rational basis for the Township to adopt the open space requirement. As stated earlier, the "tightly circumscribed" standard of review that a court must apply does not permit the court to choose its own preference for the testimony of challenging experts over those supporting the ordinance. Rather, if the issue is debatable, the ordinance must be sustained. *Mt. Olive Complex,* 340 *N.J.Super.* at 533 (*quoting Bow & Arrow Manor,* 63 *N.J.* at 343). Here, the justifications for the open space set-aside provided by defendants' experts make the issue at least fairly debatable. Therefore, the Township's acceptance of these explanations and justifications, and its adoption of the open space requirements, are not, on their face, arbitrary, capricious, or unreasonable.

98. Recently, the Appellate Division struck down a downzoning ordinance in East Brunswick Township on the ground that the reduction of permitted density to 6–acre minimum lot size in a new Rural Preservation Zoning District in that municipality did not serve the stated purposes of the ordinance and did not reflect reasonable consideration of existing development in the surrounding zoning districts. *Bailes v. Township of East Brunswick,* 380 *N.J.Super.* 336 (App.Div. Sept. 22, 2005). The facts in that case, however, were significantly different from the facts applicable to Readington Township. In *East Brusnwick,* the new zone had no septic suitability problems or environmental constraints, preserving agricultural uses was not compatible with the designation of the Township as an urban fringe area, and preservation of open space by itself could not serve as a sufficient purpose because an inequitable burden was being placed on the few property owners who had preserved rather than already developed their land. In contrast, Readington Township has substantial septic suitability problems, it is located in a rural area, and agricultural and open space preservation are appropriate goals. *See New Jersey Farmers Bureau v. East Amwell Township,* 380 *N.J.Super.* 325. Its open space regulations are suited to the characteristics of the AR Zone in the Township.

(iv) Standards and Specificity

***25** 99. Plaintiffs challenge Ordinance 43–98 on the ground that it lacks adequate standards and specificity and is impermissibly vague. They contend that use of the terms "preferred use," "where practical," and "continue as farmland" in the open space regulations, Section 148–15(F), delegate excessive and improper discretion to the Planning Board. Relying upon *Damurjian v. Board of Adjustment of Colts Neck,* 299 *N.J.Super.* 84, 97 (App.Div.1997), and *Lionshead Woods v. Kaplan Bros.,* 250 *N.J.Super.* 545 (Law Div.1991), plaintiffs argue that:

> The law is well settled that a zoning ordinance must be clear and explicit in its terms, setting forth sufficient standards to prevent arbitrary and indiscriminate interpretation or application by local officials.
>
> * * * *
>
> The rule of certainty and definiteness of zoning ordinances verges on or is identical with the rule that they must establish a clear rule or standard to operate uniformly and govern their administration in order that arbitrariness and discrimination in administrative interpretation and application be avoided.

Id. at 549–50. *See also Pizzo Mantin Group v. Township of Randolph,* 137 *N.J.* 216 (1994); *Morristown Rd. Assoc. v. Mayor of Bernardsville,* 163 *N.J.Super.* 58, 63 (Law Div.1978).

100. Plaintiff's expert planner, Creigh Rahenkamp, testified that § 148–15(F) of Ordinance 43–98 is improperly vague in that it lacks sufficient specifics, details, guidelines, and criteria that limit the discretion of the Planning Board regarding the configuration, location, and massing of the mandatory open space. In addition, there is no definition of "preferred use" in either the MLUL or in the Ordinance, vesting the Planning Board with excessive, improper discretion. According to Mr. Rahenkamp, the Ordinance has insufficient standards and objective specifications that an applicant can follow in order to submit a "wholly conforming" application. In Mr. Rahenkamp's opinion, the Ordinance's reference to the "preferred use" of the open space asagricultural empowers the Planning Board to deny an application based upon its delegated authority to enforce that preference. In addition, Ordinance 43–98 provides with respect to open space that "where practical, when farmed it shall be continued as farmed." Plaintiffs argue that the Ordinance does not define nor provide any criteria by which the "practicality" is to be measured or determined. The vagueness of the concepts prevents an applicant from being able to claim that its application fully complies with the requirements, intent, and purposes of the zoning Ordinance and, therefore, the applicant cannot petition the courts to challenge the Planning Board's denial based on preference and practicality of maintaining a farm.

101. Defendants' expert planner, Philip Caton, disagreed with Mr. Rahenkamp's opinion testimony on this issue. Mr. Caton described these challenged provisions of Ordinance 43–98 as "policy guidelines." He expressed the opinion that the Planning Board would not have the discretion to deny an application that was otherwise conforming to the standards set forth in the AR Zone simply because the application did not abide by the preferences stated in the Ordinance for the use of the open space. Mr. Caton stated that the Ordinance provides that the 70 percent open space may be used for agriculture, natural resource protection, or passive open space.

***26** 102. Mr. Caton's testimony is persuasive. Use of the terms "preferred use," "where practical," and "continue as farmland" in the open space regulations, Section 148–15(F),

does not render the AR Ordinance vague or delegate improper or excessive discretion to the Planning Board. The AR Ordinance requirement for a 70% open space set-aside does not mandate how the open space is to be utilized among the several options, agriculture, conservation/open space, or recreation. Section 148–15(F)(3) does not require that the open space be used for agriculture. The Planning Board cannot deny an otherwise compliant application because the applicant seeks to use the open space for passive recreation and conservation of environmental features instead of agriculture. The AR Ordinance does not empower the Planning Board to deny an otherwise compliant application.

E. Conclusion as to Facial Validity of the Ordinance

103. The evidence demonstrates that the AR Ordinance is rooted in legitimate government objectives, i.e. planning for residential development compatible with farmland preservation and environmental protection. Plaintiffs failed to overcome the presumption of validity of the Ordinance by proving that it was adopted for an unlawful purpose.

104. The facial validity of the AR Ordinance is also supported by certain admissions of plaintiffs' planning experts. In criticizing the ordinance, Mark Remsa prepared a study establishing the uses of designated lots within 2,000 feet of the Lackland property and within Block 64, where the Lackland property is located. Mr. Remsa, however, did no calculations as to the number of acres of farmland and open space in that area and block, or in the AR District generally. He could not dispute that almost 66% of the AR District is farmland and open space. *See* D287A–D287T. He acknowledged the AR District includes large tracts of farmland, significant open space, woodlands, and stream corridors. The AR District contains environmentally sensitive areas, including the Pleasant Run Stream Corridor affecting the Lackland property, which are worthy of protection. Mr. Remsa admitted that the 1998 Master Plan Amendment and implementing AR Ordinance took into account the State Plan, Hunterdon County Growth Management Plan of 1986 and Hunterdon County Draft Strategies for Managing Growth Report.

105. Plaintiffs' other planning expert, Mr. Rahenkamp, admitted that the AR District was founded upon long-standing policies in Readington Township to protect and preserve farmland, open space, and natural resources. He acknowledged that the Township has been a leader in Hunterdon County in open space and farmland preservation. He acknowledged the analysis in the 1998 Master Plan Amendment resulted in its recommendation for establishment of the AR District.

106. The Township's expert planners, Messrs. Caton, Sullivan, and Banisch, discussed in detail the statutory purposes of the Ordinance and the rationale for specific provisions under attack. They provided ample testimony to support the validity of the AR Ordinance.

***27** 107. Plaintiffs failed to overcome the presumption of validity accorded to the Ordinance. The Readington Township Committee had the discretion under the MLUL to adopt Ordinance 43–98 after consideration of competing arguments and analyses for and against it. For all of the above reasons, Ordinance 43–98 is not an arbitrary, capricious, or unreasonable exercise of the municipality's zoning authority. It is facially valid.

II. Validity of the AR Zoning Ordinance as Applied to Lackland Property

108. A zoning ordinance may be valid generally, yet be invalid as applied to a particular parcel of property and a particular set of facts. *Odabash v. Mayor and Council of Borough of Dumont,* 65 N.J. 115, 123–24 (1974); *Riggs v. Township of Long Beach,* 109 *N.J.* at 610–11; *Kirby v. Township Committee of Bedminster,* 341 *N.J.Super.* 276, 287 (App.Div.2000); *Pheasant Bridge Corp. v. Township of Warren,* 169 *N.J.* 282, 289–92 (2001).

A. Standards of Review

109. In the *Pheasant Bridge* case, Warren Township in Somerset County adopted a rezoning ordinance limiting residential development to 6–acre minimum lots. In striking down the ordinance, the Supreme Court of New Jersey held that it was arbitrary, capricious and unreasonable "as applied" to the plaintiff's specific piece of property. The Court held that a property owner affected by this type of "downzoning" need not show that the ordinance is unreasonable throughout the municipality, saying:

> [A] landowner may challenge the application of an otherwise valid ordinance to a specific tract of property ... [A]n ordinance that may operate reasonably in some circumstances and unreasonably in others is not void *in toto,* but is enforceable except where in the particular circumstances its operation would be unreasonable and oppressive.... The litigant can focus only on the property in question and

> prevail in invalidating the ordinance as applied to that property if the appropriate facts can be shown.

Id. at 292. In *Pheasant Bridge,* the Supreme Court upheld the trial court's finding that "few of the environmental concerns which justified the passage of the ordinance apply to this apparently unique piece of property." *Id. See also Glen Rock Realty Co. v. Board of Adjustment and Bor. of Glen Rock,* 80 *N.J.Super.* 79 (App.Div.1963) (availability of potential variances from requirements of zoning ordinance not a basis to uphold invalid ordinance as applied to a particular property). In *Pheasant Bridge,* the Court said that in reviewing the validity of a zoning ordinance as applied, "a court engages in a review of the relationship between the means and ends of the ordinance." 169 *N.J.* at 290. The Court said further:

> [T]he means selected must have a real and substantial relation to the object sought to be attained, and the regulation or proscription must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated.

***28** *Id., quoting Kirsch Holding Co. v. Borough of Manasquan,* 59 *N.J.* 241, 251 (1971).

110. In *Odabash v. Mayor and Council of Borough of Dumont,* 65 N.J. 115, Dumont amended its ordinance to prohibit construction of additional garden apartments or other multiple-family dwellings. The Supreme Court held that the zoning amendments were unconstitutional as applied to the plaintiff's property because "the immediate area is so studded with apartment and business uses, leaving it as an isolated island, that it could not reasonably be used for single family dwelling purposes and to so require would be arbitrary." *Id.* at 123.

111. In this case, plaintiffs contend that, as in *Odabash,* the Lackland property is an "isolated island" of unimproved, vacant land surrounded by residential, suburban development and residual tracts of farmland. They argue that as applied to the Lackland property, the effect of AR Zone Ordinance 43–98 is to prevent development of the property consistent with the development in the surrounding area, thereby rendering development impossible and economically not feasible.

112. Plaintiffs also argue that consideration of the neighborhood in the immediate vicinity of the plaintiffs' property leads to the legal conclusion that the AR Ordinance violates the MLUL as applied to the Lackland property. *See Hankins v. Borough of Rockleigh,* 55 *N.J.Super.* 132, 137 (App.Div.1959). Relying upon *Sartoga v. Borough of West Paterson,* 346 *N.J.Super.* 569, and *Riggs v. Township of Long Beach,* 109 *N.J.* 601, plaintiffs argue that an ordinance that satisfies one purpose of the MLUL is not to be upheld automatically if it conflicts with other purposes of the MLUL. "Rather, the court is required to decide whether a proper legislative goal is being achieved in a manner reasonably related to that goal." 346 *N.J.Super.* at 580. They argue that this case "is four square on point with both *Sartoga* and *Riggs"* because they have proven that the AR zoning was applied to the Lackland property for the purpose of facilitating and making affordable its acquisition by the Township for public use as open space. They argue that employment of the Township's zoning power for such an improper use constitutes a taking of their property without just compensation.

B. Taking and Just Compensation

113. To succeed on a constitutional claim of regulatory taking as to a particular parcel of property, a plaintiff must demonstrate that the regulation denies the owner substantially all economically beneficial use of the land. *Kirby v. Township of Bedminster,* 341 *N.J.Super.* at 293.

114. Plaintiffs presented the testimony of Russell Sterling as a professional real estate appraiser. Sterling concluded that the various land use regulations imposed on the Lackland property depressed the value to the same value as preserved farmland that has no development potential. In his opinion, the AR zoning and the Board of Health septic suitability standards reduced lot yield of the Lackland property to the point that there was no difference in the value of the Lackland property under the AR Zone as compared to the value it would have if it had been preserved with its development rights purchased under an easement preservation program after Lackland had been properly compensated under the Garden State Preservation Trust Act. Sterling concluded that the AR Ordinance eliminates any financial incentive to develop the Lackland property.

***29** 115. Defendants' valuation experts, Robert Vance and Richard Reading, valued the Lackland property in its existing state as vacant and unapproved. Mr. Vance concluded that there was no affect on its value in the change from the previous RR zoning to AR zoning because the development potential of the property was severely constrained previously by a documented history of poor septic suitability that overshadowed the zoning density changes.

116. Defendants' expert geologist and hydrogeologist, Matthew Mulhall, testified as to suitability of the soils on the Lackland property for septic systems. He explained that the Lackland soils, surface water, and seasonable ground water systems severely limit potential development of the Lackland property. He said that approximately 75% of Lot 40 cannot be developed without potential adverse environmental and health impacts. He testified that Concept Plans B(D4) and C(D5) prepared by plaintiffs' civil engineering expert, Joseph Jaworski, under pre–1995 and 1996 RR zoning, respectively, were not feasible plans because they suggest development through and on top of streams and wetlands. He explained that the stream systems, wetlands, and seasonal perched groundwater in the southern one-third and east-central portions of Lot 26 also severely restrict the potential to develop this portion of the Lackland property. He concluded that approximately 78 acres of the tract, comprising the northern portion of Lot 26 and southern portion of Lot 40, may be capable of supporting 17 to 31 single family homes and associated septic systems on 1 ½ acre lots, taking into account nitrate dilution and recharge rates. The actual number of homes would be dependent upon septic suitability testing. Lot yield was driven by the soils and their septic limitations, not the zoning.

117. Defendants' other septic suitability expert, Paul Ferriero, reached the same conclusion. He reviewed the soils data, analyzed the data against *N.J.A.C.* 7:9A and Readington Township's septic ordinance, and evaluated the septic suitability of the Lackland property and how lot yield was affected. His analysis also included the Jaworski Concept Plans A, B and C (D3A, 4A and 5A), and overlays (D15, 17 and 19), and the analysis in reports of plaintiffs' septic suitability expert, Andrew Higgins, Ph.D., (D97 and D98), and Concept Plans A, B and C (D16, 18 and 20). Mr. Ferriero testified that the data on the Lackland property showed the presence of Klinesville and Reaville soils. He explained the septic limitations of those soils, utilizing the Hunterdon County Soil Survey (D99). The Hunterdon County Soil Survey described Klinesville soils as having shallow bedrock and Reaville soils as having shallow groundwater. He pointed out that the majority of soils where testing was completed had significant constraints for installation of septic systems.

118. Focusing on Lot 26, Mr. Ferriero stated that it is almost entirely comprised of Klinesville and Reaville soils, which are rated as severe for septic suitability. He explained that septic suitability restrictions in soils on the Lackland property are important in determining development potential because *N.J.A.C.* 7:9A dictates strict parameters governing septic approval. The Hunterdon County Soil Survey (D99) provides a baseline for analyzing the kinds of soils that will be encountered in the context of septic suitability testing. Based upon his review of the soil logs for the Lackland property, Mr. Ferriero found the information in the soil logs (D429, D430, and D431) to be consistent with the descriptions of the soils in the Hunterdon County Soil Survey.

***30** 119. Plaintiffs' expert in septic suitability, Mr. Higgins, did an analysis using the several Concept Plans under different zoning regulations and classified proposed building lots under categories of "septic approval likely," "septic approval probable," and "septic approval unlikely." He explained these classifications, which he had created, as reflecting the percentage of likelihood of obtaining septic approval on the proposed building lots. His analysis confirmed information contained in the Hunterdon County Soil Survey that there are severe restrictions for the installation of septic systems on the Lackland property.

120. Mr. Ferriero concluded from the results of soil testing on the Lackland property and Mr. Higgins's report and analysis that the development potential of the Lackland property is driven by the soils, not zoning.

121. Mr. Ferriero testified that the evaluative process by plaintiffs should also have included revision of the road layout and lot lines on the Concept Plans prepared by Mr. Jaworski and Mr. Higgins to capture acceptable testing on the lots. This was not done. Mr. Ferriero testified that by redrawing the lot lines around acceptable testing, the number of potential lots would be essentially unchanged after the 1998 zoning change from RR District regulations to AR District regulations because the lot yield on the Lackland property is driven by septic limitations in the soils, not the zoning. He pointed to Mr. Higgins's conclusion that under all the zoning regulations, the "septic approval unlikely" category embraced most, between 60–70%, of the Lackland property.

122. Ultimately, even if the conclusions of plaintiffs' experts are accepted regarding lot yield on the Lackland property over those of defendants' experts, there is only a reduction of about 10 proposed building lots (about 32 as compared to about 22) resulting from the change from the RR zoning in effect when Wilmark and Lackland entered into their contingent contracts

for the development and sale of the Lackland property and the AR zoning enacted in December 1998.

123. Plaintiff's appraiser, Russell Sterling, acknowledged continued beneficial use of plaintiffs' property notwithstanding the change in zoning from RR to AR. Mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. *Kirby v. Township of Bedminster,* 341 *N.J.Super.* at 293. To prevail on a takings claim, a property owner must show more than a substantial decrease in market value, when the regulation is designed to achieve a legitimate government objective. *Bernardsville Quarry, Inc. v. Borough of Bernardsville,* 129 *N.J.* 221, 238 (1992). While Mr. Sterling opined that the alleged diminution in value was approximately 38%, his analysis was premised upon a false assumption that the Lackland property would have approved lots for development when, in fact, it did not. In *Bernardsville Quarry,* even a 90% reduction in value did not constitute a taking. *Id.* at 238–40. The "core of plaintiff's opposition is really that the lot size requirement prevents the most profitable use of his land. But the welfare of the community for all time cannot be subordinated to the profit motive of an individual landowner." *Rockaway Estates, Inc. v. Rockaway Township,* 38 *N . J.Super.* 408, 478 (App.Div.1955). A property owner is entitled to a reasonable use of his land, not the most profitable use. *Fischer v. Township of Bedminster,* 11 *N.J.* 194, 206 (1952).

***31** 124. David and Frederick Lackland also admitted that the property is worth substantially more now than it was at the time of adoption of the AR Zone in 1998. In fact, David Lackland testified that, despite Wilmark's failure to obtain development approvals, the value of the Lackland property has "skyrocketed" since the events leading to this litigation.

125. The AR Ordinance does not constitute a taking because it does not deprive the plaintiffs of beneficial use of the property.

C. Violation of MLUL in the Zoning Ordinance as Applied

126. Plaintiffs' expert planner, Mark Remsa, concluded that Ordinance 43–98 violates the provisions of the MLUL in several respects as applied to the Lackland property. First, he testified that the AR Ordinance is inconsistent with the character of the neighborhood surrounding the Lackland property. Mr. Remsa conducted a "2,000 foot study" of the properties surrounding the subject Lackland property and determined that 43% of the uses were single-family residential; 25% agricultural; 5% open space, and 25% vacant woodlands. He found that the average residential lot size within this 2,000 foot radius was about 3.4 acres. In his report, D142, he included 59 photographs showing the surrounding area. To the west, there are two subdivisions with single-family lots that vary in size from 1.72 acres to 6.548 acres and farmland of approximately 126 acres, which is the preserved Bauer Farm. To the south, across Barley Sheaf Road, existing single-family dwellings are on lots that vary in size from 1.72 acres to 4.02 acres. To the east, there are two subdivisions of single-family lots that vary in size from 1.96 acres to 4.87 acres. There is a single-family dwelling on a large parcel, approximately 15 acres, as well as a cultivated field that shares approximately 150 feet of the property line. To the north is the permanently Green Acres preserved Lot 41, which is approximately 24 acres. There is also one single-family dwelling and, across Pleasant Run Road, there are single-family detached dwellings on lots of varying size from 1.76 acres to almost 10 acres.

127. Mr. Remsa also testified that the Lackland property's boundary line is approximately 21,413 linear feet. Approximately 3,427 feet (16%) of the property's boundary is in common with agricultural uses and approximately 1,677 linear feet (7.83%) is shared with open space. The remaining boundary of the subject property, approximately 16,309 linear feet (76.16%) is in common with the existing single-family dwellings that have been described. Mr. Remsa determined that approximately 90% of the lots and 43% of the acres within 2,000 feet of the Lackland property were single-family uses. He noted that as far back as 1979 the Lackland property was surrounded by single-family residential development along its eastern and southern sides as well as a portion of its southwestern side. Based on these findings, he concluded that the dominant land use within the 2,000 foot radius was single-family, residential dwellings. This also was true for land uses within Block 64.

***32** 128. Mr. Remsa determined that Block 64 was "farmed out" and agricultural lands are in the minority and have little opportunity for expansion. He further concluded that the policy of preserving large agricultural areas free from intrusion of residential and other uses does not apply to the Lackland property because the surrounding area has already been developed principally as rural residential uses consisting of single-family dwellings on large lots. Most of the farmer-operated farms were concentrated farther north and in the central portion of the Township, and working dairy farms are located at the southern end and the southwestern corner of the Township. The Right to Farm Act would

not apply to the Lackland property because it was not a "commercial farm" as that term is defined under the County and State regulations. Mr. Remsa testified that there was little chance to preserving significantly more farmland within Block 64, including the Lackland property. The thrust of the ADA is to preserve land for agricultural purposes. Because only 22% of Block 64 is in agricultural use while 43% is already in single-family residential use, it is highly questionable in Mr. Remsa's opinion whether the block would presently comply with ADA criteria. Although planning documents in Readington Township, including the 1995 Re-examination Report, observed that there was conversion of farmland into housing, that problem was not applicable to the Lackland property because it was not being used as farmland. Therefore, developing the site as housing would not result in the loss of farmland.

129. Both Mr. Remsa and plaintiffs' agricultural expert, Helen Heinrich, testified that the increase to 65% of the unconstrained lands being preserved as open space does not preserve agricultural lands as contemplated by the Master Plan. The practical effect of preserving the Lackland property for farmland use is not served or fulfilled by the AR zoning. Rather, that zoning only results in the Township getting more "open space" for its existing residents at the expense of a few property owners such as Lackland. According to Mr. Remsa, the existing land use pattern in the area is 5% open space but under the AR zone, 70% of the Lackland property would be set aside as open space.

130. Among the purposes which the AR Zone Ordinance 43–98 was to further, Readington Township's 1998 Amendment to the Master Plan identified agricultural preservation and environmental protection. Mr. Remsa testified that the policy of conserving and protecting environmentally sensitive areas, as well as a Township-wide greenbelt along Pleasant Run, applied to the Lackland property but was already being achieved under the previous RR zone. Ultimately, he concluded that the existing land uses surrounding the subject property are consistent with the RR zone and not consistent with the AR zone. Mr. Remsa concluded that the prior RR zone was the appropriate zoning and that the AR zone was arbitrary, capricious and unreasonable as applied to the Lackland property.

***33** 131. In contrast to the expert testimony on behalf of plaintiffs, the Township's planning experts, Messrs. Sullivan and Banisch, provided testimony and reached conclusions to support the Township's contentions that Ordinance 43–98 does fulfill appropriate zoning purposes as applied to the Lackland property.

132. Contrary to Mr. Remsa's findings with respect to the 2000 foot study area surrounding the Lackland property, Mr. Sullivan testified that 911 acres of the 1,609 acres in that area are agriculture, open space, and vacant parcels. Referencing D287C, a map entitled Relationship of Block 64 to the AR Zone, Mr. Sullivan found the dominant land uses within Block 64 are agricultural, open space, and vacant lands, comprising 57.31%, with single family dwellings comprising 42.69%.

133. Mr. Banisch also found that approximately 66% of the 2000 foot study area was comprised of agriculture and forest lands, 8.9% was comprised of wetlands, and only 24.2% was comprised of residentially developed lands. He found that the average lot size was about 7.5 acres, not 3.4 acres. Mr. Banisch concluded that $^{2}/_{3}$ of Mr. Remsa's 2,000 foot study area exhibited the very features the AR Zone was designed to protect, that is, prime agricultural soils, soils of statewide importance, stream corridors, flood plains, steep slopes, and woodlands. To test his conclusions, Mr. Banisch enlarged the study area to a½ mile radius, comprising 2,890 acres. He found that 27% of the½ mile study area was forest, 42% was agricultural, 8–9% fell in the categories of wetlands, barren land, and water, and 22% was residential. He concluded that the½ mile study area supported the undeveloped character of the AR District. He also found the average lot size in the½ mile study area was 7.87 acres. Mr. Banisch concluded these areas are dominated by agricultural lands, woodlands, and other undeveloped lands.

134. Mr. Sullivan also analyzed the acreage on the Lackland property. Stream corridors comprise 79.3 acres, freshwater wetlands (not including wetland transition areas) comprise 16.7 acres, woods comprise 140.37 acres, successional vegetation comprises 105.99 acres, and easements comprise 15.44 acres. He explained that there was some overlapping on these calculations because the woods, stream corridors, and wetlands intersect. The current and historical use of the Lackland property was also evaluated. That documentation evidenced a farmland assessment history from 1982 to 1986, and again from 2002 to the time of trial. D287H. The Lackland property's farmland assessment is also evidenced in D645, a 2004 farmland assessment application signed by David Lackland. To qualify for farmland assessment, Lackland submitted a Forest Stewardship Plan and Woodland Management Plan. D31.

135. The Township's planning experts also analyzed soils and agriculture with respect to the Lackland property. Prime agricultural soils and soils of statewide importance, as defined by the United States Department of Agriculture, are present on the Lackland property. 29.4% of the Lackland property is comprised of prime agricultural soils, and 40.9% is comprised of soils of statewide importance, the types of soils that are conducive to agricultural uses. Collectively, these soils constitute almost 70% or 179.2 acres of the Lackland property. In comparison with the rest of the AR District, D287F shows that of the 15,165 acres in the AR District, 6,013 acres (39.7%) comprise prime agricultural soils and 5,041 acres (33.2%) comprise soils of statewide importance. D287F and D287G evidence the compatibility of the Lackland property's inclusion in the AR District. The soil types on the Lackland property are present throughout the AR District.

***34** 136. Mr. Sullivan also examined two nearby farms (Bartles and Schaefer) in the AR District to compare the soil types on those parcels to those on the Lackland property. D287J is an aerial photograph showing the Lackland property and the Bartles and Schaefer farms. The Schaefer farming activities include pumpkins, hayrides, fruits, vegetables, and flowers. The farming activity on the Bartles farm is mostly grain crops. Both farms have been accepted into the Farmland Preservation Program. D287K is a map comparing the soil types, as defined in the Hunterdon County Soil Survey (D99), on the Bartles and Schaefer farms and the Lackland property. The map shows the soils on the Bartles and Schaefer farms are primarily comprised of the Klinesville and Reaville series. Those soils are also present on the Lackland property, demonstrating that the Lackland property is capable of productive farming activity, such as that done on the Bartles and Schaefer farms. Mr. Sullivan testified that agricultural land uses including sod, dairy, poultry, livestock, horses, apiaries, farm stands, and forest management are all capable of being conducted on the Lackland property. In fact, Lackland's Forest Stewardship Plan, D31, states objectives including maintenance of the property for forestry and woodland management.

137. The Township's planning experts also showed that the Lackland property fits criteria applicable to delineation of an Agriculture Development Area (ADA), i.e. (1) contiguous land area of 250 acres or greater; (2) land comprised primarily of prime farmland soils and soils of statewide importance; (3) land outside sewer service areas; and (4) land free of non-agricultural use.

138. Mr. Banisch, referencing D255C, an enlarged version of the Open Space and Farmland Map, (Figure 11 in his report), described the open space and farmland characteristics of parcels around the Lackland property. He found a mosaic of State, County and Township preserved farms, municipal public open spaces and farmland conservation easements, which create a network and fabric of what the State, Hunterdon County, and the Township are attempting to retain as large contiguous masses of farmland and other open space to allow for continued agricultural uses and conservation of significant environmentally sensitive features.

139. The natural attributes of the Lackland property have been recognized in the State's Natural Heritage Data Base and Landscape Project, projects of the New Jersey Department of Environmental Protection that delineate wildlife habitats. Mr. Sullivan explained this in his testimony and his report, D287 at page 39. Grassland area, where state-endangered species have been documented under the Landscape Project, is shown in the Critical Wildlife Habitat: Grasslands map, D287N, and comprises Lot 26 of the Lackland property. The southern third of Lot 26 has been mapped by the New Jersey Natural Heritage Areas as an area of threatened or endangered species sighting. This is shown in D287P. The Township's Environmental Resource Inventory, D144, which is part of its Master Plan, incorporates data from the Landscape Project and Natural Heritage Areas mapping of wildlife habitat areas.

***35** 140. The northern portion of the Lackland property falls in the State Plan's Rural Planning Area (PA4), and the southern portion falls in the Rural–Environmentally Sensitive Planning Area (PA4B). *See* D287Q. The Lackland property is in the Environs of PA4 and PA4B. It is not in a Center and does not have any characteristics of a Center as defined in the State Plan. D50 and D131.

141. Plaintiffs acknowledged, through Mr. Remsa, that residential cluster development is appropriate for the Lackland property (Remsa Report, D142, p. 81), to protect its environmental features, the Pleasant Run Stream Corridor, steep slopes, and wooded areas (D142, p. 83), and that clustering advances the Township-wide greenbelt system (D142, p. 85). Mr. Remsa believed, however, that the clustering provisions under the prior RR zoning district are appropriate to the Lackland property. Both the AR and prior RR zoning regulations provide for 1 ½ acre cluster lots. To address opinions by plaintiffs' expert faulting the AR cluster regulations, Mr. Sullivan identified two conceptual

development plans, D287R and D287S, the first utilizing the RR 1 ½ acre cluster and open space provisions, and the second using the AR 1 ½ acre cluster and open space provisions. The base data for these two conceptual plans came from plans prepared by plaintiffs' experts, Joseph Jaworski and Andrew Higgins. D3A, D5A, D16, and D20. The objective was to compare the Lackland property's development potential under RR and AR cluster provisions, using plaintiffs' street layout and lot layout shown in the Jaworski Concept Plans. Only minor adjustments were made to conform the residential and open space parcels with the applicable zoning requirements of the RR and AR Districts. From these conceptual development plans and resulting analysis, Mr. Sullivan concluded that the AR cluster regulations show significantly less intrusion into the woodlands on Lot 40 and markedly less disturbance of stream corridors and wetlands than the RR cluster regulations. He disagreed with Mr. Remsa that the prior RR cluster zoning regulations should apply to the Lackland property. He explained the AR regulations fit well, in relation to the proximate residential uses to Lot 26, and reduce the amount of land that is disturbed on Lot 40, which contains natural resources, specifically woodlands and stream corridors that are tributaries to the Pleasant Run Stream Corridor and associated wetlands. Those regulations also leave the open space and critical habitat in the southern portion of Lot 26 relatively undisturbed. He explained these environmental characteristics are the very features the AR District is intended to protect and preserve. He also explained that the AR Ordinance does not mandate the open space be used for agriculture. The set-aside can be used for open space, passive or active recreation, or agriculture.

142. To answer plaintiffs' contention that the Lackland property is not farmland and will not contribute to farmland preservation, the Township cites the Lackland property's history of farmland assessment. It also challenged the credibility of plaintiffs' agricultural expert, Helen Heinrich, who focused on the alleged non-suitability of the Lackland property for farming. Also, defendants note that the average farm size in Hunterdon County is 80 acres while the Lackland property is more than 260 acres. Lot 26 alone, the part of the property that is not forested, is about 110 acres and exceeds the Hunterdon County average farm size by 35%. In addition, the soils on two working farms, the Schaefer and Bartles farms, are the same soils that comprise Lot 26 of the Lackland property, that is Klinesville and Reaville soils, and the soils on the northern portion of the Lackland property are primarily Penn Soils which are agriculturally suitable. D287K.

***36** 143. The Township experts also testified that the Pleasant Run Stream Corridor, forming part of the Township's greenway, and the woodlands on Lot 40 of the Lackland property are worthy of protection through cluster development. *See* D287A. Streams and wetlands, present on both Lots 26 and 40 of the Lackland property (D287O), constitute natural constraints with respect to development potential and the power line easements on Lot 40 (D287M) constitute man-made development constraints. The experts also referred to the applicability of the State Plan policies governing the Rural and Rural Environmentally Sensitive Planning Areas, PA4 and PA4B to the AR District generally, and to the Lackland property specifically. D50, D131 and D287Q.

D. Conclusion as to Challenge to Ordinance as Applied

144. The conflicting testimony of the experts shows that application of the AR Zone regulations to the Lackland property is a debatable question with reasonable conclusions on either side. Plaintiffs' experts have reasonable opinions about why those regulations are not appropriate, especially based on surrounding existing uses and the viability of agricultural activity at the site. Defendants' experts respond with evidence of why the regulations do fit the Lackland property and, therefore, are within the power of the Township to impose. This court must grant a presumption of validity to the Ordinance as applied to the Lackland property. The standards of review discussed previously apply as well in considering this challenge to the Ordinance. *See* *Bow & Arrow Manor,* 63 *N.J.* at 343 ("It is fundamental that zoning is a municipal legislative function, beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [MLUL]"); *Rumson Estates,* 177 *N.J.* at 350–51 ("Reviewing courts should not be concerned over the wisdom of an ordinance. If debatable, the ordinance should be upheld.")

145. As applied to the Lackland property, the Ordinance aims at the multiple objectives of the AR District, to facilitate farmland preservation, open space retention, preservation of natural resources, and maintenance of the Township's rural character. These objectives are recognized zoning purposes under the MLUL. Furthermore, the Lackland property exhibits characteristics in common with lands in the AR District.

146. The case law relied upon by plaintiffs to support their as-applied challenge does not change this result. *Odabash v. Mayor and Council of Borough of Dumont,* 65 *N.J.* 115, and *Pheasant Bridge Corp. v. Township of Warren,* 169 *N.J.* 282, are factually dissimilar from this case. In *Pheasant Bridge,* the zoning was invalidated as applied because of specific findings by the trial court that the property there did not contain the environmental resources that the zoning was adopted to protect. That is not the case here. The evidence shows that the Lackland property contains the agricultural and environmental features that the AR District was created to protect. *Odabash* also is distinguishable because the Lackland property is not an "isolated island" of restrictive regulations situated within other uses. Significant percentages of the surrounding area are devoted to agricultural, open space, and other similar uses. Also, the Lackland property is a very large tract, almost 1 ½ miles in length and approaching ½ mile in width. In many municipalities, it could easily constitute a separate zoning district by itself.

***37** 147. Plaintiffs have not satisfied their burden of proving that the AR Ordinance is arbitrary, capricious, or unreasonable as applied to the Lackland property. Ordinance 43–98 does not violate either constitutional strictures or the MLUL as applied to the Lackland property.

III. Validity of Board of Health Ordinances as to Septic Systems

148. Plaintiffs also challenge the validity of Readington Township Board of Health ordinances pertaining to septic systems. They allege that certain regulations are arbitrary, capricious, and unreasonable because they exceed requirements of the New Jersey Department of Environmental Protection (DEP), are unnecessary, and were enacted only for the purpose of curtailing development and compelling property to remain as open space. Plaintiffs presented the testimony of their expert wastewater engineer, Andrew Higgins, Ph.D., regarding the requirements of the Readington Township septic ordinances pertaining to setback distances and a reserve disposal field. Plaintiffs contend that these requirements in combination severely reduce the development potential of vacant land in the Township without adequate justification.

149. The Board of Health septic Ordinances in effect at the time of trial are contained in Board of Health Ordinance 98–02 adopted September 1998, effective October 9, 1998 (D372), Board of Health Ordinance 99–02, adopted October 1999, Board of Health Ordinance 2001 adopted February 2001, and Ordinance 2001–01 adopted July 2001. At the time of Wilmark's septic suitability applications in March 1997, the septic Ordinance in effect contained amendments adopted in 1995 (D641) that included most of the provisions that plaintiffs challenge in this case.

A. Increased Distance Requirements

150. Plaintiffs challenged the distance setback regulations imposed by Readington Township for new septic systems. Those setback regulations were in effect at the time of Wilmark's original applications in 1997. (D641, section 7) Mr. Higgins used the following distance setback tables to compare the requirements set by the DEP through *N.J.A.C.* 7:9A–4.3 and the stricter requirements established by Readington Township in its Ordinance.

Table 1: N.J.A.C. 7:9A Setback Distances in Feet

Component	Well or Suction Line	Well Service Line	Water Course	Property Line
Building sewer	25	5	——	——
Septic tank, pump pit	50	——	25	5
Distribution box	50	——	25	5

Disposal field or trench	100	——	50	10

Table 2: Readington Township Setback Distances in Feet

Component	Well or Suction Line	Well Service Line	Water Course	Property Line
Building sewer	25	10	——	——
Septic tank, pump pit	100	——	100	15
Distribution box	100	——	100 *	15
Disposal field or trench	100	——	100 *	15

* Can be reduced to 75 feet provided select fill enclosure design is employed.

***38** Plaintiffs contend that the increased setbacks required by the Readington Ordinance exceed without justification what the State deems both adequate and safe. The increased setbacks expand the amount of land needed on each individual lot, and also affect adjoining lots by increasing setback distances that "spill-over" from one lot to another. These requirements compound the difficulty of obtaining septic approval because the AR Zoning District regulations require small lot clustering at the same time as pushing the homes away from the soils most suitable for septic systems by mandating a very high percentage of unconstrained lands to be set aside as open space. In Mr. Higgins's opinion, the cumulative effect of these regulations significantly reduces the number of potentially approvable lots throughout the AR Zone without adequate justification.

151. Defendant Township responds that the DEP regulations are not exclusive. *N.J.A.C.* 7:9A–4.3 as reflected in Table 1 sets forth *minimum* separation distances between various components of a septic system and other listed features on a lot. Footnote 2 to *N.J.A.C.* 7:9A–4.3 states that where excessively coarse soils or fractured rock substrata are encountered, the minimum separation distances may be increased by the administrative authority, meaning the local Board of Health. One of defendants' wastewater engineering experts, James Coe, explained that coarse soil involves stones and rocks that are part of the soil matrix. Referring to the definitions section in *N.J.A.C.* 7:9A–2.1, Mr. Coe testified that the soils in Readington are generally clays and loams that include coarse fragments, and that fractured rock lies below the soils. These soil conditions justify the increase in the minimum separation distances set forth in the Readington Township Ordinance.

152. Using D282A, an enlarged copy of Exhibit 8 to his report, Mr. Coe described a hypothetical lot layout for a septic system under the Township Ordinance. The hypothetical was based upon the AR Ordinance (D33) standard in Section 148–15(E)(2)(k) that the building lot have a minimum 65,000 square feet of contiguous usable land. It showed a location for a 3,000 square foot residence, a well, and two septic disposal fields. It also took into account the minimum and separation distance requirements to conform with Ordinance 98–02 and *N.J.A.C.* 7:9A–4.3. Mr. Coe's testimony demonstrated that a 1 ½ acre (65,000 square feet) lot can accommodate a primary and reserve disposal field with the required setbacks.

153. Mr. Coe concurred with the court's calculations that after deducting the square footage applicable to setback and minimum separation distance requirements, about 50,000 square feet or approximately 1 acre is left in a hypotethical proposed lot for two septic disposal fields, a house, and a well.

B. Reserve Field Requirement

154. Plaintiffs also challenge through the testimony of Mr. Higgins the Readington Board of Health requirement that each newly developed lot must have a reserve area where a new septic disposal field could be installed if at some time in the future the approved septic field fails. That requirement (D641, section 11) was also in effect at the time of Wilmark's septic suitability applications. There is no requirement that a reserve disposal field actually be built, only that the site be preserved for future use if necessary. Plaintiffs contend that the reserve field requirement is directly contrary to the DEP's express decision to reject such a requirement. They say that the DEP design standards for septic systems were intended to require a septic field that would operate indefinitely. Furthermore, plaintiffs contend, a disposal field that later fails could be remedied by simply removing the soil and replacing it with select fill.

***39** 155. Plaintiffs argue that the 1990 revisions to the Title 9A codes governing septic systems throughout New Jersey represented a major enhancement as to the standards required for the design and testing of suitability of septic systems. Plaintiffs' expert testified about the legislative record in 1989 and the response of the DEP to comments asking it to require that a reserve area be tested and provided for all new lots. The DEP "disagreed with the comments," stating:

> Substantial increases in the requirements for soil evaluation, design, construction and maintenance will greatly reduce the likelihood of septic system malfunctions and thereby eliminate the primary justifications for requirements of a reserve disposal area. The intent of the standards is to require that septic systems be designed, constructed and maintained indefinitely. To require provision of a reserve disposal area is a means of designing for failure and therefore is in conflict with the intent of the standards.

Plaintiffs' expert testified that, in his opinion, failures of approved septic fields are highly improbable given the enhanced design and testing standards required under the 1990 Code and subsequent amendments.

156. Mr. Higgins observed that the Board compounded the arbitrary and unreasonable reserve area requirement by also requiring that the reserve area be at least 30 feet from the primary area. The DEP allows a test to be within 15 feet of the proposed field. By requiring the 30–feet separation, Readington Township prevented a single test from being used for both the reserve and primary field. The net effect of increasing the amount of testing required for each lot is a significant reduction of the number of lots for which septic system approval can be obtained. In the opinion of Mr. Higgins, the reserve area requirement has no basis or justification.

157. In response, Mr. Coe testified for the defendant Township and its Board of Health that a reserve disposal field is reasonable because the AR District is not in a sewer service area and there is no likelihood there will be sewers in the future based upon the Wastewater Management Plan and the State Plan. The State Plan specifically discourages sewer systems in the Rural Planning Area (PA4), which largely encompasses the AR District. Homes constructed in the AR District must be served by septic systems. A septic disposal field does not have an infinite life. For this reason, it is not unreasonable to anticipate that a replacement disposal field may be needed in the future. Mr. Coe furnished examples where that can occur because of homeowners' neglect, abuse, or failure to maintain. The reserve disposal field requirement is designed to ensure that the value of a home, dependent on septic disposal, is maintained should the primary field fail.

158. Mr. Coe explained that there are at least 6 other municipalities in Hunterdon County that require reserve disposal fields for this very reason, the Borough of High Bridge, and the Townships of Alexandria, East Amwell, Delaware, Tewksbury, and Franklin. He also referenced the United States Environmental Protection Agency (EPA) Design Manual (Attachment 3 to his Supplemental Report, D283), which specifically recommends a reserve disposal field as part of the design of a septic system to cover potential failure of the primary field.

***40** 159. Mr. Coe also pointed out that the DEP comments in 1989 that reserve disposal fields are not necessary were made at a time when there were extensive maintenance and inspection requirements under the regulations, *N.J.A.C.* 7:9A–12.2 through 12.6. Those regulations were deleted in 1993. Consequently, it was Mr. Coe's opinion that because the maintenance and inspection requirements were no longer

available as protection against septic failures, reserve septic disposal fields are an important protective measure.

160. Mr. Coe also pointed out that in Readington the soils are highly variable, as for example, the Lackland property with 11 different soil classifications. Given these circumstances, a reserve disposal field requirement provides a higher level of assurance that a replacement disposal field can be successfully constructed if it becomes necessary.

161. As to repairing a failed primary disposal field by excavating the entire area and importing new soils, Mr. Coe questioned whether that solution was cost-effective as compared to constructing a new septic disposal field in a reserve area. Using the reserve field eliminates the cost of disposal of the failed primary disposal field and also retains its future value. He referred to the EPA Manual which states that over time a primary system will rejuvenate and be reusable.

C. Conclusions

162. Municipal ordinances, including Board of health ordinances, are accorded a presumption of validity. By reason of the importance of the public health and the protection necessary to the residents of the community, the powers of the local Board of health are wide and liberally construed. *Itzen Robertson, Inc. v. Board of Health of the Borough of Oakland,* 89 *N.J.Super.* 374 (Law Div.1965), *aff'd,* 92 *N.J.Super.* 241 (App.Div.1966). The powers vested in a local Board of Health under *N.J.S.A.* 20:3–31 are police powers to be construed liberally and broadly to serve the public health. *Myers v. Township of Cedar Grove,* 66 *N.J. Super* . 530 (App.Div.1961). Here, the more stringent standards in Readington Township's septic Ordinance governing minimum separation distances and reserve disposal areas were grounded in environmental protection concerns given the nature of the severe limitations of septic suitability in soils of Readington Township. *See* D255A and D657.

163. Although the potential lot yield is significantly reduced by the septic ordinance requirements pertaining to setback distances, a reserve area for each lot, and a separation of at least 30 feet between the primary and reserve areas, the experts' testimony establishes that these more stringent requirements are not arbitrary, capricious, or unreasonable. Moreover, the DEP regulations only require that the Board of Health adopt special ordinances that are not less stringent than those regulations. They do not prohibit more stringent requirements if circumstances, such as the severe soil conditions in this case, justify them. *N.J.A.C.* 7:9A–3.1.

***41** 164. For these reasons the increased setback, minimum separation, and the reserve field requirements are not beyond Readington Township's power and authority to impose on new septic systems.

IV. Board of Health's Actions on Plaintiffs' Septic Suitability Applications

A. Unreasonable Delay and Imposing of Unjustified Testing Standards

165. From 1997 to 1999, Andrew Higgins was plaintiff Wilmark's engineer in connection with its efforts to obtain approval from the Readington Township Board of Health ("Board") for septic suitability approvals on 33 potential residential building lots on the Lackland property. At the time, the Readington Township Planning Board checklist required septic suitability approvals by the Readington Township Board of Health before it would consider a development application to be complete. As stated earlier, that requirement was set aside during this litigation by the Order of the Honorable John H. Pursel on February 4, 2000. Relying on the minutes of Board meetings (D651) and information from Wilmark, Mr. Higgins gave a chronological history of the events, meetings, and hearings of the Board during plaintiffs' 20–month effort to obtain septic approvals to demonstrate unreasonable delays and obstructionist tactics of the Board.

1) In March 1997 Wilmark filed an application with the Board for soil test approval on 10 proposed lots, numbered as lots 1,2,5,6,7,8,9,10,11 and 25 as sketched on a preliminary subdivision "sketch plat" of Lot 26.

2) The Board first held hearings on Wilmark's application on May 21, 1997. The Board would review each proposed lot separately.

3) Lot 2 was first presented along with the associated soil logs and permeability tests for the primary and reserve area.

4) At the end of the May 21, 1997 meeting, Board member Julia Allen made a motion to deny the application on lot 2 and all other lots until Wilmark performed additional testing. The motion resulted in a 3–3 tie and no further action on the motion was taken.

5) At the next meeting, on June 11, 1997, additional testimony on lot 2 was taken. Board member Moeller moved for approval of lot 2. The vote was again 3–3. The motion for approval not having received a vote of the majority, it failed.

6) Board member Julia Allen then made a motion to require seasonal high groundwater testing on lot 2 before any further testimony was taken on the application. She referred to section 12 of the Readington Township ordinance, which provides in relevant part: "[T]he administrative authority will require the high seasonal water table level to be monitored where any of the following exists: ... (c) where the Hunterdon County Soil Conservation Map shows ... the soil is rated as having "severe" constraints for septic disposal." (D641, p. 11) Ms. Allen's motion was approved 5–1. Chairman Thompson noted that the Board had never before invoked Section 12 regarding wet season testing. Because of the Board's demand for wet season testing, no further action took place on Wilmark's application for septic suitability approvals in 1997.

***42** 7) In January 1998, Wilmark conducted wet season testing as required by the Board.

8) Wilmark appeared before the Board in March 1998 to ask again for approvals. At the beginning of the March meeting, Julia Allen said that any test data gathered in January 1998 would not be accepted because a drought warning had been in effect in the Delaware River basin. Wilmark's application was not reached at that meeting. Wilmark then requested a special meeting, and the Board agreed. Subsequently, the Board cancelled the special meeting and re-scheduled Wilmark's application for April 15, 1998. No hearing was held on that date either because of a lack of quorum.

9) Wilmark did additional testing in April 1998 to be within the wet season and presumably beyond the drought warning. It submitted the new test results to the Board.

10) On May 20, 1998, twelve months after the initial meeting on Wilmark's application, the Board considered proposed lot 1 for septic suitability. At this hearing, the County Health Department's expert, Robert Vaccarella, and Wilmark's expert engineer, Mr. Higgins, both testified that the lot was suitable for a septic system. No expert testified that the lot was not suitable.

11) In spite of uncontradicted expert testimony that the data showed the proposed lot was suitable, the Board denied approval of lot 1 by a vote of 3–2 on the ground that there was allegedly conflicting information. The alleged conflicting information consisted of Ms. Allen's general recollection without specific testing data regarding a 20–year history of unsuccessful subdivision efforts of the Lackland property. (D651, Bates 185–87)

12) The application on lot 5 proceeded in a similar manner—the County Health Department expert and Mr. Higgins testified that the lot was suitable, and no expert contradicted those opinions. Nevertheless, the Board denied approval of lot 5 by vote of 5–0 on the ground that there was conflicting information. (D651, Bates 187–88)

13) The Board then decided to hire Robert Starcher of Killam Associates, an expert hydrogeologist, to review the remaining proposed lots.

14) Another hearing on lots 1 and 5 was held on September 2, 1998.

15) The Board's expert, Mr. Starcher, questioned the location of certain tests and certain setbacks to streams and wetlands. Mr. Starcher also conducted another review of the data submitted including the soil logs and permeability tests. The meeting was continued to allow the surveyor to appear as well as enable Mr. Starcher to review further and to familiarize himself with the property and applications.

16) At the September 16, 1998 continuation hearing, Wilmark presented the testimony of a licensed surveyor regarding the location of the soil logs and permeability tests.

17) Without any additional testing or data besides that available at the May 1998 meeting, the Board finally gave its approval for proposed building lots 1 & 5 on September 16, 1998. Thus, the Board had considered and finally approved 2 out of 33 proposed lots for septic suitability 18 months after the original filing of Wilmark's application.

***43** 18) Effective as of October 1998, Readington Township amended its ordinance regarding wet season testing. The new ordinance required standpipes to be installed in soil test pits and readings taken over a 3–day period to be witnessed by the Board. The previous

ordinance allowed readings to be taken in open pits after 24 hours. (D392)

19) Wilmark continued with approval hearings for lots 6,7,8,9 & 11 on November 18, 1998.

20) A long discussion between the Board and Mr. Starcher ensued pertaining to the various soil logs as to lot 6. These logs had previously been reviewed by the Hunterdon County Health Department and found acceptable.

21) Mr. Starcher indicated that another test would be required for this lot called a hydraulic head test to confirm whether the site did or did not have an artesian condition.[2] Hydraulic head tests require the installation of piezometers and can only be conducted in the January to April wet season as defined by NJ State code.

[2] The term "artesian condition" is explained at length in the section of this decision pertaining to hydraulic head testing.

22) The Hunterdon County Health Department had reviewed the data submitted and concluded that sufficient information existed to rule out an artesian condition.

23) Once again, the Readington Board required another test before the application could move forward. Hence, approval was denied pending a hydraulic head test.

24) Hearings on additional lots were held over to the next meeting, scheduled for December 16, 1998.

25) At the December 16, 1998 meeting, the Board asked Mr. Starcher to prepare a written report on the Wilmark application for consideration at the next meeting, scheduled for January 20, 1999.

26) At the January 20, 1999 meeting, proposed lot 7 was considered. After a brief discussion, lot 7 was also denied approval until a hydraulic head test was performed to rule out an artesian condition.

27) The Hunterdon County Health Department expert was questioned about determining whether a site was artesian and said that if wet season soil logs show one foot of separation between the water table measurement and the hydraulically restrictive horizon, the site is not considered artesian. He said that this criterion is used throughout the county.

28). The Board imposed the same requirement as to hydraulic head testing with respect to proposed building lots 8 and 11.

29) The Board allowed no wet season testing in January 1999 because of allegedly another drought. Once again, the Board shortened wet season testing from 4 months to 3 months.

30) The Board did not hear Wilmark's application again until February 17, 1999. At this meeting, the discussion continued on lots 6,7,8,9 & 11 as to the requirement for hydraulic head tests.

31) Wilmark's expert engineer, Mr. Higgins, presented standpipe groundwater data showing the separation distance between the water levels and the hydraulically restrictive zones on the site. He testified that the results showed the lots presented did not have an artesian condition.

32) This conclusion was accepted and agreed to by the Hunterdon County Health Department expert and eventually by the Board's own expert, Mr. Starcher.

***44** 33) In spite of this uncontradicted expert opinion from three experts, the Board in the form of a resolution denied the application for lots 6,7,8,9 & 11 and also required hydraulic head tests to be performed.

34) Wilmark did not proceed with any further testing and instead pursued this lawsuit, which it filed on February 4, 1999.

166. Mr. Higgins concluded that the Board had a strategy of delay and constantly changing standards, which both unduly and unnecessarily lengthened the approval process and reduced the number of approvable lots. He testified that the Board's requests for new information and changes in the septic ordinances made it unreasonably difficult for a property owner to obtain septic suitability approval as a preliminary step in filing a site plan application. He explained how the Board repeatedly raised old test data and results to challenge the applications then pending before it. He described the Board actions as constantly changing the approval process and standards, as well as its rules and requirements. Plaintiffs contend that these actions of the Board violated their due process rights to obtain approvals for the use of their land.

167. Defendant Board responds that a searching examination of the record before the Board concerning the Wilmark septic suitability applications demonstrates that the Board did not act in an arbitrary, capricious or unreasonable manner. Defendants rely on the following chronology of events and the Board's justifications for the demands it placed on Wilmark:

1) Wilmark filed its applications with the Board on March 26, 1997. (D429). The applications did not include maps and other submissions required under *N.J.A.C.* 7:9A–3.5(c)(2), *N.J.A.C.* 7:9A–3.18 (c), and *N.J.A.C.* 7:9A–6.1(i). The map later submitted by Wilmark on April 16, 1997 (D615), prepared by Thomas Olenik of Semester Consultants, did not disclose all septic suitability testing required by *N.J.A.C.* 7:9A–6.1(i). Septic testing shown in a map prepared by Mr. Olenik in September 1991 revised to April 3, 1992 (D501) was not disclosed in the map submitted on April 16, 1997 (D615). Wilmark's nondisclosure violated *N.J.A.C.* 7:9A–6.1(i). Furthermore, the map submitted to the Board on April 16, 1997 (D615) also did not include required submissions under *N.J.A.C.* 7:9A–3.18. It did not show the location of all stream encroachment boundaries required by *N.J.A.C.* 7:9A–3.18(c)(8), wetlands transition areas required by *N.J.A.C.* 7:9A–3.18(c)(9), and location of all soil profile pits, soil borings, permeability or percolation tests required by *N.J.A.C.* 7:9A–3.18(c)(10).

2) The request for seasonal high water testing at the May 21, 1997 Board meeting was justified. At trial all of the experts agreed that the Lackland property included Klinesville and Reaville soils, rated as severe under the Hunterdon County Soil Survey (D99). Section 12(c) of the 1995 Readington Township Ordinance (D641) requires that where severe soils are present, as shown on the Hunterdon County Soil Survey, seasonal high water (wet season) testing be done. The wet season is defined under *N.J.A.C.* 7:9A–5 .8 and the 1995 Ordinance (Section 12) (D641) as January 1 through April 30. The purpose of wet season testing is to ensure an accurate determination of the high water table and zone of saturation. Given the severe soils present on the Lackland property, the absence of wet season testing was a legitimate matter of concern at the May 21, 1997 Board meeting.

***45** 3) On June 11, 1997, the Board adopted a motion to invoke Section 12 of the 1995 Ordinance requiring wet season testing by Wilmark. The fact that Wilmark had to wait until the next wet season beginning January 1, 1998 to do this testing was not owing to conduct by the Township or its Board. Had Wilmark complied with the wet season testing requirement prior to its March 1997 submissions, its applications could have been heard in 1997.

4) Although Mr. Hartman contended that the wet season testing done in January 1998 was rejected by the Board in March 1998, nothing in the Board minutes supports that assertion. Resolutions adopted by the Board on September 16, 1998 and June 29, 1999 show, in fact, the January wet season testing was included. (D651) Mr. Higgins acknowledged in his supplemental report (D98, p. 9), that there was no suspension of wet season testing by the Township or State in 1998.

5) The Board next met on the Wilmark applications on May 20, 1998. The minutes reflect that concern was expressed about conflicting data in the soil logs submitted by Wilmark, raising questions about their reliability and, in particular, the location of the high water table. Because of the conflicting data, the Board decided to hold a special meeting on June 10, 1998 and hire a hydrogeologist, Mr. Starcher. Instead of proceeding with the June 10, 1998 special meeting, Wilmark filed suit against the Board on July 2, 1998 challenging its actions at the May 20, 1998 meeting. Wilmark did nothing to pursue its applications before the Board during that lawsuit. That suit was later voluntarily dismissed by Wilmark because of its failure to exhaust its administrative remedy to prosecute an appeal before the Board. The appeal was not pursued until September 1998.

6) In the interim, Mr. Starcher submitted reports to the Board in letters dated July 29, 1998 (D653) and August 26, 1998 (D654). In his August report, Mr. Starcher raised concerns about the accuracy of Wilmark's survey and related septic suitability issues.

7) At the September 2, 1998 Board meeting, Mr. Starcher reviewed the survey and septic suitability issues. Wilmark agreed to make changes and have its surveyor appear at the next meeting on September 16, 1998 to explain the revisions.

8) At the September 16, 1998 meeting, Wilmark and its surveyor agreed to changes with respect to lots 1 and 5 to conform with Mr. Starcher's reports and observations. The Board adopted a resolution approving lots 1 and 5, even though the testing results were considered marginal, as reflected in the Board's resolution. (D651, Sept 18, 1998, pp. 9–15).

9) On October 28, 1998, the Board hired Mr. Starcher to review 12 additional proposed lots by Wilmark. At the November 18, 1998 Board meeting, Mr. Starcher expressed concern about a potential artesian condition on lot 6, which would prohibit Board approval under *N.J.A.C.* 7:9A–5.8(f). Mr. Starcher told the Board a hydraulic head test would determine whether or not an artesian condition was present. The Board moved to require the test, as mandated by *N.J.A.C.* 7:9A:5.8(g).

***46** 10) The Board next met on Wilmark's applications on December 16, 1998. Wilmark's attorney objected to proceeding because he wanted a written report from Mr. Starcher even though Mr. Starcher was present to give testimony. As a result, Mr. Starcher prepared a written report dated January 13, 1999 (D655). In that report, he found artesian conditions on lots 6, 7 and 8, and a regional zone of saturation within 24 inches of the surface on lot 9, all of which evidenced conditions that were unacceptable for septic approval under *N.J.A.C.* 7:9A.

11) At the January 20, 1999 Board meeting, Mr. Starcher's January 13, 1999 report was presented. There was discussion concerning proposed lots 7, 8, 9, 10 and 11, and continued concern expressed over the presence of artesian conditions. The Board moved to require Wilmark to do hydraulic head testing to address those issues. Wilmark's consultant, Mr. Higgins, insisted a standpipe test in lieu of a hydraulic head test was sufficient to prove or disprove an artesian condition.

12) The Board again met on the Wilmark applications on February 17, 1999. At that meeting Mr. Higgins conceded that although a hydraulic head test is required by *N.J.A.C.* 7:9A–5.8 and 5.9 to prove or disprove an artesian condition, it was his opinion that a standpipe test would suffice. He insisted the Board accept standpipe testing.

13) On March 17, 1999, Wilmark requested a special meeting of the Board to appeal the Board's position on hydraulic head testing with respect to the above lots. The meeting was scheduled for May 5, 1999. At that meeting, Mr. Higgins continued to assert that standpipe tests would prove or disprove an artesian condition.

14) The Board again met on Wilmark's applications on June 29, 1999. This was a continuation of the appeal hearing. At that hearing, the Board reaffirmed that hydraulic head testing was necessary to confirm or deny artesian conditions on proposed lots 6, 7, 8, 9 and 11, and determined that applications for those lots would be denied until such testing was performed.

168. Based on this version of the proceedings before the Board, defendants argue that the proceedings were not arbitrary, capricious, and unreasonable, but that Wilmark simply did not comply with *N.J.A.C.* 7:9A and the 1995 Readington Township septic Ordinance.

169. The issue of whether hydraulic head testing was appropriately required to test for artesian condition will be addressed separately.

170. The remainder of the two versions of the facts recited above show that the Board's conduct may have been supported by strict adherence to State regulations and Township ordinances, but nevertheless the Board set out to delay approvals and to impose obstacles upon Wilmark's development efforts. While a Board of Health acts within its authority when it insists on compliance with regulations, in two respects the Board's actions in this case were capricious and unreasonable, especially as manifested by the *de facto* leadership of Board member Julia Allen. Ms. Allen led the effort to derail Wilmark's septic suitability applications by imposing progressively more stringent requirements and acting personally as an advocate instead of an independent and impartial decision maker.

***47** 171. First, Ms. Allen moved to require wet season testing, under Section 12(c) of the Readington Township Board of Health Ordinance. According to its Chairman, the Board had not imposed such a requirement in the past. When Wilmark conducted tests in January 1998, Ms. Allen said informally at the March 1998 meeting that the tests would not be acceptable because of an alleged drought condition. Ms. Allen's testimony at trial that she did not recall rejecting the January 1998 test results is not credible. In an earlier certification in this case, dated December 15, 1999, she made the same statement regarding a drought condition in January 1998 invalidating test results. She certified at that time, “Test

data from January 1998 was rejected because the low ground water levels in the test results were considered unreliable owing to abnormal climactic conditions in that month (a drought).” D365B, p. 16, par.23. There was no drought, however, in January 1998. An excerpt from a DEP Water Resources Data report for Water Year 1998 (D104) contains the following:

> Water year 1998 was a year of contrasts. The water year began and ended with below-normal precipitation and streamflow, but as a result of much greater than normal precipitation during the middle six months of the year, the yearly average for precipitation was greater than normal.
>
> On October 27 [1997], the Delaware River Basin Commission (DRBC) issued a declaration of drought warning....
>
> By January 13 [1998], above-normal precipitation, snowmelt, and water-use restrictions caused reservoir levels to increase sufficiently for the drought warning to be lifted. Precipitation during January through June was much greater than normal....

Consequently, Ms. Allen and the Board had no factual basis for rejecting January 1998 testing because of alleged drought conditions. Ms. Allen's trial testimony lacked credibility in some other respects, such as when she denied the meaning and intent of certain portions of her covertly recorded conversations with the undercover investigators. Mr. Hartman's testimony that an alleged drought condition was used as an excuse to require additional testing is more credible than Ms. Allen's denial and the absence of such a record in the minutes of the Board meeting of March 1998.

172. In addition, although the Township Ordinance refers in section 12 to “significant departure from normal climactic conditions” (D641,p.12), the applicable regulations appear to give the DEP, not municipal Boards of Health, authority to extend or shorten the “wet season.” *See N.J.A.C.* 7:9A–5.8(b)(2)(i) (“Whenever *the Department* determines that there has been a significant departure from normal climactic conditions *the Department* may, with due notice to the administrative authority, lengthen or shorten the period allowed ....”)(italics added); *N.J .A.C.* 7:9A–5.8(f)(3)(same). Defendants have not shown what authority the Board itself had, without DEP action, to deviate from the designation of the “wet season” contained in the Code. N.J.A .C. 7:9A–5.8.

***48** 173. All of these facts lead to the conclusion that Ms. Allen took it upon herself to reject informally Wilmark's January 1998 test results on the basis of faulty information and without legal authority.

174. Next, in the spring of 1998 after Wilmark conducted additional wet season tests, Ms. Allen found fault for yet new reasons. Ms. Allen had been a member of the Board in earlier years and recalled that the Lackland brothers or others had made unsuccessful application for septic approvals on the Lackland property in the past. According to her own testimony, she searched Board records for old maps or septic suitability tests and determined that some of the perc test sites contained in Wilmark's 1998 application were the same sites as previous unsuccessful tests from about 1991 or earlier. She knew generally of difficulties throughout the years in obtaining successful permeability tests on the Lackland property. She referred to a 20–year history of unsuccessful subdivision efforts as creating “conflicting information” that would justify rejection of test results that even Hunterdon County officials found satisfactory. At one point, she brought up a 1981 report of alleged septic failure on neighboring properties. This last topic was so outdated that the Chairman of the Board rejected its consideration. In Ms. Allen's opinion, however, any previous unsuccessful test automatically disqualified that particular site from septic approval at any time in the future.

175. Ms. Allen testified that the test results that failed under pre–1990 procedures would be relevant to post–1990 testing even though the procedures for testing before 1990 differed from those procedures required after 1990 amendments to Title 9A were adopted. Specifically, a “pit bale” test was not permitted before 1990 but allowed after 1990. After 1990, if an applicant hit water while digging a test pit, the applicant had the option of conducting a “pit bale” test. Encountering water did not automatically fail that test location after 1990. Despite the availability of a “pit bale” test to reverse failing test results, Ms. Allen said that it was not possible to have tests that both pass and fail in the same location regardless of whether the failed test was pre–1990 and whether alternative designs and procedures could now be utilized. In Ms. Allen's opinion, both tests were to determine permeability and the site was either permeable or not permeable. In response to this court's question, Ms. Allen said that if a site failed a test at any time in the past, it could never get a passing test again. She could not cite or reference any specific authority in support of this rigid opinion.

176. Ms. Allen's conclusion that an unsuccessful perc test forever disqualifies that site from septic approval has no support in the law, either under DEP regulations or any decisional law that has been brought to the court's attention.

177. Ms. Allen testified that the earlier test data were on file in the municipal building. She conducted an investigation and used information that she gathered herself to conclude that Wilmark's current test results were in conflict with earlier tests. More problematic, she relied on her general knowledge of prior testing without specific data to contradict the evidence presented to the Board on Wilmark's current applications. From this information, she concluded in May 1998 that the septic applications for lots 1 and 5 should be rejected because of "conflicting information."

***49** 178. Ms. Allen's zeal for preservation of open space overcame her objectivity and impartiality. Although undertaking careful investigation and relying on knowledge of local conditions is usually within the appropriate duties of a municipal official, Ms. Allen's conduct displayed partiality based on her personal preference for preserving others' property as open space. Her bias and true motivations are revealed on the covertly recorded tapes. She effectively admitted that she sought to obstruct Wilmark's septic suitability applications for the Lackland property, and she also exposed her inclination to treat quite differently a potential property owner who had stated objectives similar to her own for that property. During a May 8, 2001 secretly recorded meeting with the undercover investigators, Ms. Allen said that she used her powers on the Board to "slow the thing down," referring to Wilmark's septic suitability applications. Part of the conversation was as follows:

> MS. ALLEN: And then the other thing you would want to know about this land and the reason why—one of the reasons we're in court is that it supposedly doesn't perc.
>
> MALE: Perc?
>
> MS. ALLEN: Now before any of these houses go in you have to get a soil test that shows that you can run a septic system in that soil, okay.
>
> MALE: Yes.
>
> MS. ALLEN: Now, I spent years on the Board of Health that approved these septic systems and as a member of the Board of Health, I was not passing these, but I do know that—you know, that cannot be why ... that if that land, you know, fully litigated were able to sprout houses with the best of them, do you follow me?
>
> MALE: It could sprout houses with the best of them because—
>
> FEMALE: So, basically, then you had the power at the time to make it, you know, that they couldn't.
>
> MS. ALLEN: I slowed the thing down, you know.
>
> FEMALE: Oh, well, that's what I was trying to get to with you before is like how—I couldn't understand.
>
> MS. ALLEN: So, the big secret about that land, and the reason it's open and the rest of the land around it is because underneath the soil there is shallow bedrock.
>
> MALE: Yeah
>
> MS. ALLEN: And that makes it more difficult to run a septic system.
>
> * * * *
>
> MALE: It's not impossible?
>
> MS. ALLEN: Absolutely not impossible.
>
> FEMALE: But that slows him down doesn't it?
>
> MS. ALLEN: It slowed him down and he's going to deal with it, but I tell you what I'm on the other side of it and I know the analysis as well as, the engineers do, just because when you're fighting something, you learn it real quick and real well.
>
> MALE: Right.
>
> MS. ALLEN: And I know—and I told—this never goes any farther than here, but that place would sprout houses there's no question.
>
> * * * *
>
> MS. ALLEN: Don't tell him [Hartman] it would sprout houses.

P99, Exh.G, pp. 71–73. This conversation shows that Ms. Allen viewed herself as an opponent of the Wilmark application rather than as an impartial member of the Board of Health that was to rule fairly upon the application.

***50** 179. At an October 4, 2001 meeting with the undercover investigators, Ms. Allen reassured them that they would have

no problems getting septic approvals from the Board for one or two houses on the tract:

> MS. ALLEN: Oh, I think -I think—oh absolutely. There's no doubt in my mind that you're going to have success, that I'm going to come up with a good answer. But I want to be able to back up my answer with ...”
>
> * * * *
>
> MS. ALLEN: I don't think you'll have any problems. I don't think you'll have any problem. There's—there's no doubt in my mind you won't have a problem. My—all I'm struggling is, is what form the insurance would take. Do you follow me? Knowing that Bunny and my son are on the Board of Health.

P100, Exh.L, pp. 44, 54–55. In her conversations with the undercover investigators, Ms. Allen expressed confidence about their ability to obtain approval for septic systems because, unlike Wilmark, the investigators were posing as a couple who wanted to preserve most of the open space on the property and would build only one or two houses for their own use. With respect to Wilmark's septic suitability applications, however, Ms. Allen had undertaken personal investigative efforts to find “conflicting” historical information in stored records of the Board. In contrast to her efforts to find fault with Wilmark's applications, she offered the undercover investigators copies of similar Board records and expert reports to assist them with their future septic suitability applications. P100, Exh.L, pp. 40–50. When confronted at trial with her statements on tape that the undercover couple would get the approvals accomplished through “Bunny,” that is, Board member Beatrice Muir, and that her own son was now sitting on the Board, Ms. Allen claimed that she was being “facetious.” Even if that is true, the tone and tenor of the conversation reflected Ms. Allen's desire to facilitate the purchase of the property by these potential buyers through assurances of favorable results before the Board of Health.

180. The taped conversations show that Ms. Allen did not treat applicants equally and impartially. Potential buyers of the Lackland property who shared her agenda for open space were assured of getting septic approvals and were offered her personal assistance from the Board's records. On the other hand, a developer, Mr. Hartman, was “slowed ... down” and subjected to Ms. Allen's personal investigative efforts in opposition to his applications. As a member of the Board, or one purporting to exercise influence through “Bunny” Muir or her son, Ms. Allen viewed herself as “on the other side of” developers such as Mr. Hartman and Wilmark. She was “fighting” their applications rather than evaluating them impartially.

181. Not only did Ms. Allen impose her own incorrect interpretation on the law regarding prior failed perc tests, but she became investigator and objector without relinquishing her position as one of the decision-makers on the Board. Three qualified witnesses had testified without being refuted that particular building lots were suitable for septic systems. Rather than evaluating that testimony, Ms. Allen found alleged “conflicting information” in the Board's historical files and her own memory without giving the applicant an opportunity to challenge the relevance of that information. If Ms. Allen wished to be an objector and an advocate against Wilmark's application, she should have disqualified herself from the matter as a member of the Board. Local government officials who are given the responsibility of deciding applications and issues should not accept that role if they cannot be impartial. *See* N.J.S.A. 40A:9–22.5(d) (“No local government officer ... shall act in his official capacity in any matter where he ... has a direct or indirect ... personal involvement that might reasonably be expected to impair his objectivity or independence of judgment.”) Ms. Allen was not impartial and objective in her judgment on Wilmark's applications. A public official who plays favorites with property owners according to her own preferences and agenda should not sit on an adjudicative body such as a Board of Health. *See* Rivkin v. Dover Township Rent Leveling Board, 143 *N.J.* 352, 372 (1996).

***51** 182. Ms. Allen's conduct led to delays in considering Wilmark's application, the extra burden and expense of further testing without justification, and eventually the Board's rejection of two lots in May 1998 on the ground that there was conflicting information. Ms. Allen's biased conduct as a member of the Board of Health, and the Board's acceptance and adoption of her advocacy, was arbitrary, capricious, and unreasonable.

B. Hydraulic Head Testing

183. Plaintiffs challenge the Board's insistence on hydraulic head testing to disprove so-called “artesian” conditions on portions of the Lackland property. An artesian condition of the soil prevents septic suitability approval.

184. *N.J.A.C.* 7:9A–2.1 (D362) contains definitions of certain relevant terms, used throughout the Code as they pertain to septic systems and an artesian condition of the soil:

"Artesian zone of saturation" means a zone of saturation which exists immediately below a hydraulically restrictive horizon, and which has an upper surface which is at a pressure greater than atmospheric, either seasonally or throughout the year.

"Zone of saturation" means a layer within or below the soil profile which is saturated with ground water either seasonally or throughout the year.

"Hydraulically restrictive horizon" means a horizon within the soil profile which slows or prevents the downward or lateral movement of water and which is underlain by permeable soil horizons or substrata. Any soil horizon which has a saturated permeability less than 0.2 inch per hour or a percolation rate slower than 60 minutes per inch is hydraulically restrictive.

185. One of defendants' experts on soil conditions and septic suitability, Paul Ferriero, explained in laymen's language the term "artesian zone of saturation" as defined in the regulations. He likened an artesian condition to a water balloon. The water in the balloon is constrained by the balloon's rubber surface, which represents a "hydraulically restrictive horizon." Popping a hole in the balloon would make the water come out because its pressure is greater than the atmosphere. An artesian zone of saturation, then, is essentially pressurized water under a hydraulically restrictive horizon. If testing locates an artesian condition, that location is unsuitable for septic installation because the septic system would, in effect, "pop the balloon" and the intrusion of water under pressure would prevent proper drainage in the disposable field.

186. In arguing for or against the necessity of hydraulic head testing, which is described in N.J.A.C. 7:9A–5.9, plaintiffs and defendants refer to separate sections of the Code. *See* D362. Plaintiffs rely on *N.J.A.C.* 7:9A–5.8(c) as establishing criteria for recognizing zones of saturation, and under the above definitions, an artesian condition. That section provides:

(c) When a hydraulically restrictive horizon, a hydraulically restrictive substratum, or a massive rock substratum is *not present throughout* or immediately below the zone of saturation, the zone of saturation shall be considered a regional zone of saturation. (italics added)

***52** Definitions for additional relevant terms used in that section from N.J.A.C. 7:9A–2.1 are:

"Hydraulically restrictive substratum" means a substratum below the soil profile which slows or prevents the downward or lateral movement of water and which extends beyond the depth of profile pits or borings or to a massive substratum. A substratum which has a saturated permeability less than 0.2 inch per hour or a percolation rate slower than 60 minutes per inch is hydraulically restrictive.

"Regional zone of saturation" means a zone of saturation which extends vertically without interruption below the depth of soil borings and profile pits.

Plaintiffs argue essentially and in great detail that their evidence before the Board proved that a hydraulically restrictive horizon or substratum was *not present throughout* the site of the proposed septic disposal fields for which soil tests were presented. Therefore, only a "regional zone of saturation" existed and that condition does not establish an artesian condition.

187. Defendant Board of Health relies on other provisions of the Administrative Code for identification of, and restrictions upon, land with an artesian condition. Pertinent portions of *N.J.A.C.* 7:9A–5.8(f) provide:

(f) Any zone of saturation which is present below a hydraulically restrictive horizon shall be considered an artesian zone of saturation whenever any of the following conditions are met:

* * * *

3. An unsaturated zone of substantial thickness and continuity is not observed below the hydraulically restrictive horizon. To prove the absence of an artesian condition, the unsaturated zone must be free of mottling and have a chroma of four or higher. When this determination is made during the months of January through April inclusive, the unsaturated zone must be a minimum of one foot in thickness. At times of the year other than January through April inclusive, the unsaturated zone must be a minimum of four feet in thickness .....

* * * *

(g) When any of the conditions in (f) above are met, the administrative authority [Board] *shall not approve* the removal of the hydraulically restrictive horizon for the purpose of installing a soil replacement disposal field *unless* it is determined by means of *a hydraulic head test,* as prescribed in N .J.A.C. 7:9A–5.9, that an artesian zone

> of saturation is absent below the hydraulically restrictive horizon. [italics added]

Defendant Board argues that the criteria for an artesian condition existed on several proposed building lots presented by Wilmark and, therefore, the Board was only following the requirements of the Code subsection (g) above when it insisted that hydraulic head tests be performed to disprove artesian conditions.

188. Plaintiffs' expert, Mr. Higgins, described the information in soil logs and acknowledged that some of the logs revealed that soil was encountered that was classified as a hydraulically restrictive horizon for that area. But Mr. Higgins also testified that the soil logs did not indicate that a uniform and continuous hydraulically restrictive horizon was "present throughout" the area. Therefore, in his opinion, there was no artesian condition pursuant to § 5.8(c). As a result, plaintiffs disputed that a hydraulic head test had to be conducted. They sought to disprove the existence of an artesian condition through the use of a so-called standpipe.

***53** 189. Mr. Higgins explained the difference between a standpipe and a hydraulic head test, which uses a piezometer. The essential difference relates to the installation of the pipe and its construction. Both measure depth to groundwater. The standpipe is constructed by inserting a perforated pipe in the soil test pit and back-filling the hole. A piezometer is constructed by placing a perforated pipe in a borehole usually constructed with a drilling rig. A seal is constructed across the hydraulically restrictive horizon to prevent perched water (water perched above the hydraulically restrictive horizon) from entering the lower water table. Hydraulic head tests are more costly and difficult to perform than standpipes.

190. Plaintiffs contend that the Board's hydrogeological expert, Mr. Starcher, agreed with the opinion of Mr. Higgins. The minutes of the February 17, 1999 Board meeting state:

> Mr. Starcher said that the strongest argument that Mr. Higgins has used is that the hydraulically restrictive horizon is not found in all the soil logs even though they are in a close proximity to one another. That would be a good indication that even if the water level did rise up to 24 inches, it would not be an artesian condition. The reason is because all there are is discontinuous pockets of clay, which by themselves would not create an artesian condition.

D651, Bates 371. Furthermore, the resolution denying lots 6,7,8,9 & 11 dated June 29, 1999 stated:

> The Board's hydrogeologist, Mr. Robert Starcher, testified at the same meeting that the standpipe testing conducted would suffice (to rule out artesian formations), that he did not believe that the hydraulic head test was required, and that the discontinuity of the hydraulically restrictive horizons on these lots was indicative of pockets of clay and that there was a good indication that even if the water levels rose up to 24 inches, it would be indicative of the regional groundwater, and not an artesian condition.

D651, Bates 437.

191. Plaintiffs argue that under the Code, a hydraulic head test may only be required to disprove an artesian condition if two circumstances are met: (1) a continuous hydraulically restrictive horizon, meaning that it exists throughout the site; and (2) the water underneath the continuous hydraulically restrictive horizon is trapped under pressure forcing it up through that horizon. In the case of the Wilmark site, the hydraulically restrictive horizon is not continuous.

192. Mr. Higgins testified that the Hunterdon County Health Department agreed with his interpretation of the Code. He also testified that Mr. Starcher eventually came to accept his interpretation. In spite of all three experts agreeing, however, the Board still denied Wilmark's applications for the other lots 6,7,8,9 & 11 on the ground that hydraulic head tests were required to disprove the presence of an artesian condition.

193. Plaintiffs also contend that the Board did not impose the same requirements for hydraulic head testing on other applicants and developers. They argue that the refusal of the Board, led by Ms. Allen, to follow the interpretation of the Code used by other authorities shows the arbitrary and unreasonable position the Board took, in addition to the arbitrary and inconsistent manner in which the Board applied its self-serving interpretation only as against the Lackland property and no others. They argue that it was arbitrary and capricious for the Board to deny the applications of Wilmark in the face of unrebutted expert testimony. It was also arbitrary and capricious for the Board to require Wilmark to conduct hydraulic head tests when the unrebutted expert testimony of three experts, Mr. Higgins, Mr. Starcher and the County Health Department, opined that such was unnecessary. *See* *Cell South of New Jersey, Inc. v. Zoning Bd. of Adj. of West Windsor Tp.*, 172 *N.J.* 75, 87–88 (2002) (denial of an application was arbitrary where it relied only upon lay testimony and ignored expert testimony); *New York SMSA v. Board of Adj. of Tp. of Weehawken*, 370 *N.J.Super.* 319, 337–38 (App.Div.2004) (same).

***54** 194. Defendants respond that the Board did not act in an arbitrary, capricious or unreasonable manner in requiring hydraulic head testing. Rather, the Board was enforcing the mandate of N.J.A .C. 7:9A–5.8 quoted earlier. Mr. Ferriero explained various groundwater conditions, i.e. perched, regional and artesian. He said that a "perched condition" is a situation where groundwater sits on top of a hydraulically restrictive horizon. He gave as an example, if water is poured on a desk, it would not go below the desk top and said that is analogous to a perched water table. He explained that where perched ground shallower than 24 inches is shown to exist, there is a septic system design solution to address that situation. He emphasized, however, that *N.J.A.C.* 7:9A contains very specific parameters for the identification of various groundwater conditions. Referencing *N.J.A.C.* 7:9A–5.8 and 5.9, Mr. Ferriero testified that when data exists raising questions whether the zone of saturation is regional, perched, or artesian, *N.J.A.C.* 7:9A–5.8 mandates that the administrative authority, here, the Board, shall require a hydraulic head test to be performed.

195. Mr. Ferriero explained that when a hydraulic head test is performed, it includes two piezometers. One piezometer is shallow and sealed and is above the hydraulically restrictive horizon. The other piezometer is deep and pierces through the hydraulically restrictive horizon. The hydraulic head test measures the water levels in these two piezometers. If the shallow piezometer has water in it and the deep piezometer is dry, then a perched water condition exists, which means, through certain design parameters, a septic system can be designed for that location and the site may be acceptable. A standpipe test cannot make this determination.

196. Mr. Ferriero said that a standpipe is a perforated piece of PVC which is placed vertically in the ground in an excavation done for a soil log. The excavation is back-filled, either with clean stone or sometimes material excavated out of the soil log. The difference between a hydraulic head test and a standpipe test is that a standpipe is more informational than definitive because the standpipe is not sealed off, and one cannot necessarily tell whether the water in the test hole is surface water going down or groundwater coming up. The purpose of the seal on the hydraulic head test is to differentiate between the two. A hydraulic head test must be used to confirm or negate the presence of a perched condition. The Board was correct in requiring a hydraulic head test to make that determination. A standpipe test cannot confirm with certainty the presence or absence of a perched condition.

197. *N.J.A.C.* 7:9A–5.8 mandates that a hydraulic head test be utilized to confirm the presence or absence of an artesian zone of saturation. If water is found in both the shallow and deep piezometers, it evidences an artesian condition. Referencing *N.J.A .C.* 7:9A–5.8(d), Mr. Ferriero said that if there is doubt as to the type of zone of saturation, the hydraulic head test may be required to determine whether it is perched, regional, or artesian. That section provides in part: "When doubt exists as to whether the zone of saturation is regional or perched, ... the administrative authority may require a hydraulic head test to be performed...." D362. Mr. Ferriero explained that there is no provision in *N.J.A.C* . 7:9A that permits the use of a standpipe test to confirm the presence or absence of an artesian zone of saturation, and that a standpipe test will not conclusively demonstrate the presence or absence of such a condition.

***55** 198. Mr. Ferriero identified data in the Wilmark's soil logs (D429, D430, and D431) that revealed the presence of potential artesian conditions. Mr. Ferriero referenced *N.J.A.C.* 7:9A–5.7(a)(2), which states that any soil horizons or substratum possessing a clay, silty clay, or silty clay loam texture, as defined in the U.S.D.A. system of classification, shall be considered hydraulically restrictive. He explained that if the soil log evidences the above, by definition it is hydraulically restrictive. When any of the conditions identified in *N.J.A.C.* 7:9A–5.8(f) quoted earlier are met, a hydraulic head test is required to prove the absence of an artesian zone of saturation.

199. Based on this conflicting testimony of the experts, this court concludes that the Board did not act arbitrarily, capriciously, or unreasonably in requiring hydraulic head testing for Wilmark's septic suitability applications. *N.J.A.C.* 7:9A–5.8(g) requires such testing when any of the conditions described in subsection (f) are present. Those conditions are not stated as plaintiffs' expert, Mr. Higgins, determined, that is, both a continuous hydraulically restrictive horizon and a showing that the water at that site is under pressure. In fact, subsection (f)1 and (f)2 in the same part of the Code, which are themselves not applicable or referenced in this case, describe conditions more generally, including at adjacent or higher elevation areas in relation to the tested site. It appears, therefore, that the conditions in subsection (f) may be present on a particular tract without a showing that every soil log on the property contains those same conditions. If that is so, then hydraulic head testing is required by subsection (g) even without a showing of a continuous hydraulically restrictive horizon with water under pressure. Consequently,

the Board did not err in reading the regulation as requiring hydraulic head testing for the Lackland property. It also did not act arbitrarily, capriciously, and unreasonably in declining to follow the recommendations of experts that standpipe tests would be sufficient.

200. By reaching this conclusion, this court is not deciding that the Board must always require hydraulic head testing. As long as the requirements of the Code are applied equally and uniformly to all applicants, the Board has discretion to interpret data according to expert evidence presented and to require or not require hydraulic head testing. The only decision made here is that the Board was within its rights in demanding hydraulic head testing by Wilmark given the evidence from the existing soil logs as to soil conditions on the Lackland property.

201. Finally, plaintiffs' highly technical argument about the adequacy of the less-costly standpipe testing to determine artesian conditions is better made to the rulemaking body, the DEP. A court is not in a position to disregard a particular regulation because an individual litigant can show that it is not necessary. As long as the regulation and its implementation are not arbitrary, capricious, or unreasonable, the court must enforce them.

C. Time–of–Decision Rule

***56** 202. Wilmark's septic suitability applications, filed in March 1997, were governed by the 1995 septic Ordinance (D641). Board of Health Ordinance 98–02 (D397) did not become effective until October 9, 1998. It included a grandfather provision in Section 12 which covered submitted applications for up to one year after October 9, 1998.

203. The general rule in land use cases governing "time of decision" states the last municipal enactment controls. *See* *Manalapan Realty v. Township Committee,* 140 *N.J.* 366, 379 (1995). In *Burcam Corp. v. Planning Board Township of Medford,* 168 *N.J.Super.* 508, 512 (App.Div.1979), the Court explained the time of decision rule as follows:

> In the area of land use, a municipality may change its regulating ordinances after an application has been filed and even after a building permit has been issued and, as long as the applicant has not substantially relied upon the issuance of the building permit, it is subject to the amended ordinance. This is so even where the municipality amends its ordinance in direct response to the application.

204. In view of the arbitrary, capricious, and unreasonable delays and demands imposed by the Readington Township Board of Health, principles of equity preclude application of the time of decision rule against plaintiffs as to Readington Township's septic regulations. In *Pizzo Mantin Group v. Township of Randolph,* 137 N.J. 216 (1994), the Supreme Court of New Jersey said that in considering whether to apply the time of decision rule to a particular case, a court must balance the municipality's zoning interest against the property owner's degree of reliance on the old statute and its entitlement of right. *Id.* at 234. In *S.T.C. v. Planning Board of Hillsborough,* 194 *N.J.Super.* 333 (App.Div.1984), the Planning Board had wrongfully denied an application for site plan approval. While the case was on appeal, a zoning ordinance amendment prohibiting plaintiff's proposed use was adopted. The Appellate Division held that the plaintiff should not be deprived of site plan approval because of the new ordinance. The Court said:

> Under general equitable principles, plaintiff should have the benefit of the statutory protection against a change in use requirements as if preliminary site plan approval had been granted in accordance with law; plaintiff should not forfeit its proposed use because of Planning Board error.

Id. at 335. *See also* *Dinizo v. Planning Board of Westfield,* 312 *N.J.Super.* 225 (Law Div.1998) (where a Planning Board erroneously denied an application for a subdivision and related bulk variances the time of decision rule did not apply).

205. In this case, the grandfathering provision of Readington Township's amended septic Ordinance of 1998 should continue to apply to plaintiffs because of the arbitrary, capricious, and unreasonable manner that the Board obstructed and delayed their septic suitability applications.

V. Remedies

***57** 206. This court has concluded that the Ordinance adopting Readington Township's AR Zone District is not arbitrary, capricious, and unreasonable and does not violate the provisions of the MLUL. Therefore, defendant Readington Township is entitled to judgment dismissing with prejudice Counts 3, 4, and 6 of plaintiffs' Second Amended Complaint challenging Ordinance 43–98 on its face.

207. The court has also concluded that plaintiffs have not met their burden of proving that Ordinance 43–98 is unconstitutional or arbitrary, capricious, and unreasonable

as applied to the Lackland property. Therefore, defendant Readington Township is entitled to judgment dismissing with prejudice Count 5 of plaintiffs' Second Amended Complaint challenging Ordinance 43–98 as applied to plaintiffs' property.

208. As to the challenge contained in Counts 1 and 2 to Ordinance section 906–2.41 establishing a "checklist" requirement before the Readington Township Planning Board that an applicant first obtain septic suitability approval from the Board of Health, the Honorable John H. Pursel, J.S.C., ruled by Orded dated February 4, 2000, that the requirement violates *N.J.S.A.* 40:55D–22(b). That ruling will be incorporated into the Final Judgment in this case. Ordinance section 906–2.41, so far as it requires septic suitability approval as a pre-requisite to an application before the Planning Board being deemed complete is declared null and void.

209. With respect to Board of Health Ordinances pertaining to septic approvals that establish setback distances that in some instances exceed those established by *N.J.A.C.* 7:9A–4.3, and the requirement of an approved reserve disposal field, this court has concluded that Readington Township did not exceed its authority or act arbitrarily, capriciously, or unreasonably in enacting those more stringent standards for septic systems within the municipality. Therefore, the challenges contained in Counts 1 and 7 of plaintiffs' Second Amended Complaint to those Township septic regulations are dismissed with prejudice.

210. As to the challenge contained in Count 1 to actions of the Readington Township Board of Health on plaintiffs' septic suitability applications filed in March 1997, this court has concluded that some of those actions were capricious and unreasonable and motivated by a goal harbored by at least one member of the Board to obstruct and delay the applications. The court grants to plaintiff Lackland and Lackland the following remedies:

a) The Readington Township septic regulations in effect in March 1997, unless superseded by Federal, State, or County regulations to the contrary, shall be utilized for a period of two years from the time of this decision to evaluate any septic suitability applications submitted by plaintiff Lackland and Lackland or its assignee. In other words, the time of decision rule generally applicable to land use applications shall be applicable to Federal, State, and County regulations pertaining to any septic approvals for the Lackland property but not to any Readington Township regulations for a period of two years. Consequently, the Readington Township Board of Health may not apply for the next two years to the Lackland property the more stringent testing requirements established in its septic ordinances adopted in 1998 or thereafter.

***58** b) Because she has displayed through her actions and conversations a bias against the plaintiffs and their development applications that constitutes a conflict of interest, Julia Allen shall be disqualified from official or indirect participation as a member of the Board of Health or Planning Board from adjudicating any applications brought with respect to the Lackland property. This prohibition means that she may not vote or participate as a member of those Boards in hearings concerning applications pertaining to the Lackland property. She shall not be precluded by this court's decision, however, from exercising whatever rights she may have as a resident or taxpayer of Readington Township with respect to those applications. Also, this prohibition does not apply to Julia Allen's role on the Township Committee with respect to consideration of ordinances that may apply to the Lackland property along with other properties in the Township.

c) The Readington Township Board of Health and Planning Board shall be enjoined and prohibited from permitting Julia Allen to participate directly or indirectly in any manner beyond that permitted to the other residents of the Township in decisions pertaining to the Lackland property.

d) The Readington Township Board of Health shall be enjoined and prohibited from applying septic regulations differently and unequally to plaintiffs from their application to other property owners and applicants. The Board of Health shall consider promptly and fairly any septic suitability application filed by plaintiffs or their assignees.

211. The court has concluded that the Board of Health did not act arbitrarily, capriciously, and unreasonably in requiring that plaintiffs prove the absence of an artesian condition on sections of the property by means of a hydraulic head test, as required by *N.J .A.C.* 7:9A–5.8(g).

VI. Dismissal with Prejudice of Counts 8 and 9

212. The court dismissed at the conclusion of plaintiffs' case in chief the remainder of plaintiffs' claims against the Planning Board and plaintiffs' civil rights claims against all defendants as contained in Count 8 of the Second Amended

Complaint. The parties dispute vigorously whether those dismissals should be with or without prejudice.

213. This court dismissed the Planning Board from the case because plaintiffs had not presented any evidence of improper actions by the Planning Board. They never submitted an application to the Planning Board for subdivision or site plan approval. To the extent that they challenged the "checklist" requirement of prior septic suitability approvals, that issue had been decided in plaintiffs' favor by the Order of this court dated February 4, 2000. Plaintiffs had no remaining claims or remedies available against the Planning Board. Their contention that the Planning Board acted in concert with the other defendants to recommend Ordinance 43–98 for an improper purpose was dismissed for lack of proof.

***59** 214. As argued in briefs submitted after the partial rulings in open court, plaintiffs contend that two parallel federal cases brought separately on behalf of Wilmark and Lackland in 2002 were always intended to be their vehicle for pursuing their federal constitutional claims for money damages from these defendants and others. They contend that the defendants always understood that the plaintiffs' causes of action were "bifurcated" between their actions in lieu of prerogative writs being pursued in State Superior Court and their claims for money damages for alleged constitutional violations being pursued in the United States District Court. They argue that defendants should be judicially estopped from seeking dismissal with prejudice because they argued in this court at a pretrial motion in April 2003 that Wilmark had no standing to pursue the prerogative writs action in State court. Lastly, they contend that the Wilmark federal lawsuit involves several properties in addition to the Lackland property and that both lawsuits, now consolidated, include parties other than those in this case.

215. Defendants respond that Count 8 was not voluntarily withdrawn by plaintiffs until the conclusion of their case in chief at trial and that it contained allegations of constitutional violations and sought money damages and attorney's fees. They contend further that plaintiffs' opening statement at trial was fraught with allegations of alleged due process violations presumably in pursuit of the remedies sought under that count. They argue that plaintiffs have no right after issue has been joined in this court to dismiss without prejudice causes of action that have been fully litigated and are ripe for determination on the merits. Finally, they argue that they are not judicially estopped from claiming that trial in this court included plaintiffs' claims under Count 8 because their pretrial motion to dismiss Wilmark as a plaintiff for lack of standing was denied.

216. Plaintiffs have taken seemingly inconsistent positions as to Counts 8 and 9 in this court. They maintained that cause of action long after defendants filed their Answers and, in fact, through six years of litigation. Consequently, they may not dismiss voluntarily without prejudice unless the court so rules. *R.* 4:37–1(a). Additionally, although plaintiffs submitted a letter dated November 17, 2004, shortly before trial commenced reserving their federal claims under *Parkview Associates Partnership v. City of Lebanon,* 225 *F.2d* 321 (3d Cir.2000), and *England v. Louisiana State Board of Medical Examiners,* 375 *U.S.* 411, 422 (1964), they also filed a summary judgment motion shortly before trial seeking a judgment in their favor on Count 8 as well as other Counts in their Second Amended Complaint. Plaintiffs' opening statement at trial contained many references to alleged constitutional violations. In addition, plaintiffs placed in evidence, over strenuous objection by defendants, the entirety of the covert tape recordings they had gathered presumably to prove that individual municipal officials of the defendant Township had violated their civil rights. Most important, this court's inquiry of plaintiffs' counsel at the end of plaintiffs' case regarding whether he would seek money damages in this case shows that the court was not aware at that time that plaintiffs intended to pursue their claims for money damages exclusively in federal court. This court does not doubt the sincerity of plaintiffs' counsel in averring his intention to proceed separately in the federal lawsuits on the claim for money damages for alleged violations of plaintiffs' civil rights. But all of the factors described here lead to the conclusion that Counts 8 and 9 were part of the litigation in this court until this court dismissed them at the end of plaintiffs' case in chief.

***60** 217. As to the Township Committee and Board of Health, defendants argued that plaintiffs had failed to establish through two months of their case in chief that the defendants had violated their substantive due process rights in accordance with the standard established in *Rivkin v. Dover Township Rent Leveling Board,* 143 *N.J.* 352 (1996). In that case, the New Jersey Supreme Court held that arbitrary, capricious, and unreasonable conduct of a municipal agency in allowing a biased member to participate and vote is not by itself sufficient to show violation of a plaintiff's constitutional due process rights entitling the plaintiff to money damages and attorney's fees. Rather, the Court held that substantive due process claims are reserved for the most egregious

governmental abuses against liberty or property rights, abuses that "shock the conscience or otherwise offend ... judicial notions of fairness ... [and are] offensive to human dignity." *Id.* at 366. In this case, before the court ruled on defendants' motion to dismiss under *R.* 4:37–2(b) and the holding of *Rivkin,* plaintiffs agreed upon questioning by the court that they were not pursuing money damages claims in this court.

218. With respect to dismissal of claims, *R.* 4:37–2 provides in relevant parts:

> (b) At Trial—Generally. After having completed the presentation of the evidence on all matters other than the matter of damages (if that is an issue), the plaintiff shall so announce to the court, and thereupon the defendant ... may move for a dismissal of the action or of any claim on the ground that upon the facts and upon the law the plaintiff has shown no right to relief.
>
> * * * *
>
> (d) Dismissal with Prejudice; Exceptions. Unless the order of dismissal otherwise specifies, a dismissal under R. 4:37–2(b) ... and any dismissal not specifically provided for by R. 4:37, other than a dismissal for lack of jurisdiction, operates as an adjudication on the merits.

Application of these rules leads to the conclusion that dismissal of Counts 8 and 9 of plaintiffs' Second Amended Complaint is with prejudice in this court. This court agrees with defendants that plaintiffs failed to present evidence at trial of conduct by the defendants that "shocks the [judicial] conscience." In the limited respect found, the conduct of the Board of Health was capricious and unreasonable because one of its members displayed bias and conflict of interest in deciding Wilmark's applications. But the Board also relied on the incompleteness of aspects of Wilmark's septic suitability applications. While remedies have been granted to plaintiffs for the Board's conduct, the substantive due process claims were not supported by the evidence presented at trial. This conclusion is squarely supported by the holding of *Rivkin,* which is based on similar facts.

219. In dismissing Counts 8 and 9 with prejudice, this court has no intention of determining how the United States District Court should view that dismissal as it pertains to the federal lawsuits. The effect of this dismissal, if any, on the federal lawsuits is for that court to determine. In this court, however, all causes of action contained in plaintiffs' pleadings have been fully and finally adjudicated through this decision.

VII. Conclusion

***61** 220. A Final Judgment is hereby entered in accordance with the Findings of Fact and Conclusions of Law contained in this decision.

All Citations

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

UNPUBLISHED
Court of Appeals of Michigan.

Frank VANWULFEN, Plaintiff–Appellant and Cross–Appellee,

v.

MONTMORENCY COUNTY and Montmorency County Drain Commissioner, Defendants–Appellees and Cross–Appellants.

Docket No. 281930.
|
March 19, 2009.

Montmorency Circuit Court; LC No. 04–000950–CC.

Before: DONOFRIO, P.J., and K.F. KELLY and BECKERING, JJ.

Opinion

PER CURIAM.

***1** This inverse condemnation action arises out of plaintiff's contention that defendants' maintenance of higher lake levels between 1997 and 2001 damaged his property. The circuit court entered an order of no cause of action and plaintiff now appeals as of right. We affirm.

I. Facts and Procedural Background

The property at issue is a tract of land on the north shore of Avery Lake located in Montmorency County, Michigan. The VanWulfen family bought a home on the subject property in 1965. The home was originally an outdoor pavilion, but was subsequently converted into a home for year-round living. Before the VanWulfens' purchase, the property had also had a wooden damn built on it, which maintained the lake at a constant level. This wooden dam was replaced with a concrete dam sometime between 1950 and 1952, after which point the lake levels fluctuated. This dam broke in November 1969 and it was replaced with a new dam. However, water came onto the VanWulfens' property in front of the house. Consequently, a seawall was constructed that abutted upon the property's lakeshore. The first winter that the wall was intact, it "didn't last" due to "wind and ice action." The wall was reset sometime during the following spring or summer.

As far back as plaintiff can remember, the county used the damn to lower and raise the lake level, typically lowering the level in the winter and raising it in the summer. The county's authority to adjust and control lake levels derives from the Inland Lake Levels Act (ILLA), MCL 324.30701, et seq. Under these provisions, the county may change the level of an inland lake by initiating a proceeding in the circuit court upon the motion of the county board or two-thirds of the relevant landowners. MCL 324.30702. After an evidentiary hearing, the court determines the lake level and the county, or other authority, is responsible for maintaining that level. MCL 324.30707; MCL 324.30708.

In 1970, the circuit court, pursuant to the ILLA procedures, entered a judgment indicating that that the lake level should remain at 891.3 feet above sea level during the summer months and be lowered to 890.3 feet above sea level during the winter months. In 1982, the circuit court entered another order indicating that the lake level should be reduced two and a half feet during the winter from the summer level. This practice continued until 1997, when the court entered a judgment determining that the lake level would remain at 890.3 feet above sea level year round. According to plaintiff, before 1997, there was no mounding in the lakeside yard behind the seawall. The court re-adjusted the lake level upwards by several inches on numerous occasions thereafter. In June 1997, the court increased the lake's level by four inches. In November 1998, the court raised the lake's level to 890.88 feet above sea level. The court raised the lake's level another three inches to 891.13 feet above sea level in April 1999. According to plaintiff, it was during the summer of 1998 or 1999 that a mounding behind the seawall became apparent.

A. 2000–2001 State Court Proceedings

***2** On December 11, 2000, Anna VanWulfen petitioned the court pursuant to the ILLA to re-determine the lake's normal levels. According to VanWulfen, maintaining the lake at the higher winter level, as opposed to lowering it, as had been the practice before 1997, was causing substantial damage to

the property. In VanWulfen's view, the increased lake level had caused ice to smash against the seawall and the home, created noticeable mounding that pushed into the home, and saturated the home's supporting soil such that the it was being "destroyed from the ground up."

The circuit court, Judge John F. Kowalski presiding, issued an opinion and order on October 19, 2001. It framed the issue as whether the damage to the VanWulfens' home resulted from the lake levels or some other cause. After considering the testimony of numerous experts, including testimony that the home's settling was due to the fact that it had been built over peat, it concluded that "the lake level, which existed between 1970–1982, caused no structural damage, earth mound or any other problems...." In coming to this conclusion, the court stated that it was "not able to find that the problems with the VanWuflen home, except for the mounding in front of the home, are related to the lake level of Avery Lake." The court readjusted the lake level to 890.3 feet above sea level for the winter months and 891.3 feet during the summer months, which is the same level applied between 1970 and 1982. VanWulfen did not attempt to bring any other claims in this proceeding.

B. April 2002 State Court Action

In April 2002, plaintiff filed suit in the court of claims against the county, as well as the county drain commissioners, alleging that the higher lake levels between 1997 and 2001 had raised the ground water level permitting the house to sink into the ground, created damage due to freeze and thaw, and "smashed the retaining wall due to ice pressure." Plaintiff asserted claims of inverse condemnation,[1] trespass and nuisance, and gross negligence. Plaintiff did not raise any federal claims in this complaint, nor attempt to reserve any federal claim for the federal forum.

1 Plaintiff alleged a claim of inverse condemnation generally; he did not cite either the U.S. Constitution or the Michigan Constitution.

The case was removed to circuit court, Judge Joseph P. Swallow presiding, where defendants moved for summary disposition. The court granted defendants' motion with respect to gross negligence, finding that plaintiff failed to show a genuine issue of material fact. Before ruling on the inverse condemnation portion of defendants' motion, the court noted that it must constrain its inquiry "to whether the mounding in front of the VanWulfen home constitutes a taking of Plaintiff's property resulting in permanent deprivation of possession or use of the property." According to the court, collateral estoppel barred consideration of the causation element of plaintiff's inverse condemnation claim because the court had previously stated during the 2000–2001 ILLA proceedings that "[it] is not able to find that the problems with the VanWulfen home, except for the mounding in front of the home, are related to the lake level of Avery Lake." Ultimately, the court determined that questions of fact remained as to whether plaintiff had suffered a compensable taking. This matter was left for trial. However, the parties stipulated to a dismissal without prejudice.

C. July 2004 Federal Court Action

***3** Several months later, in July 2004, plaintiff filed suit in federal district court, asserting claims of a federal taking under the Fifth Amendment and inverse condemnation under the Michigan Constitution.[2] The federal court, on defendants' motion for summary judgment, dismissed plaintiff's federal takings and inverse condemnation claims on the grounds that they were not ripe because plaintiff failed to fully pursue an inverse condemnation claim in state court. *VanWulfen v. Montmorency Co.*, 345 F Supp2d 730, 741–743 (E.D.Mich.2004).

2 Plaintiff also raised his gross negligence claim again. However, the federal court concluded that plaintiff's gross negligence claim was precluded because of the state court's previous dismissal of that claim. *VanWulfen v. Montmorency Co.*, 345 F Supp2d 730, 740 (E.D.Mich.2004). Plaintiff raised this claim yet again in his subsequent state action in December 2004. The state court concluded that the gross negligence claim was barred.

D. December 2004 State Court Action

Consequently, in December 2004, plaintiff filed a new complaint in state circuit court, Judge Richard M. Pajtas presiding, again asserting claims of a federal taking under the Fifth Amendment and inverse condemnation under the U.S. and Michigan Constitutions. Defendants moved for summary disposition, arguing that plaintiff failed to state a federal takings claim or inverse condemnation claim and that res judicata barred plaintiff's gross negligence claim. Plaintiff's response brief to defendants' motion relied upon both federal

and state law. The circuit court concluded that issues of fact remained regarding plaintiff's takings claims.

Before trial, defendants moved for clarification requesting that the matter be limited to the mounding in front of plaintiff's seawall consistent with Judge Swallow's 2003 opinion and order finding that collateral estoppel barred consideration of lake levels as the cause of damage to plaintiff's home. The court denied the motion. Defendants moved for reconsideration and plaintiff did not file a response. Subsequently, the court, relying on *Zerfas v. Eaton Co Drain Comm'r*, 326 Mich. 657, 40 N.W.2d 763 (1950), granted defendants' motion finding that "any claims ... relating to causation of and damage to the house are barred by res judicata as it [sic] was previously litigated in the lake level case before Judge Kowalski [in 2001]." After this determination, the parties stipulated to a bench trial, rather than a jury trial, and submitted trial briefs and exhibits to the court. The parties further agreed that their decision to forgo a jury trial in state court in no way "constitute[d] a waiver of any party's right to seek a trial by jury in federal Court."

In his trial brief, plaintiff, for the first time, asserted an *England* Reservation.[3] In other words, plaintiff indicated that he only sought a resolution of his inverse condemnation claim and did not provide any argument with respect to his federal claim in hopes of reserving it for the federal forum. Plaintiff then argued, relying entirely on state law, that defendants' action of raising the lake level caused ice pressure to move the seawall and create a mound on his property, amounting to a regulatory taking and a physical occupation of his property. To support his contention, plaintiff relied on the deposition testimony of his expert, Gary Dannemiller, a hydrologist, who asserted that "frost heaving," due to the higher lake level, caused the mounding and damage to the seawall. In Dannemiller's view, the elevation of the groundwater in the lakeside yard of plaintiff's property increased with the lake's level. Because the groundwater was "pushed high enough so that it would freeze," it follows that when it freezes, it increases the "volume of the voids [in the saturated soil] by nine percent." In addition, ice—due to the higher lake level—had also exerted pressure on the wall. These forces, in plaintiff's view, are what caused the mounding on plaintiff's property and have pushed the top of the seawall toward the lake. Dannemiller also testified that the soil along the seawall is composed of fine to medium sand, which is susceptible to frost heaving.

3 *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 412–413, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964).

***4** Defendants, in their trial brief, argued that plaintiff could not prove that defendants' adjustment of the lake level was the "substantial cause" of the mounding. Defendants presented photographic evidence showing that the mounding had gotten worse after 2001 when the winter lake level was reduced to its historical level of 890.3 feet above sea level. Defendants also produced evidence showing that the seawall had moved 12 inches toward the house after the lake level's reduction.

In addition, defendants relied upon the expert testimony of Duane MacNeill, a professional engineer, who believed "wind-driven ice floes," or ice pressure from wind pushing ice against the wall, had caused the mounding. This phenomenon occurs independently of, and has no relation to, the lake's level. In MacNeill's view, the seawall is under pressure due to ice movement and, as a result and in conjunction with the wall's lack of "footing[s]," the structure has moved toward plaintiff's house causing the ground to mound. According to MacNeill, such wind-driven ice can exert tremendous pressure. Although MacNeill did not personally observe the phenomenon on Avery Lake he indicated that he had observed wind forcing ice across land on a different lake. The drain commissioner also testified that he had observed such an ice floe on Avery Lake, including on one occasion an "ice flow" that had pushed a dock up onto shore. MacNeill's theory was based on photographic evidence, as well as several site visits to rule out the possibility that tree roots were causing the problem and to determine whether the wall had a sufficient base. MacNeill also testified that what was occurring on plaintiff's property was inconsistent with Dannemiller's frost heave theory because any expansion due to freezing is temporary and the soil will re-settle when it thaws as there is no longer any force to hold up the mound. MacNeill further indicated that frost heaving was not likely the cause because mounding did not occur at the ends of the seawall, which turned perpendicular to the house.

Subsequently, the court entered a no cause of action order against plaintiff as to his inverse condemnation claim for damage to the lakeside yard and seawall only. The circuit court found that plaintiff had failed to meet the burden of proof. Further, with respect to plaintiff's federal takings claim, the court deemed plaintiff's "hope of preserve[ing] the issue for litigation in Federal Court" to be an abandonment of the claim. Thus, the court dismissed the claim. This appeal followed.

II. Preclusion

Plaintiff first argues that his inverse condemnation claim with respect to damage caused to the home by the lake levels should not be barred by res judicata because the court was acting in an administrative capacity. We disagree.

A. Standard of Review

We review a trial court's determination on a motion for reconsideration for an abuse of discretion. *Shawl v. Spence Brothers, Inc.,* 280 Mich.App. 213, 218, 760 N.W.2d 674; —— NW2d —— (2008). We review a court's application of the preclusion doctrines de novo. *Van Vorous v. Burmeister,* 262 Mich.App. 467, 476, 687 N.W.2d 132 (2004); *Wayne Co. v. Detroit,* 233 Mich.App. 275, 277, 590 N.W.2d 619 (1998).

B. Res Judicata and Collateral Estoppel

***5** The doctrine of res judicata is intended to prevent multiple suits on matters already litigated. *Washington v. Sinai Hosp. of Greater Detroit,* 478 Mich. 412, 418, 733 N.W.2d 755 (2007). "The doctrine [of res judicata] bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Id.* (citation omitted). At the outset, we note that although the lower court granted defendants' motion for reconsideration based on res judicata, the court's decision is more properly characterized as denying relitigation of a single issue because the court's rationale is consistent with collateral estoppel, or issue preclusion. The doctrine of collateral estoppel requires that "(1) a question of fact essential to the judgment was actually litigated and determined by a valid and final judgment, (2) the same parties had a full and fair opportunity to litigate the issue, and (3) there was mutuality of estoppel." *Estes v. Titus,* 481 Mich. 573, 585, 751 N.W.2d 493 (2008).

Our Supreme Court has already decided the issue raised on appeal. In *Zerfas, supra* at 659–660, 40 N.W.2d 763, plaintiffs, riparian owners, sough injunctive relief after the court had determined the lake level and permitted construction of a dam in petition proceedings under the ILLA. Plaintiff's bill of complaint sought to enjoin the construction of the dam on the grounds that the ILLA was unconstitutional because it permitted a taking of private property without due process of law. *Id.* at 660–661, 40 N.W.2d 763. The Court determined that:

> The decree entered in [the petition] proceeding, from which decree no appeal was taken, was a final adjudication of the right to construct the dam at the outlet of ... [the] lake. Necessarily the constitutionality of the cited statute was involved. It follows that such adjudication is a complete defense as a matter of *res judicata* to the issues presented by the bill of complaint in the instant case, and that plaintiffs herein could not be decreed the relief sought—i.e., that the drain commissioner be perpetually enjoined from constructing such dam. *[Id.* at 664, 40 N.W.2d 763 (citations omitted and emphasis in original).]

We find that the rationale of *Zerfas* applies equally to the doctrine of collateral estoppel.

C. Application

In the instant matter, plaintiff petitioned the circuit court to readjust the lake levels. During those proceedings, Anna VanWulfen asserted that the higher lake levels were damaging the property, including the house. The court determined that it was "not able to find that the problems with the VanWuflen home, except for the mounding in front of the home, are related to the lake level of Avery Lake." As a result of the petition the court lowered the lake level to its previous level. Plaintiff then filed a separate lawsuit alleging claims of inverse condemnation, trespass and nuisance, and gross negligence, based on his contention that the lake levels between 1997 and 2001 had damaged the home. The court concluded that collateral estoppel barred the portion of plaintiff's claim relating to damage caused to the home. That case was dismissed by stipulation and plaintiff filed a new lawsuit in federal district court. The federal court dismissed that action on ripeness grounds. Plaintiff then filed another complaint in state court, alleging a federal takings claim and an inverse condemnation claim under the U.S. and Michigan Constitutions. The court found that plaintiff's takings claims were barred with respect to damage caused to the home, but not with respect to the mounding.

***6** This was the correct result. The 2000–2001 lake level determination was a final adjudication from which no appeal was taken. *Zerfas, supra* at 664, 40 N.W.2d 763. Although the circuit court did not actually adjudicate plaintiff's individual

rights, as the ILLA does not provide such protections, *In re Van Ettan Lake,* 149 Mich.App. 517, 525–526, 386 N.W.2d 572 (1986), the court did adjudicate the issue of whether plaintiff's property had been damaged and made findings with respect to that issue. *Heeringa v. Petroelje,* 279 Mich.App. 444, 449–450, 760 N.W.2d 538; —— NW2d —— (2008) (concluding that findings of fact made during adjudicatory proceedings have preclusive effect). As part of the ILLA proceedings, this issue of whether plaintiff's property had been damaged was necessarily considered and "litigated" by the parties during a two-day hearing. See MCL 324.30707(4); *Zerfas, supra* at 664, 40 N.W.2d 763. It follows, like in *Zerfas,* that plaintiff is collaterally estopped from relitigating the issue of whether the lake levels caused damage to the home. To conclude, it is clear that all three elements of collateral estoppel are met, such that the issue of damages to the home is barred: A question of fact essential to the judgment was actually litigated and determined by a valid and final judgment during the petition proceedings, the same parties had a full and fair opportunity to litigate the issue during a two day hearing, and there was mutuality of estoppel. *Estes, supra* at 585, 751 N.W.2d 493. Although the court premised its conclusion on res judicata, it nonetheless reached the correct result. We will not reverse when the lower court reaches the correct result albeit for the wrong reason. *Shember v. Univ. of Michigan Medical Ctr.,* 280 Mich.App. 309, 329, 760 N.W.2d 699; —— NW2d —— (2008).

Plaintiff's argument that proceedings under the ILLA are administrative, meaning that the doctrines of collateral estoppel and res judicata do not apply, must necessarily fail because the *Zerfas* Court determined that ILLA proceedings are adjudicatory in nature. *Zerfas, supra* at 664, 40 N.W.2d 763. We are bound to follow the decisions of the Supreme Court until it overrules itself. *O'Dess v. Grand Trunk Western R Co.,* 218 Mich.App. 694, 700, 555 N.W.2d 261 (1996). Thus, we conclude that the circuit court did not abuse its discretion by granting defendants' motion for reconsideration and precluding from consideration the issue of whether lake levels caused damage to plaintiff's home.

III. Inverse Condemnation

Plaintiff next argues that the circuit court erred by finding that defendants' actions did not substantially cause plaintiff's damages. Plaintiff's argument is premised on his position that, regardless of which expert is believed, the destructive force that caused damage to the property—the higher lake levels—was set in motion by defendants. We cannot agree. We review the trial court's findings of fact for clear error. *Schumacher v. Dep't of Natural Resources,* 275 Mich.App. 121, 127, 737 N.W.2d 782 (2007). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake has been made. *Heindlmeyer v. Ottawa Co. Concealed Weapons Licensing Bd.,* 268 Mich.App. 202, 214, 707 N.W.2d 353 (2005). We must give deference to the lower court's findings in conducting this review. *Id.* at 214 n. 3, 707 N.W.2d 353.

***7** An inverse condemnation claim arises where the government takes private property without commencing condemnation proceedings. *Electro–Tech Inc. v. H F Campbell Co.,* 433 Mich. 57, 88–89, 445 N.W.2d 61 (1989). When such a taking occurs, the Michigan Constitution entitles the property owner to just compensation for the taking. *Id.* at 89, 445 N.W.2d 61. "To be liable for a 'taking' for purposes of inverse condemnation, the property owner must demonstrate that the government, by its actions, has effectively and permanently deprived the owner of any possession or use of the property." *Ligon v. Detroit,* 276 Mich.App. 120, 131, 739 N.W.2d 900 (2007) (quotation marks and citation omitted). A plaintiff must show a causal connection between the government's actions and the alleged damages, *Hinojosa v. Dep't of Natural Resources,* 263 Mich.App. 537, 548–549, 688 N.W.2d 550 (2004), in that the "government's actions were a substantial cause of the decline of its property ... [and must also prove] that the government abused its legitimate powers in affirmative actions directly aimed at the plaintiff's property," *Merkur Steel Supply Inc. v. Detroit,* 261 Mich.App. 116, 130, 680 N.W.2d 485 (2004) (citation omitted).

In the present matter, after considering the opinions of plaintiff and defendants' experts, the court concluded:

> This court cannot conclude that the lack of a winter drawdown of the lake level between 1997 and 2001 was the substantial cause of the mounding on the property adjacent to the seawall. The court gives more weight to the theory that wind-driven ice floes from the lake are pushing the seawall backward causing the mounding. There is no evidence of record that the latter phenomenon is dependent on lake level. At best, the experts [sic] opinions are equal which means the plaintiff has failed to meet his burden of proof by the preponderance of the evidence. As such, the court cannot find inverse condemnation or a causal connection between the defendants [sic] action and the alleged damages.

After our review of the record, and in light of the circuit court's consideration of the evidence, we cannot conclude that that

court clearly erred. Contrary to plaintiff's position, MacNeill's causation theory was unrelated to, and independent of, the lake levels. It does not follow, as plaintiff would have us believe, that defendants necessarily set in motion the destructive force, allegedly the lake levels, that caused damage to the property. As plaintiff has raised no other arguments with respect to this issue, we conclude that the circuit court did not reversibly err when it declined to conclude that defendants' actions were a substantial cause of the mounding on plaintiff's property.

IV. Expert Witness

Plaintiff also argues that the circuit court committed reversible err by considering the expert testimony of Duane MacNeill because his opinions were unreliable and unscientific inconsistent with MRE 702. We disagree. We review a trial court's decision to admit or exclude expert testimony for an abuse of discretion. *In re Wentworth,* 251 Mich.App. 560, 562–563, 651 N.W.2d 773 (2002). A court abuses its discretion if its decision is outside the principled range of outcomes. *Dep't of Environmental Quality v. Waterous Co.,* 279 Mich.App. 346, 380, 760 N.W.2d 856; —— NW2d —— (2008). Further, it is for the trier of fact to decide which expert to believe and the weight to be afforded the testimony. *Guerrero v. Smith,* 280 Mich.App. 647, 669, 761 N.W.2d 723; —— NW2d —— (2008).

***8** MRE 702 controls the admission of expert testimony and states:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Thus, for expert testimony to be admissible "(1) the witness [must] be an expert, (2) there are facts in evidence that require or are subject to examination and analysis by a competent expert, and (3) the knowledge is in a particular area that belongs more to an expert than to the common man." *Dep't of Environmental Quality, supra* at 381, 760 N.W.2d 856. The expert's testimony, including the underlying data and the methodologies relied upon, must also be reliable and a circuit court must ascertain its reliability before admitting the testimony. *Gilbert v. DaimlerChrysler Corp.,* 470 Mich. 749, 779, 685 N.W.2d 391 (2004). As our Supreme Court noted in *Gilbert,* the vetting of expert testimony requires "a searching inquiry:"

> [I]t is insufficient for the proponent of expert opinion merely to show that the opinion rests on data viewed as legitimate in the context of a particular area of expertise (such as medicine). The proponent must also show that any opinion based on those data expresses conclusions reached through reliable principles and methodology. [*Id.* at 782, 685 N.W.2d 391 (footnote omitted).]

Here, the thrust of plaintiff's arguments is that MacNeill's testimony was unreliable. Plaintiff first contends that MacNeill's testimony regarding the windblown ice phenomenon was unsupported by any facts. Plaintiff's position is factually inaccurate. The VanWulfens admitted during ILLA petition proceedings in 1996 that wind had blown ice toward their shores and that ice had pushed their seawall forward. A previous owner of the property also admitted during the 2001 ILLA petition proceedings that he observed wind force ice from the lake onto the shore. MacNeill himself also observed the phenomenon of ice being pushed across land by the force of wind. On one occasion, the county's drain commissioner observed a dock that had been pushed up on shore by an "ice floe." The fact that some evidence contradicted MacNeill's theory, and the fact that MacNeill did not consult wind-speed data and did not personally observe the phenomenon on Avery Lake is immaterial to MacNeill's reliability. Thus, we cannot conclude that the court abused its discretion by admitting and considering MacNeill's deposition testimony pursuant to MRE 702.

In any event, the circuit court may very well have taken the factors plaintiff cites into account when considering what weight, if any, MacNeill's testimony should be afforded. These are issues for the trier of fact to judge, not this Court, and we will defer to the trier of fact's judgment. *Guerrero, supra* at 669, 761 N.W.2d 723. Further, we will not disturb the court's findings in this regard unless we would have reached a different result had we been in the court's position. *Jott, Inc. v. Clinton Charter Twp.,* 224 Mich.App. 513, 525–526, 569 N.W.2d 841 (1997). After our review of the record, we cannot conclude that, had we occupied the circuit court's position, we would have reached a different result.

***9** We must reject plaintiff's other arguments that MacNeill's testimony lacked reliability for this same reason. Specifically, plaintiff asserts that MacNeill's contention that the mounding began shortly after the seawall was built is unreliable because MacNeill admitted that he had no personal knowledge of that supposed fact and that MacNeill's methodology for testing the seawall's foundation was unreliable because MacNeill simply probed the ground with a rod instead of digging down to the wall's base. Again, these arguments relate to the believability of MacNeill's testimony and to the weight it should be given, not to whether the circuit court should have admitted the testimony pursuant to MRE 702. We will defer to the trier of fact's judgment on these issues. *Guerrero, supra* at 669, 761 N.W.2d 723.

Lastly, plaintiff contends that MacNeill's rejection of Dannemiller's frost heave theory as the cause of the mounding is unreliable and unscientific because MacNeill admitted that he never observed frost heave at Avery Lake and because MacNeill is not a hydrologist. We disagree. MacNeill indicated during his deposition that his testimony was based on scientific principles. MacNeill also testified that he had observed land that had been lifted up due to frost subside after a thaw while employed at the highway department. Both MacNeill's 30 years of practical experience as an engineering consultant and his educational background, which includes training in hydrology, qualified him to testify to these matters and it is irrelevant that he did not observe frost heave on plaintiff's property. MacNeill was called upon to testify to the cause of the mounding on plaintiff's property. We can see no reason—and plaintiff has not proffered one—why it was necessary that MacNeill have some special heightened expertise in hydrology beyond that which he has acquired through both his formal education and his extensive practical experience. See *Farr v. Wheeler Mfr Corp.,* 24 Mich.App. 379, 384–388, 180 N.W.2d 311 (1970). For the foregoing reasons, we conclude that the court did not abuse its discretion by admitting and considering MacNeill's testimony.

V. Great Weight of the Evidence

Plaintiff further contends that the circuit court's verdict was against the great weight of the evidence. Because plaintiff did not present a motion to this effect below, plaintiff has failed to preserve this argument for appellate review and, thus, this argument is waived unless a miscarriage of justice would result. *Hyde v. Univ. of Michigan Bd of Regents,* 226 Mich.App. 511, 525, 575 N.W.2d 36 (1997). Plaintiff's argument on appeal is simply that plaintiff's expert, Dannemiller, was more convincing that defendants' expert, MacNeill. We have already concluded that MacNeill's testimony was properly admitted and considered pursuant to MRE 702. Given that the weight to be afforded such testimony is best left to the trier of fact and not this Court, *Guerrero, supra* at 669, 761 N.W.2d 723, we fail to see how our refusal to consider the issue will result in a miscarriage of justice. As plaintiff has presented no other argument showing us that an injustice will result, we consider plaintiff's argument waived. *Rickwalt v. Richfield Lakes Corp.,* 246 Mich.App. 450, 464, 633 N.W.2d 418 (2001); *Hyde, supra* at 525, 575 N.W.2d 36.

VI. Reservation of Federal Claim

***10** On cross-appeal, defendants argue that the circuit court erred by accepting plaintiff's *England* Reservation because it was untimely made. We cannot conclude that the circuit court erred.

A. Standard of Review

This issue presents a question of law that we review de novo. *Wold Architects and Engineers v. Strat,* 474 Mich. 223, 229, 713 N.W.2d 750 (2006).

B. The *England* Reservation Doctrine

An *England* Reservation permits a litigant to preserve a federal claim distinct from an antecedent state action that may moot the federal issue. This doctrine was formulated in *England v. Louisiana State Bd. of Medical Examiners,* 375 U.S. 411, 412–413, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), where appellants, a group of chiropractors, brought suit in a Louisiana federal district court, alleging that Louisiana's Medical Practice Act, as applied to them, violated the Fourteenth Amendment. The federal court applied the *Pullman* abstention doctrine,[4] staying the proceedings in federal court, and affording the state court an opportunity to determine whether the act applied to the chiropractors. *Id.* In effect, if the state court determined that the act did not apply to appellants, this would end the controversy and there would be no reason for the federal court to hear the Fourteenth Amendment claim. Upon returning to state court,

appellants fully litigated both their state and federal claims. *Id.* at 413. The Louisiana appellate court determined that the act applied to them and did not violate the Fourteenth Amendment; the Louisiana Supreme Court denied review. *Id.* at 413–414. Upon returning to federal district court, the district court dismissed appellant's complaint on the grounds that the issues had already been decided in state court. *Id.* at 414. On appeal to the United States Supreme Court, the Court held that a party who is remitted to state court under the abstention doctrine court may reserve his federal claims by refusing to litigate them in the state forum. *Id.* at 421–422. However, if the party, without reservation, freely and fully litigates his federal claims in the state forum, that party has relinquished his right to return to federal court. *Id.* at 419, 421–422.

4 *Railroad Comm'n of Texas v. Pullman Co.,* 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 61 (1941).

The Supreme Court more recently explained its decision in *England* in *San Remo Hotel, LP v. San Francisco,* 545 U.S. 323, 338–340, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005). The Court indicated that its holding in *England* was limited to cases where the state issue is distinct from the federal one and opined that "typical" *England* cases involve those where the federal question will be made moot by the state court determination. *Id.* at 339–340. The Court stated:

> 'Typical' *England* cases generally involved federal constitutional challenges to a state statute that can be avoided if a state court construes the statute in a particular manner. In such cases, the purpose of abstention is not to afford state courts an opportunity to adjudicate an issue that is functionally identical to the federal question. To the contrary, the purpose of *Pullman* abstention in such cases is to avoid resolving the federal question by encouraging a state-law determination that may moot the federal controversy. [*Id.* at 339 (footnote and citations omitted).]

***11** The court held that an *England* Reservation will not negate any preclusive effect that a state court judgment may have with respect future federal litigation. *Id.* at 338.

Here, however, plaintiff was not involuntarily forced into state court after the federal court invoked a *Pullman* abstention. Rather, plaintiff's claim was never properly before the federal court as that court deemed his takings claims to be unripe under *Williamson Co. Regulatory Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). In *Williamson Co,* the Supreme Court indicated that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Id.* at 195. Thus, a takings claim will not be ripe for review in the federal forum until the plaintiff has sought compensation through state court procedures. *Id.* at 194–195. It would seem to necessarily follow that a plaintiff must file in state court first. Alternatively, if the plaintiff first files his claim in federal court, his claim would be deemed unripe and he would be required to return to state court. In many instances, however, state takings law and federal law are synonymous and, thus, a plaintiff risks preclusion of his claims in the federal court when he returns to that forum.

The Supreme Court's decision in *San Remo Hotel,* however, indicates that an *England* Reservation has no place in the litigation when the litigant finds himself in state court pursuant to *Williamson Co. San Remo Hotel, supra* at 33–341; see *Montana v. United States,* 440 U.S. 147, 163, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). In *San Remo Hotel,* the petitioners' as applied claims were found to be unripe under *Williamson Co.* The Court stated:

> Unlike their [facial constitutional challenge], petitioners' as-applied claims were never properly before the District Court, and there was no reason to expect that they could be relitigated in full if advanced in the sate proceedings. In short, our opinion in *England* does not support petitioners' attempt to circumvent [the preclusion doctrines of the full faith and credit clause]. *[San Remo Hotel, supra* at 341.]

The Court then went on to state, "The relevant question ... is not whether the plaintiff has been afforded access to a federal forum; rather, the question is whether the state court actually decided an issue of fact or law that was necessary to its judgment." *Id.* 342. Thus, where the federal question and the state question are one in the same, the *England* Reservation will not function to insulate a plaintiff's claim. Further, given the purpose of *England* and the context in which *England* was decided, the *England* Reservation is simply inapplicable when a federal court dismisses an action pursuant to *Williamson Co.* See *Treister v. Miami,* 893 F.Supp. 1057, 1071 (S.D.Fla.1992) *(England* inapplicable where jurisdiction has not been properly invoked due to lack of ripeness). Stated otherwise, as numerous federal courts have concluded, the *England* Reservation is only appropriate where a litigant has properly invoked the jurisdiction of the federal court, the federal court has abstained on *Pullman* grounds, and the litigant has found himself involuntarily in federal court. See *Duty Free Shop, Inc. v. Administracion de*

Terrenos, 889 F.2d 1181, 1183 (C.A.1, 1989) ("*[England]* permits a plaintiff who files a case in federal court *before state proceedings begin* to tell the state court that it wishes to litigate its federal claim in that *federal* court; it thereby permits the *federal* court to engage in *Pullman* (not *Younger*) abstention, a form of abstention that permits the federal court, in effect, to ask a state court to clarify a murky question of *state* law involved in the case, while permitting the plaintiff to *return* to the federal forum for determination of the federal question after the state court has decided the issue of state law." (emphasis in original)); *Schuster v. Martin,* 861 F.2d 1369, 1373–1374 (C.A.5, 1988) *(England* does not apply where litigant voluntarily chooses to pursue state action first and there was never any abstention by federal court); *Tarpley v. Salerno,* 803 F.2d 57, 59–60 (C.A.2, 1986) (*England* not applicable where there was never an abstention by federal court); *Griffin v. Rhode Island,* 760 F.2d 359, 360 n. 1 (C.A.1, 1985) (*England* inapplicable where plaintiff first filed takings claims in state court).

C. Application

***12** Turning to the instant matter, plaintiff originally filed a three-count complaint in state court in April 2002, alleging inverse condemnation, trespass and nuisance, and gross negligence. Before trial, the parties stipulated to dismiss the case without prejudice. Then, in July 2004, plaintiff filed suit in federal district court, alleging in a taking under the Fifth Amendment and inverse condemnation under the Michigan Constitution. The federal district court found that neither of the takings claims were properly before it pursuant to *Williamson* and dismissed plaintiff's case for lack of subject matter jurisdiction. *VanWulfen, supra* at 741–743. The federal district court appears to have considered plaintiff's federal taking claim "to be grounded in the theory of inverse condemnation...." *Id.* at 743. Thus, the court did not abstain from deciding the federal takings claim under the *Pullman* doctrine, but rather the matter was never properly before the court pursuant to *Williamson. Id.* at 741–743.

Thereafter, plaintiff returned to state court to pursue his inverse condemnation claim. Plaintiff filed the same complaint it had filed in federal district court and made no attempt to reserve a federal claim. Subsequently, the parties stipulated to a bench trial, at which point the parties also agreed that their decision to forgo a jury trial in no way "constitute[d] a waiver of any party's right to seek a trial by jury in federal Court." Then, for the first time during the litigation, plaintiff asserted an *England* Reservation in his trial brief and restricted the scope of his argument to state law. When the circuit court announced its opinion, it noted that it considered the federal portion of plaintiff's claim to be "abandoned" and dismissed the claim.

In our view, plaintiff's assertion of the *England* Reservation was inappropriate in the context of this case. Plaintiff originally filed his claim in state court. The parties stipulated to dismiss that action and plaintiff filed in federal district court. That court did not abstain pursuant to *Pullman;* rather, the issue was never properly before that court as the matter was not ripe pursuant to *Williamson Co.* Thus, the requirements for an *England* Reservation have not been met: Plaintiff did not first file in federal court and get punted back to state court on *Pullman* grounds, thereby finding himself to be involuntarily in state court. See *Duty Free Shop, Inc, supra* at 1183; *Schuster, supra* at 1373–1374; *Tarpley, supra* at 59–60; *Grifin, supra* at 360 n. 1. We note that even repeated attempts to make such a reservation in this context fail. See *Fuller Co. v. Ramon I Gil, Inc.,* 782 F.2d 306, 311–312 (C.A.1, 1986) (despite repeated attempts at reservation, litigant's reservation failed because *England* requirements not met). Thus, we consider the parties' stipulation to also be ineffective for purposes of reserving plaintiff's federal claim.

***13** Defendants, however, ask this Court to reverse the circuit court's acceptance of the reservation and find that it is invalid because it was untimely made. Defendants have mischaracterized the circuit court's decision. The circuit court did not accept the reservation; rather, the court explicitly stated that as a result of plaintiff's attempt to reserve the issue, it considered plaintiff's federal claim to be "abandoned" and dismissed the count. We can see no error in this course of action as plaintiff voluntarily abandoned this count of his complaint. Further, we cannot agree that the court's decision effectively amounted to an acceptance of the reservation. Rather, as we have already noted, an *England* Reservation is inapplicable in this context and, thus, plaintiff's reservation was ineffective from the outset—the circuit court's determination cannot have the effect of an acceptance because the reservation was null and void in the first instance. Because an *England* Reservation is not appropriate in this case, we cannot conclude that the circuit court erred by finding that plaintiff abandoned his federal claim when plaintiff voluntarily chose not to submit his claim to the state court.

Affirmed.

All Citations

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