

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1910-06T2

ANNA GREENWOOD, MARIAN GREENWOOD
SHAFMAN, JUDY GREENWOOD ULAN,
BARBARA GREENWOOD BERG &
LINDA GREENWOOD, as Tenants in
Common, LILLIAN W. NIEDERER,
THOMAS O. NIEDERER & DENNIS A.
NIEDERER, SAMUEL K. & AGNES P.
KERR, G.R. and S.K. KERR,
ROBERT J. HOCH, HERBERT HOCH,
PRINCETON RESEARCH LANDS,
LANDWIN DEVELOPMENT CORP.,
JOANNE ELSE, HARBAT FARMS,
HENRY AND LIDIA HARBAT, ESTATE
OF JAMES TRAVAGLINE, GERALD L.
and ALLAN M. BLAUTH, GREGORY
SANDFORD, SANFORD J. and PATRICIA S.
SCHWINN, THOMAS ROMAN, BRUNA &
VALENTINO ROMAN, JEAN S. WEASNER,
CONNIE SKOLNICK, ANTHONY DICOCCO,
CYNTHIA GOLDSMITH, THEODORE
WILK, LILLIAN ZUCCARELLI,
PRESIDENTIAL HILL, LLC,
GARY & DEBORAH PATRICELLI,
JOHN & PATRICIA PATRICELLI,
JEAN A. MOKROS, ESTATE OF
RONALD LAYFIELD, GALE W. MOSER,
MARK L. GOITEIN, THEODORE & DORIS
GOITEIN, EARL & DORIS WERT,
CHARLES M. & LUCIA HUEBNER,
STEVEN T. HUDACEK & JOAN C.
VERPLANCK, BRYCE W. THOMPSON,
JOHN KUHN BLEIMAIER, MARGARET V.
ROCKNEY, WILLIAM A. PIZZINI,
WALTER R. & LINDA E. BROWN,
JOHN G. WINANT JR. & KATHLEEN S.
WINANT, BYRON STEELE, and
JOHN CLIFFORD,

Plaintiffs,

and

ESTATE OF CLARA HUNTER,
RICHARD J. and DONNA M. GILLESPIE,
JAMES S. REGAN and AMY H. REGAN,
JOSEPH and SANDRA SALADINO,
BERNARD and PATRICIA HOFFMAN,

Plaintiffs-Appellants,

vs.

THE MAYOR AND TOWNSHIP COMMITTEE
OF THE TOWNSHIP OF HOPEWELL, a
Municipal Corporation of the State
of New Jersey, located in Mercer
County, New Jersey,

Defendant-Respondent.

MERRICK WILSON and
PRESIDENTIAL HILL, LLC,

Plaintiffs-Appellants,

vs.

THE MAYOR AND TOWNSHIP COMMITTEE
OF THE TOWNSHIP OF HOPEWELL, and
HOPEWELL TOWNSHIP, a Municipal
Corporation of the State Of New
Jersey, located in Mercer County,
New Jersey,

Defendants-Respondents.

Argued: February 27, 2008 - Decided: August 14, 2008

Before Judges Cuff, Lisa and Lihotz.

On appeal from the Superior Court of New Jersey, Law Division, Mercer County, Docket Nos. L-3594-01 and L-3597-01.

David J. Frizell argued the cause for appellants (Frizell & Samuels, attorneys; Mr. Frizell, on the brief).

Howard D. Cohen argued the cause for respondents (Parker, McCay, P.A., attorneys; Mr. Cohen, on the brief).

PER CURIAM

On December 19, 2002, the Township Committee of the Township of Hopewell (Township Committee and the Township) adopted a new zoning Ordinance, No. 02-1268, which established a Mountain Resource Conservation zoning district (MRC) and Valley Resource Conservation zoning district (VRC). Among other things, the Ordinance imposed minimum lot requirements of fourteen and six acres, respectively, for properties located in the two districts. On appeal, plaintiffs challenge the down-zoning accomplished by the creation of the MRC and VRC districts. Plaintiffs assert that the down-zoning was driven entirely by water resource concerns that were unfounded, ill-founded and beyond the zoning authority of the Township. Following an eleven day trial, Judge Feinberg held that the challenged provisions were a valid exercise of the Township authority under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163. We affirm.

The Township, located in the northwest corner of Mercer County, is bounded to the northwest by West Amwell and East Amwell Townships in Hunterdon County, to the northeast by Montgomery Township in Somerset County, to the south by Lawrence Township, and to the southwest by Ewing Township, both in Mercer County. Two boroughs, Pennington and Hopewell, are located within the Township's fifty-eight square miles.

The Township is equally divided between the Raritan and Delaware River watersheds. High quality headwaters from several important streams and rivers are located in the Township. Because these headwaters are within the Township's borders, the Township cannot rely on them for drinking water.

The Township also has twenty-four types of soils. Several soil types have severe limitations relative to the disposal of septic system effluent. Other soils are of prime importance to the State and are called Prime Farmlands.

Based on the Township's 1995 property tax map, it is composed largely of farm land (50%), residential uses (20%), public uses (17%), and vacant or open land. A 1995 land use and cover map disclosed that 31% of the land is devoted to agriculture, 39% is forested, 19% is residential (i.e., urban), 2% is water, and 9% is wetlands. This pattern existed at the time the 2002 Master Plan and Ordinance 02-1268 were adopted.

In other words, forests and farmlands account for about 70% of the Township.

The Township is not uniform in height or geology. Portions of the Township to the northwest are mountainous and include the Sourland Mountain and Baldpate Mountain. This area, which mostly corresponds to the MRC district, is largely forested and contains "high priority habitats." Almost 10% of the MRC district is wetlands. It is difficult to build septic systems beneath the uneven terrain of the MRC district because of the need for level surfaces. Further, given the mountainous terrain, construction of sewer and public water infrastructure would be very expensive.

Agricultural uses are concentrated in the Township's valley areas, which correspond with the VRC district. In fact, 40.6% of the VRC district contains agricultural fields, while 8.3% of the VRC is wetlands.

Before Ordinance 02-1268 was adopted, the land now within the VRC district permitted maximum four-acre residential lots, while the land now within the MRC district permitted maximum six-acre residential lots. Combined, the VRC and MRC constitute approximately seventy-eight percent of the Township's land area, and lack public water and sewer infrastructure. In fact, there is no residential water or sewer in the Township, except in a

portion of the homes located in the southeastern area of the Township and a small area near Washington Crossing State Park. Stated differently, all but approximately 3500 residents obtain their water from wells and dispose of their waste through septic systems.

The purpose of the MRC and VRC districts is to implement the goals and objectives set forth in the 2002 Master Plan.

Purpose. The purpose of these Districts is to implement the goals, objectives and principles of the 2002 Master Plan relative to protecting environmentally sensitive areas, recognizing development capacity limitations established by natural resource capabilities, maintaining the rural character and providing for sustainable development. These Districts have been designed to comprehensively address the interrelated goals of protecting groundwater quantity and quality, maintaining surface water resources, conserving the scenic rural character, addressing limiting soil condition and promoting continued agricultural use opportunities, while also providing a range of development opportunities that offer alternatives for the landowner.

[Ordinance No. 02-1268, § 17-16.A.]

The principal permitted uses in the VRC and MRC districts include the following:

Single family dwellings and conversions.

Community residences for the developmentally disabled, community shelters for victims of domestic violence, community residences for

the terminally ill and community residences for persons with head injuries.

Cemeteries; golf courses with accessory club house; eating facilities; tennis courts; swimming pools and similar usual accessory structures; public library; public parks and playgrounds; municipal buildings including school bus shelters; fire houses.

Farm and agricultural uses including, as accessory uses, horse riding lessons and a farm stand offering facilities for seasonal sale of products or produce, in accordance with the Township's Right-to-Farm Ordinance.

Model homes . . . as a sales office within a residential development . . . during the period necessary for the sale of new homes within that development.

[Ordinance No. 02-1268, § 17-160.B.]

The Ordinance permits open lands subdivisions on tracts of eighteen acres or more in the VRC district and forty acres or more in the MRC district. The Ordinance states:

[T]his option is intended to promote the retention of large contiguous wooded tracts and large farm tracts, and to promote the aggregation of smaller wooded and farm parcels. It is also intended to encourage and promote flexibility, economy and environmental soundness in subdivision layout and design At least 60 percent of the tract if located in the VRC District and 75 percent of the tract if located in the MRC District is to be designated as "open lands" and shall, as a condition of approval of the development, be deed restricted for agricultural or conservation use. Lots qualifying as open lands shall be permitted a primary residence

and other accessory buildings uses as provided in this ordinance.

[Ordinance No. 012-1268, §§ 17-160.I.4.2.]

Open lands subdivisions and cluster subdivisions on tracts of eighteen acres or more in the VRC district and forty acres or more in the MRC district are permitted, with minimum open space of 60% of the total tract in the VRC district and 75% of the total tract in the MRC district. Specific standards applicable to open lands subdivisions are set forth in section 17-160.I.4.2 and cluster subdivisions are set forth in section 17-160.I.4.3. Furthermore, lot-averaging subdivisions are permitted on tracts of eighteen acres or less in the VRC district and forty acres or less in the MRC district in accordance with standards specified in the Ordinance. Section 17-160.I.4.4.

In the case of open lands, cluster and lot averaging subdivisions, the Ordinance provides that development plans for such subdivisions shall not result in a greater dwelling unit yield than if the property in question were developed as a conventional subdivision. Section 17-160.I.4.4. The Ordinance also provides for non-contiguous cluster developments in the VRC and MRC districts; standards for the municipal designation of villages in the VRC district; development standards for villages in the VRC district; and grandfathering of non-conforming properties in the VRC and MRC districts. Sections 17-160.J-M.

Plaintiffs are property owners in the Township. When the trial commenced on May 17, 2006, the following persons and entities remained as plaintiffs: Sanford J. Schwinn; Joan B. Muscente; John Kuhn Bleimaier; Richard J. and Donna M. Gillespie; James S. and Amy Regan; the Clara Hunter Estate; the Niederer Family (Thomas, Dennis and Lillian); Merrick Wilson/Pennington Hills Partnership; Presidential Hill, LLC; Patricia A. Hoffman; and Joseph R. and Sandra L. Saladino. Plaintiff Bleimaier owns 66.61 acres of property formerly in the R-200 and R-250 zoning districts and in the VRC and MRC districts following adoption of Ordinance 02-1268. The Estate of Clara Hunter owns approximately 142 acres formerly in the R-250 zoning district and in the MRC district following adoption of the revised zoning ordinance.

Plaintiffs Gillespie own approximately 127 acres of property formerly in the R-250 zoning district and now in the MRC district. Plaintiff Muscente owns approximately 51 acres of property formerly in the R-200 zoning district and now in the VRC district.

Plaintiff Lillian Niederer owns approximately 109 acres of property formerly in the R-250 zoning district and now in the MRC district. Plaintiffs Thomas and Dennis Niederer own

approximately 119 acres of property formerly in the R-200 and R-250 zoning districts and now in the VRC and MRC districts.

Plaintiffs Regan own approximately 357 acres of property formerly in the R-200 and R-250 zoning districts and now in the VRC and MRC districts. Plaintiffs Saladino own approximately 132 acres of property formerly in the R-200 zoning district and now in the MRC district. Plaintiffs Schwinn own approximately 112.02 acres of property formerly in the R-250 zoning district and now in the MRC district. Plaintiff Merrick Wilson/Presidential Hill, LLC and Pennington Hills, LLC own approximately 88 acres formerly in the R-200 zoning district and now in the VRC district. All of plaintiffs' properties carry farmland assessments.

Prior to adoption of Ordinance 02-1268, the R-200 zoning district permitted single-family residential lots on a minimum of two acres. The R-250 zoning district permitted single-family residential lots on a minimum of three acres.

In their complaint,¹ plaintiffs alleged that the ordinance was invalid due to a conflict of interest of one of the members of the Township Committee (Count One). They also alleged that

¹ Ordinance 02-1268 was challenged in two complaints, each with multiple plaintiffs: Greenwood v. Mayor and Township Committee of Hopewell and Wilson v. Mayor and Township Committee of Hopewell. The matters were eventually consolidated.

the ordinance was invalid because it was not adopted to further any lawful purpose (Count Two), and because it was inconsistent with the Master Plan (Count Three). Plaintiffs alleged that the resolution memorializing adoption of the zoning ordinance did not contain the findings required to resolve the inconsistency between the Master Plan and the zoning ordinance (Count Four). Plaintiffs also alleged that the ordinance was arbitrary as applied (Count Five) and effects an improper taking of their property (Count Eight). They also alleged that the ordinance violated the Federal Fair Housing Act, 42 U.S.C.A. §§ 3601 to 3619, and the State Law Against Discrimination, N.J.S.A. 10:5-1 to -49, (Count Nine); and the State Fair Housing Act, N.J.S.A. 52:27D-301 to -329, (Count Ten). Finally, plaintiffs alleged that the ordinance was arbitrary and capricious because it failed "to give reasonable and adequate consideration to the character of [their] propert[y] in contrast to the character of other properties" in the VRC and MRC districts (Count Eleven). At the close of plaintiffs' case, Judge Feinberg dismissed all but Count Eleven.

We present a summary of the testimonial and documentary evidence presented at trial. We incorporate the extensive summary of the evidence contained in Judge Feinberg's September 21, 2006 opinion.

The Township grew considerably during the 1990s. Over 1800 new housing units were built and the Township added 4515 new residents. In reaction, the Township sought to direct growth to the most appropriate places through its Master Plan and zoning ordinances.

The recent growth in the Township and protection of its environmentally sensitive areas became an important consideration to the Township Committee and Township planning board. In this respect, Michael Bolan, the Township Planner since 1999, noted that the 1992 Master Plan focused on meeting the Township's affordable housing obligation and on protecting the Township's environmentally sensitive areas. Specifically, the Master Plan identified the preservation of farmland and the protection of the Township's undeveloped and rural character, including forests and farms, as valuable goals and specifically referenced the environmentally sensitive areas of the Township located in the mountains and valleys, areas now within the MRC and VRC districts.

In 1998, the Township issued its 1998 Master Plan Re-examination Report. It noted that the Township had met its affordable housing requirement. The Report also recognized the Township's desire to "transfer . . . development from the valleys and Sourland Mountain to areas with higher

concentrations of development in designated centers," in order to protect the Township's "major wooded areas, various drainage corridors, and wet soil conditions." The goal was to create higher density villages "while preserving less densely developed rural and environmentally sensitive areas throughout the valley and mountain," in order to "stop sprawl development" and to save "farmlands, woodlands, and environmentally sensitive areas," thereby preserving "an important part of the Township's character."

The Re-examination Report recommended several policies. Relevant here, they included: revising zoning policy to protect environmentally sensitive areas, including steep slopes and stream corridor protection; development of design criteria to control impervious coverage and water runoff while encouraging groundwater recharge of aquifers and protection of non-agricultural fields; establishment of goals to preserve farmland and open space in the valley and mountain areas, and to preserve the environmental and rural character of those areas; reduction of density in the valley and mountain areas to "more accurately reflect recent development experiences"; design of villages for high density use; and revision of zoning standards to encourage innovative land uses such as clustering and lot size averaging.

After adoption of the Re-examination Report, the Township proceeded through the planning process. During this period, the Township considered the effect of new zoning on its groundwater resources, including factors such as nitrate dilution standards and carrying capacity, because the Township wanted to avoid high density development in areas lacking sewer service. According to Bolan, public sewer service is not intended to serve the MRC or VRC districts given the character and natural resources in these districts and the lack of infrastructure. In addition, Bolan confirmed that the Trenton Sewer Project, which would have provided sewer service in the Township, was abandoned and other infrastructure needed, for public sewer service is unavailable.

During the course of the re-examination of the Master Plan and preparation of the amended zoning ordinance, the Township commissioned Michael Mulhall of Mulhall Associates to examine water resources in the Township. His report and his testimony were a focus of the trial.

Mulhall is a professional geologist and licensed subsurface evaluator. Mulhall explained some basic hydrogeological terms, and described the characteristics of a fractured bedrock aquifer, like the ones located within the Township. He emphasized that water that flows through these fractures serves as virtually the only source of water for the Township. Water

in such fractures is always moving, migrating from the recharge point to its discharge point. Because the aquifers in the Township are "sole source aquifers," i.e., the only sources of available drinking water for most of the Township, they must be protected from contamination. Mulhall further explained that impervious surfaces prevent water from entering an aquifer; and the greater the impervious coverage, the greater the amount of surface water, which reduces the amount of water that can reach an aquifer. In addition, he noted that approximately 55% of rainfall evaporates and returns to the atmosphere; and the remainder either filtrates down or runs off the land surface.

Mulhall next described the several geologic features present in the Township. He emphasized that certain geologic features foster, while others frustrate, the aquifer systems. For example, he described the Stockton Formation, which encompasses about 3.6 square miles in the Township and also contains the Township's best aquifer system. On the other hand, Mulhall noted that the Lockatong Formation, located in the northern and southern portion of the Township, supports a very poor aquifer system.

The Passaic Formation is located in the Township's low valleys and constitutes about 40 square miles. This formation covers the majority of the Township and supports a very good

aquifer system. Mulhall opined that it would be best to have more development in the Passaic Formation, where more water is available, than in the Lockatong Formation, a poor aquifer site.

Finally, Mulhall described the diabase, molten rock similar to that which erupts from a volcano. The Sourland Mountain, in the northern part of the Township, is a large diabase and the poorest water supplier because the rock does not fracture very much. Mulhall noted that the Sourland Mountain, Belle Mountain, and Baldpate Mountain, all within the diabase, create a divide, such that water flows towards either the Delaware River or the Raritan River systems.

In addition, there is insufficient surface water in the Township, as evidenced by the fact that streams within the Township are frequently dry. Unless a massive infrastructure was constructed, the Township must rely on its aquifers for drinking water. Mulhall reiterated that, as the amount of impervious surface within the Township increases, the amount of aquifer recharge would decrease. Moreover, as the number of homes increase, the number of wells increase, thus interfering with the ability of other wells to draw sufficient water from the Township's aquifer. The number of new septic systems required by additional residential development also increases the discharge of contaminants that can infiltrate the aquifer.

From a hydrogeologic point-of-view, Mulhall noted that it would be appropriate to combine the Passaic and Stockton Formations given their similarities. The Lockatong Formation and diabase could be similarly grouped. He further noted that the Stockton and Passaic Formations were located primarily within the VRC district, while the Lockatong Formation and the diabase are within the MRC district. He opined that, based on prior studies, the medium well yield in the VRC district is ten to fifteen gallons per minute. In the MRC district, aquifers yield one-half to one-third as much water. Thus, it is two to three times easier for aquifers to transmit water in the VRC district than in the MRC district. In short, the Township has two hydrogeological zones, one with a good water-producing aquifer, and one with a poor producing aquifer. Mulhall also opined that the Township had to account for rainfall and to plan for drought conditions.

In order to ensure that the Township has an adequate water supply even in a worst-case scenario, he assumed that groundwater recharge would be 66% of the average rainfall. Multiplying the 610 and 235 gallons per day, per acre, recharge rates in the VRC district and the MRC district, respectively, by 66% resulted in recharge rates of approximately 410 and 165 gallons per day, per acre, respectively.

Mulhall explained, however, that the State Department of Environmental Protection (DEP) had established a "Planning Threshold" as part of a State-wide water supply Master Plan. Given a series of variables unrelated to this appeal, DEP recommended using approximately 20% of the calculated aquifer recharge rate to determine an aquifer's dependable yield. Again, the purpose of the threshold is to assure that even in a worst-case drought, the State would still have sufficient drinking water. Using that calculation, the dependable yield in the VRC district was 82 gallons per day per acre (20% of 410), and 32 in the MRC district.

Mulhall then calculated that the entire Township would have a dependable yield from its aquifers of 84,276,667 gallons per month in a "drought of record." He also determined that the maximum consumption in the Township in any one month, given its residential and registered business users, would be 83,232,400 gallons per month.²

In short, Mulhall opined that the dependable yield of the Township's aquifers, i.e., the available water to the Township, is almost all consumed by current users. Specifically, he

² Mulhall calculated that the average household had 4.2 members. This figure was derived from information from recently issued building permits rather than the 2000 Census. According to the 2000 Census, each household had three members.

claimed that the Township was "pushing the limits" on the amount of water available to meet its needs. Given the foregoing, he noted that wells had to be dug deeper, and streams that should still be running were dry.

In his consideration of water supply and recharge capacity, Mulhall noted that the Township's steep slopes, which create significant runoff, and its wetlands and existing impervious coverage must be considered. When these factors are taken into account, he concluded that the minimum recharge area should be 5.6 acres in the VRC district, and 13.1 acres in the MRC district. He believed these were conservative figures, as he did not take into account impervious coverage created by roads built in new developments within the Township.

Mulhall also separately considered the effect that contamination from septic systems would have on his calculations. He noted that 62% of the numerous soil types in the Township create severe to moderate limitations on septic effluent disposal. He further stated that septic effluent contains nitrogen nitrates, which are very stable in an underground water environment and which contaminate the water and create a negative health impact. Since nitrates cannot be treated, they must be diluted by sufficient volumes of water to stunt their detrimental effect before they reach aquifers. DEP

adopted regulations to ensure that groundwater contamination of nitrates is not so high as to negatively affect groundwater safety. Mulhall explained that the nitrate level in drinking water is limited to ten milligrams per liter.

Based on that calculation, Mulhall opined that in the average three-individual household within the Township, a recharge area of at least 3.7 and 9.4 acres is required in the VRC district and MRC district, respectively. If one assumes a four-individual household, those recharge areas would increase to 5.1 and 13.2 acres, respectively.

In short, Mulhall used two models to calculate the minimum recharge area required to ensure that the Township had sufficient, safe drinking water in the future. Under both methodologies, the minimum lot size in the VRC and MRC districts had to be approximately 5 and 13 acres, respectively.

Plaintiffs mounted a direct challenge to the factual and scientific underpinnings of the 2002 Master Plan and Ordinance 02-1268. Dennis Hudacsko, plaintiffs' planning expert asserted that the Township placed undue emphasis on the amount of land subject to farmland assessment. He asserted that acreage bearing a farmland assessment is not synonymous with agricultural uses. He indicated that activities conducted by weekend or gentlemen farmers are not the type of activities the

State growth plan or any State agricultural plan sought to protect.

Hudacsko also testified that the 2002 zoning ordinance was the product of public and political reaction to perceived over-development in the 1990s. He testified that the Township commissioned the Mulhall report to justify down-zoning. He also opined that the Township planner, planning board, and the Township governing body confused recharge capacity with carrying capacity, noted that Mulhall confined his analysis to recharge capacity, and criticized the basic assumption that large lot sizes would conserve water. In fact, he opined that residences on large lots would consume more water due to more landscaping. He conceded, however, that smaller lots in each zone would allow more houses and greater household water use.

The Township countered the planning expert opinion offered by plaintiffs with the testimony of the Township Planner, Michael Bolan, and Michael Sullivan, a partner with a private architectural planning and landscape firm. We have already referred to Bolan's testimony regarding the current physical characteristics and use of land within the Township, the history of the planning process, and the studies commissioned and reviewed by the Township. Bolan added that he recommended minimum lot sizes of six acres in the VRC district and fourteen

acres in the MRC district based on an analysis of the Mulhall report and application of density allowances, including impervious coverage allowed in each district, to derive the lot sizes.

Sullivan is a professional planner. At trial, he described the physical features of the Township and its zoning and planning history. He opined that the ordinance furthered several stated purposes of the MLUL, and was consistent with the 2002 Master Plan, the county plan and the New Jersey State Development and Redevelopment Plan (the State Plan). He noted the VRC and MRC districts are in designated limited growth areas. He ultimately opined that the ordinance, and specifically the VRC and MRC districts, furthered the goals of sensible growth in harmony with the physical features of the districts and conservation of these valuable natural resources.

In addition, James Coe, a licensed professional engineer and an expert in wastewater management planning, testified that septic systems were clearly the most appropriate wastewater management system given the densities permitted in the MRC and VRC districts and the prohibition of sewer service in such areas. Notably, plaintiffs did not offer any expert testimony concerning water supply or wastewater management.

Following eleven days of trial, Judge Feinberg issued a written opinion that contained the requisite findings of fact. She found that the ordinance supports the broad purposes of the MLUL and is premised on the 2002 Master Plan and 2002 Reexamination Report. The judge found that the entire process, including Master Plan review, was the product of considerable study, consultation with experts, and many public hearings.

Judge Feinberg found that the purpose of the VRC and MRC districts is to implement the goals and principles of the 2002 Master Plan. These goals are designed to protect environmentally sensitive areas, to recognize development constraints due to environmentally sensitive areas and natural resource limitations, to maintain the rural character of the Township, and to provide sustainable development. The judge also found that the purpose of the challenged districts and their compatibility with the 2002 Master Plan and the character of the Township is fully supported by the experts produced by the Township, notably the hydrogeologist and the Township planner.

By contrast, Judge Feinberg found that plaintiffs' expert planner provided no more than a broad critique of the ordinance supported by no more than broadly stated planning concepts. She found that he offered no sound basis to challenge the

hydrogeology findings submitted by Mulhall. On the other hand, she found that Bolan, the Township planner, aptly explained the concepts of recharge capacity, carrying capacity and nitrate dilution and linked those concepts and findings to the recommended minimum lot sizes for each zone.

Judge Feinberg found that the Township sought an independent empirical analysis of its water resources and sought to understand how that related to the density of land development in the Township. By contrast, plaintiffs offered no water supply expert. In the end, Judge Feinberg found that "[t]here was more than substantial evidence, through the testimony and reports of [the Township planner] and [the Township's expert planner] to support the planning rationale for the MRC and VRC Districts based on their character."

Judge Feinberg found that the ordinance furthered nine purposes identified by the MLUL. She also found that the ordinance is consistent with the 2002 Master Plan, the 2002 Reexamination Report and the State Plan. In fact, she found that "establishment of the VRC and MRC Districts represent a reasoned response to a broad range of legitimate planning objectives embraced by the Township and the State."

Judge Feinberg found that the resource protection objectives are the "backbone" of the VRC and MRC districts and

reflect the resources found in those districts. The judge expressly found that the evidence adduced at trial "overwhelmingly" demonstrated that the ordinance met the purposes of the MLUL, was consistent with the land use plan element and housing plan element of the Master Plan, comported with constitutional constraints on the zoning power, and was adopted in accordance with all requisite procedural requirements. The judge also found that the Ordinance and the Master Plan were crafted to conform with the goals, objectives and policies of the State Plan.

I

On appeal, appellants argue that the need for six and fourteen acre minimum lots in the VRC and MRC districts, respectively, is not supported by sufficient credible evidence. They also contend that the dominant motivation for the ordinance, water supply, is governed wholly by state law, that the "grandfather clause" is illegal, and that the "open lands" techniques utilized in the ordinance is illegal.

A zoning ordinance is presumed valid. Rumson Estates, Inc. v. Mayor & Council of Fair Haven, 177 N.J. 338, 350 (2003). That presumption "may be overcome by showing that the ordinance is 'clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning]

statute.'" Riggs v. Twp. of Long Beach, 109 N.J. 601, 610-11 (1988) (quoting Bow & Arrow Manor, Inc. v. Town of W. Orange, 63 N.J. 335, 343 (1973)). Accord Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 290 (2001), cert. denied, 535 U.S. 1077, 122 S. Ct. 1959, 152 L. Ed. 2d 1020 (2002). The party attacking an ordinance has the burden of overcoming the presumption of validity. Rumson Estates, supra, 177 N.J. at 350; Riggs, supra, 109 N.J. at 611.

In evaluating an ordinance to determine if it is arbitrary, capricious or unreasonable, "a court's role is not to pass on the wisdom of the ordinance; that is exclusively a legislative function." Pheasant Bridge Corp., supra, 169 N.J. at 290. Rather, the wisdom of a particular ordinance "'is reviewable only at the polls.'" Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 385 (1995) (quoting Kozesnik v. Twp. of Montgomery, 24 N.J. 154, 167 (1957)). Our Supreme Court has held that

[i]t 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 statute. 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.

[Bow & Arrow Manor, supra, 63 N.J. at 343 (citation omitted).]

Thus, where the validity of an ordinance is debatable, the ordinance should be upheld. Manalapan Realty, supra, 140 N.J. at 385; Riggs, supra, 109 N.J. at 611.

However, a zoning ordinance may be invalid if it was not enacted in compliance with the requirements of the MLUL. Riggs, supra, 109 N.J. at 611. An ordinance must advance at least one of the fifteen general purposes identified at N.J.S.A. 40:55D-2. Manalapan Realty, supra, 140 N.J. at 380; Riggs, supra, 109 N.J. at 611. Even if an ordinance advances one, some, or all of the purposes of the MLUL, "the ordinance will be invalidated if the restrictions it imposes on the use of land are not 'reasonably related to those purposes' or 'conflict[] with other purposes of the MLUL.'" Bailes v. Twp. of E. Brunswick, 380 N.J. Super. 336, 349 (App. Div.) (quoting Sartoga v. Borough of W. Paterson,

346 N.J. Super. 569, 579 (App. Div.), certif. denied, 172 N.J. 357 (2002)), certif. denied, 185 N.J. 596 (2005).

In short, the "fundamental question in all zoning cases 'is whether the requirements of the ordinance are reasonable under the circumstances.'" Pheasant Bridge Corp., supra, 169 N.J. at 290 (quoting Vickers v. Twp. Comm. of Gloucester Twp., 37 N.J. 232, 245 (1962), appeal dismissed and cert. denied, 371 U.S. 233, 83 S. Ct. 326, 9 L. Ed. 2d 495 (1963), modified on other grounds by, S. Burlington County N.A.A.C.P. v. Twp. of Mt. Laurel, 92 N.J. 158, 275-77 (1983)).

On May 23, 2002, the 2002 Master Plan was adopted. The first sentence of that Master Plan recognized that "[f]rom the rugged terrain of the Sourland mountains to the fertile farmland of the Hopewell Valley, Hopewell Township's rural character is a vanishing treasure." The land use and management objectives of the Master Plan included: ensuring the availability of the Township's lands and waters for its present and future residents; protecting the "prevailing rural character" of the Township, "which result[s] from the natural topography, agricultural lands, woodlands and watercourses"; establishing development densities that would not exceed the Township's carrying capacity; and promoting development at suitable locations and at appropriate intensities by limiting more

intense development to those areas with existing public water and sewer service.

The 2002 Master Plan also lists specific natural resources, agricultural, and recreational objectives it would further, including: preservation of steep slopes, wetlands, stream corridors, potable water supplies, watersheds, aquifers, rivers, forests, and other vegetation, soils, habitats of threatened and endangered species and unique natural systems; preservation of the "interrelationships between land and water resources that contribute to their functioning as an ecological system"; relating the intensity of development to conservative estimates of available water supplies and to the ability of soil and groundwater to sustain septic system effluents; maintenance of large tracts of contiguous farmland and open space; protection of prime agricultural soils; adoption of resource management standards to ensure the integrity of natural resources for future users, and protection of the groundwater supply and quality by adopting aquifer management programs and standards to protect and enhance groundwater recharge areas.

The 2002 Master Plan identifies the VRC and MRC districts as new zoning districts and recommends six-acre minimum lots in the VRC district and fourteen-acre minimum lots in the MRC district. A land use plan identifies the location within the

Township of those zones. The Master Plan reflects the findings in the report prepared by M² Associates (M² report) and the Township's desire to "limit the degradation of groundwater while also permitting appropriate uses of land." In doing so, the Township also adopted the smart growth policies of the State Plan, i.e., to deter sprawl. In establishing the minimum lot sizes, Bolan considered the M² report, which suggested minimum lot sizes of 5.1 acres in the VRC. Bolan added 10% to that amount in consideration of the ten percent maximum impervious coverage allowed on such a lot, leading to a 5.61-acre minimum size. Bolan rounded that number up to the minimum six-acre lot size for the VRC. Bolan also explained his calculation by looking at unit density per acre, and reached the same conclusion.

As for the MRC, the M² report suggested minimum lot sizes of 13.1 acres.³ Taking into consideration the 5% to 6% level of impervious coverage, Bolan concluded that the minimum lot in this district should be 13.9 acres, which he rounded up to 14 acres.

The underlying basis for these densities is the carrying capacity of the natural systems, i.e., groundwater supply and

³ Testimony refers to 13.1 acre minimums, but the M² report refers to 13.2 acre minimums.

quality, within the VRC and MRC districts. That is, the minimum lot sizes are intended to assure sufficient recharge areas for the Township's aquifers such that each residence would receive sufficient water. The lot sizes also ensure that there will be sufficient area for appropriate dilution of nitrates produced by individual septic systems. These densities also reflect the Township's other environmental constraints, including its physical characteristics, such as wetlands, forested areas, and steep slopes.

Here, based on all of the evidence, Judge Feinberg found that Ordinance 02-1268 advanced the same purposes of the MLUL identified by Bolan, and as described at N.J.S.A. 40:55D-2a,b,c,d,e,g,h,i and j. Moreover, she concluded that the ordinance was consistent with the State Plan and Township Master Plan.

These findings are amply supported by the substantial evidence provided by the Township. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). That evidence demonstrated that the ordinance furthers the goals of the Township's Master Plan, ensures protection of the Township's vital water supplies and its prime agricultural soils, while maintaining the Township's scenic beauty. These goals are particularly important given that the MRC and VRC districts are

located in State Planning Areas 4, 4B, and 5, i.e., environmentally sensitive areas in which the introduction of sewer and water infrastructure is discouraged.

As the trial court properly noted, the ordinance is also consistent with the State Plan, which seeks to ensure, in part, the protection of those planning areas. Thus, the Township's resource protection objectives, which formed the backbone of the VRC and MRC districts, are responsive to the resources found in those zones and on the properties at issue.

Judge Feinberg also correctly found that there was no legal requirement that a municipality zone for the highest possible density uses. To the contrary, municipalities are empowered to respond to their local needs and concerns, which here revolve around the conservation of important natural resources, including the water supply, and preservation of the Township's scenic beauty.

Unlike Bailes, supra, the Township demonstrated that the limitation of development occasioned by the minimum lot sizes of the VRC and MRC districts is required to serve the purposes of the 2002 Master Plan to allow development consistent with environmental constraints, natural resource limitations, and the dominant use of lands within each district. In short, the ordinance furthered numerous goals the MLUL seeks to advance, is

consistent with the State Plan and the Township's Master Plan, and is therefore neither arbitrary nor capricious.

II

Plaintiffs contend that Ordinance 02-1268 is invalid because it is preempted by State-wide water policy and exceeds the Township's zoning authority. We disagree.

"'[A] municipality, which is an agent of the State, cannot act contrary to the State.'" Mack Paramus Co. v. Mayor & Council of Paramus, 103 N.J. 564, 573 (1986) (quoting Overlook Terrace Mgmt. Corp. v. Rent Control Bd. of W. N.Y., 71 N.J. 451, 461 (1976)). See also G.H. v. Twp. of Galloway, ___ N.J. Super. ___, ___ (App. Div. 2008) (slip op. at 8-9) (noting municipalities must not act contrary to the State law or in a field the Legislature has preempted). If a court decides that our Legislature intended its actions to be the exclusive ones in that area, then a municipality is barred from legislating on that same subject. Mack Paramus, supra, 103 N.J. at 573. Stated differently, a municipal ordinance that attempts to regulate in a field that the State has preempted by comprehensive regulation is void, if the ordinance negatively affects the Legislature's scheme. Prunetti v. Mercer County Bd. of Chosen Freeholders, 350 N.J. Super. 72, 131 (Law Div. 2001). Thus, preemption will be found where the legislative scheme is

so comprehensive or pervasive as to preclude the co-existence of a municipal ordinance in the same area, or if the local ordinance conflicts with the State statute or policy. Id. at 131-32. A five-part test has been established to determine if the municipal action is preempted by State law:

1. Does the ordinance conflict with the state law, either because of conflicting policies or operational effect (that is, does the ordinance forbid what the Legislature has permitted or does the ordinance permit what the Legislature has forbidden)?
2. Was the state law intended, expressly or impliedly to be exclusive in the field?
3. Does the subject matter reflect a need for uniformity?
4. Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation?
5. Does the ordinance stand "as an obstacle to the accomplishment and execution of the full purposes and objectives" of the Legislature?

[Overlook Terrace Mgmt. Corp., supra, 71 N.J. at 461 (internal citations omitted) (quoting Hines v. Davidowitz, 312 U.S. 50, 67, 61 S. Ct. 399, 404, 85 L. Ed. 581, 587 (1941)).]

Accord Mack Paramus Co., supra, 103 N.J. at 573; G.H., supra, ___ N.J. Super. at ___ (slip op. at 9).

Plaintiffs contend that Ordinance 02-1268 is preempted by the Highlands Water Protection and Planning Act, N.J.S.A. 13:20-

1 to -35. This legislation regulates an area in northern New Jersey known as the Highlands Region, N.J.S.A. 13:20-7a; it does not regulate municipal planning or local water control in areas outside the Highlands Region. Hopewell Township is not located in the Highlands Region.

Similarly, plaintiffs' reliance on the Pinelands Protection Act, N.J.S.A. 13:18A-1 to -58, is also misplaced. This act also regulates land development in only a portion of the State known as the Pinelands. N.J.S.A. 13:18A-11a. Hopewell Township is not located in the Pinelands region.

Plaintiffs' reliance on the New Jersey Statewide Water Supply Plan (the Water Supply Plan) also does not further their preemption argument. This plan does not preclude the co-existence of local planning ordinances based in part on the need to conserve water. In fact, the Water Supply Plan actually provides that local planning officials should use the New Jersey Geological Survey maps "to estimate if their land use plans will allow for sufficient aquifer recharge." Further, "[c]ommunities, especially those dependent on ground water, should integrate quantity and quality management practices for recharge." In short, the Water Supply Plan ensures that "land uses and their associated activities [are] properly managed to allow adequate quantities of good quality water to recharge the

State's aquifers." Notably, "[l]ocal governments, because of their zoning and subdivision authority to regulate land use and associated activities, are key actors in protecting the quality and availability of ground water." Thus the Water Supply Plan actually recommends that local planning boards zone their communities to ensure that adequate quantities of water sources exist, and that aquifers can be adequately recharged.

Plaintiffs also claim that the Township's consideration of its water resources in adopting the ordinance was ultra vires, because the standard used by the Township "does not exist as a basis for zoning." Specifically, plaintiffs claim that the ordinance created a zoning scheme that "requires each residential site to be an independent 'island' which recharges, through rainfall, all of the potable water used by the family residing there."

As discussed earlier in this opinion, Judge Feinberg properly found that the ordinance advanced several of the MLUL's purposes identified at N.J.S.A. 40:55D-2a, b, c, d, e, g, i, and j. The ordinance does more than simply require that each residential lot be self-sufficient for its water needs. Rather, the Township sought to protect environmentally sensitive areas and maintain its rural character, while recognizing the limits on development created by the geology and hydrology of the area.

It also sought to provide for sustainable development that would allow the Township to grow reasonably without eroding its water supply or the water supply of neighboring municipalities. As Judge Feinberg noted, the Township's actions in this respect were well documented, particularly through the testimony of Mulhall and Bolan.

Appellants misstate and oversimplify the purpose of the Ordinance. While they correctly note that recharge areas for the local aquifers were an important consideration in developing the minimum lot sizes in the VRC and MRC districts, they inaccurately claim that this consideration was not a proper basis for zoning.

Moreover, the Township did not require that each property be independent in water resources from every other property. The Township adopted Mulhall's opinion that if smaller residential lots were permitted throughout the MRC and VRC districts, then too much water would be drawn from the Township's aquifers, thereby endangering the availability of drinking water for the entire Township. The Township recognized that smaller lots would have created the potential for nitrate contamination of the aquifers because most of the residential lots in the two affected zones use septic systems, and agricultural soils would not have been adequately protected.

The ordinance recognizes the inter-dependence of all lots in the VRC and MRC districts and does not require that each residential lot be a separate, self-sufficient island.

In fact, New Jersey courts have approved numerous zoning schemes in which environmental considerations led to relatively large minimum lots. In New Jersey Farm Bureau, Inc. v. Township of East Amwell, 380 N.J. Super. 325, 326 (App. Div.), certif. denied, 185 N.J. 596 (2005), the defendant township adopted an ordinance increasing the minimum lot size in its agricultural district from three to ten acres. The ordinance permitted lot averaging and an "open lands" option similar to those in Ordinance 02-1268. Ibid. The ordinance was adopted to "preserve the agricultural character of the district, which comprises approximately two-thirds of the municipality," id. at 326-27, after the township concluded that the existing three-acre minimum "would not meet [its] goal of preserving large tracts of farmland." Id. at 328.

In affirming the trial court's dismissal of the complaint challenging the ordinance, we noted that the township had discharged its obligation to provide low- and medium-income housing, and that the zoning district in question "was a rural area that the municipality may preserve for agricultural uses." Id. at 334-35. In the instant case, the Township also met its

obligation to provide low- and medium-income housing, and the MRC and VRC districts are largely rural, forested lands with interspersed agricultural uses.

Moreover, as in New Jersey Farm Bureau, supra, the MRC and VRC districts are in environmentally sensitive areas of the State as identified by the State Plan. Id. at 335. Because the ordinance in that case was "reasonably designed to preserve [East Amwell's] rural character," its adoption was approved. Similarly, Ordinance 02-1268, which ensures that an ecologically sensitive area will not be overbuilt, thereby endangering the water supply and the important agricultural soils in the area, was properly adopted, particularly since it also furthers many other goals of the MLUL.

In Kirby v. Township Committee of Bedminster, 341 N.J. Super. 276, 279 (App. Div. 2000), this court affirmed the trial court approval of an ordinance that increased minimum lot sizes from three to ten acres. In doing so, we noted that the defendant township had met its affordable housing obligation, and sought to maintain through land use planning, the special character of its countryside. Id. at 282. Therefore, we rejected the claim that the challenged ordinance was an example of "fiscal" zoning. Id. at 288-90. Accord Mount Olive Complex v. Township of Mount Olive, 340 N.J. Super. 511, 535-41 (App.

Div. 2001), remanded on other grounds, 174 N.J. 359 (2002) (zoning ordinance valid that sought to conserve open space and natural resources and to prevent degradation of the environment in a township located in a limited growth area that had satisfied its affordable housing obligation); Gardner v. N.J. Pinelands Comm'n, 125 N.J. 193, 204, 210 (1991) (ordinance allowing one unit per forty acres in the Pinelands valid).

Here, preservation of farmland and water supplies are two important goals the Township sought to further through adoption of the ordinance. Moreover, the MRC and VRC districts lie on environmentally sensitive land, and the ordinance permits the type of clustering approved in Gardner, supra, 125 N.J. at 204. All of the foregoing cases demonstrate that as long as a municipality presents a credible, factually supported case that large minimum lots are required to protect environmentally sensitive areas, the ordinance will be sustained.

III

Section 17-160.M.1 of Ordinance 02-1268 provides that "[a] single family detached dwelling located in the MRC and VRC Districts, which has received a certificate of occupancy or temporary certificate of occupancy prior to September 20, 2001, may be enlarged without an appeal to the approving authority, even though the dwelling may be on a nonconforming lot."

Further, section 17-160.M.2 provides that "[a]ccessory buildings or structures may be added to single family detached dwellings on nonconforming lots located in the MRC or VRC Zoning District[s], without an appeal to the approving authority" Finally, section 17-160.M.3 provides that "[n]otwithstanding the provisions set forth above, a lot located in the MRC or VRC Zoning Districts may nevertheless be developed in accordance with the lot area and dimensional requirements of the Zoning District in which it was formerly located . . . without an appeal to the approving authority"

Plaintiffs argue that these provisions, characterized as a grandfather clause, are illegal. This issue was not raised in the trial court and will not be considered on appeal. The issue does not present a question of constitutional dimension or public import that requires resolution without initial consideration by the trial judge. Nieder v. Royal Indemn. Ins. Co., 62 N.J. 229, 234-35 (1973).

IV

Section 17-160 of the Ordinance provides development standards for the VRC and MRC zoning districts for conventional subdivisions, lot averaging design, cluster design or open lands design. The open lands design option for subdivisions applies only to tracts of eighteen or more acres in the VRC district and

forty acres or more in the MRC district. Section 17-160.I.2 describes the purposes of the open lands option as follows:

to promote the retention of large contiguous wooded tracts and large farm tracts, and to promote the aggregation of smaller wooded and farm parcels. It is also intended to encourage and promote flexibility, economy and environmental soundness in subdivision layout and design.

To that end, at least 60% of a tract in the VRC district and 75% of a tract located in the MRC district shall be designated "open lands" and "shall as a condition of approval of the development, be deed restricted for agricultural or conservation use." Ordinance No. 02-1268, § 17-160.I.2.b. In addition, "[a]ll lots created under this subdivision option shall be deed restricted against further subdivision for the purpose of creating an additional lot or lots." Ordinance No. 02-1268, § 17-160.I.2.e.

Plaintiffs argue that the open lands technique is unconstitutional and is not only unauthorized but also prohibited by the MLUL. Plaintiffs concede that this issue was not separately addressed by them at trial. This omission is critical. The application of this technique may affect many property owners. It is the type of issue, however, that is difficult to evaluate in the context of a facial challenge to the ordinance. See In re Bd. of Educ. of Boonton, 99 N.J. 523, 536 (1985) (declining to consider issue not raised below because

there was an insufficient factual basis). We decline to consider the issue in this appeal.⁴

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.

CLERK OF THE APPELLATE DIVISION

⁴ To the extent that plaintiffs' challenge is limited to the open lands technique and based on a requirement that the open lands must be dedicated to public use, we note that section 17-160.I.2 does not contain any requirement that the "open lands" created by this development option must be dedicated or made available for public use.