Lackland and Lackland v. Readington Township

2008 | Cited 0 times | New Jersey Superior Court | February 26, 2008

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

Argued December 12, 2007

Before Judges Lisa, Lihotz and Simonelli.

Plaintiff, Wilmark Building Contractors (Wilmark), is a home builder and developer, and was the contract purchaser of a 265-acre parcel of land in Readington Township (the property) owned by plaintiff, Lackland & Lackland (Lackland). Wilmark sought to acquire the property, obtain subdivision approval, and develop it for residential use. These back-to-back appeals arise from plaintiffs' challenge of actions by Readington Township (Township), Readington Township Planning Board (Planning Board), and Readington Township Board of Health (Board of Health) that impeded Wilmark's plans for the site. Wilmark was not able to obtain land use approvals to develop the property, and its contracts with Lackland have expired.

Two pretrial rulings are implicated in the appeal issues:

(1) Judge Pursel granted partial summary judgment in favor of plaintiffs declaring null and void Township ordinance section 906.2.41, which required that the Board of Health grant soil suitability approval before a subdivision application could be deemed complete for Planning Board consideration; and (2) Judge Bartlett denied defendants' motion to dismiss Wilmark for lack of standing, holding that because the purchase contracts expired, Wilmark was confined to a facial challenge to the Township ordinance.

Plaintiffs unsuccessfully challenged ordinance 43-98, adopted on December 21, 1998, which created the agricultural residential (AR) zone, which encompasses the property. This change in zoning cut the maximum permitted density of residential units in half.

Judge Ashrafi conducted a thirty-three day bench trial. Much of the trial testimony and evidence focused on the applicable septic regulations, plaintiffs' failed attempt to obtain development approvals, and Julia Allen's actions, in her position as a member of the Board of Health and in other official capacities, to impede Wilmark's progress. The judge found Allen's actions improper and that they improperly influenced the Board of Health in frustrating plaintiffs' efforts to obtain soil suitability approvals. He therefore limited Allen's participation in any future application pertaining to the property, enjoined the Board of Health from applying septic regulations differently to

plaintiffs compared to other applicants, and ordered the Board to consider promptly and fairly any septic suitability application filed by plaintiffs, using the regulations in effect in March 1997 for a period of two years from the date of judgment (rather than the more stringent regulations adopted in 1998). Judge Ashrafi dismissed all remaining claims with prejudice.

Also relevant to some issues raised here are actions that have been filed in federal court. Wilmark and its sole owner, Mark Hartman, filed a federal action against defendants in this case and three individuals who served as Township officials, alleging violations of 42 U.S.C.A. § 1983, the Fifth Amendment of the United States Constitution, and Article I of the New Jersey Constitution. Lackland filed a similar complaint and the cases have been consolidated. The claims in federal court relate to actions involving the property involved in this appeal as well as three other parcels in the Township.

In A-2190-05T1, Lackland asserts: (1) Judge Ashrafi improperly applied the test set forth in Riggs v. Township of Long Beach, 109 N.J. 601, 610-11 (1988), and erred in failing to find that ordinance 43-98 was enacted for an unlawful purpose; (2) he erred in failing to find that ordinance 43-98 was invalid due to vagueness, that it delegated too much discretion to the Planning Board, and that it was arbitrary and capricious as applied to the property; (3) his remedy for actions caused by the improper conduct of Julia Allen was not sufficient; (4) he erred by ruling that a local board of health may adopt any standard by simply stating it is not less restrictive than those required by the New Jersey Department of Environmental Protection (DEP); (5) he erred by dismissing the civil rights claims with prejudice; and (6) he improperly restricted proofs, evidence, and arguments.

In A-2341-05T1, Wilmark contends: (1) Judge Ashrafi erred in resolving claims as to Wilmark that were not before him and in departing from Judge Bartlett's pretrial ruling; and (2) the trial record should be reopened.

The Township and Board of Health have cross-appealed in both cases. They argue that section 906.2.41, requiring Board of Health septic suitability approval as a checklist requirement, is authorized under N.J.S.A. 40:55D-10.3 and Judge Pursel's conclusion that the requirement violates N.J.S.A. 40:55D-22b was erroneous.

We briefly set forth the relevant procedural history. In their nine-count complaint in lieu of prerogative writs,[2] plaintiffs challenged: (1) the June 29, 1999 resolution of the Board of Health denying septic approvals; (2) section 906.2.41 as unlawful; (3) "down-zoning" (i.e. changing existing zoning to a lower density) of the property as arbitrary and capricious as applied; (4) ordinance 43-98 as ultra vires; (5) the minimum open space set-aside in the AR zone; (6) the lack of standards in ordinance 43-98 regarding the location of open space; (7) certain provisions in the Board of Health septic regulations as unlawful; (8) down-zoning as a violation of plaintiffs' substantive due process rights; and (9) down-zoning as inconsistent with the requirement that the Township engage in comprehensive planning.

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Plaintiffs moved for partial summary judgment challenging, among other things, the completeness provision of section 906.2.41. On February 4, 2000, Judge Pursel granted partial summary judgment, declaring section 906.2.41 null and void.

On February 6, 2003, Judge Bartlett signed a consent order, bifurcating the trial so that all claims, including damages, would be tried first, followed by the issue of quantification of damages, if any. After Wilmark's purchase contracts expired, defendants moved to dismiss Wilmark from the case. On April 4, 2003, Judge Bartlett denied the motion to dismiss Wilmark for lack of standing, but held that Wilmark was confined to a facial challenge because it no longer had an interest in the property that would support any as-applied challenges.

Trial commenced before Judge Ashrafi on November 30, 2004. On February 2, 2005, after plaintiffs rested, the judge dismissed the Planning Board from the case. The trial concluded on February 15, 2005. On November 16, 2005, Judge Ashrafi issued a comprehensive 102-page written decision disposing of all remaining issues. On the same date, final judgment was entered, dismissing with prejudice: (1) counts three, four, and six (the challenge to ordinance 43-98 (creating the AR zone) on its face); (2) count five (the assertion that ordinance 43-98 is unconstitutional, and arbitrary, capricious, or unreasonable as applied to plaintiffs' property); (3) counts one and seven (the claims that septic approvals that establish setback distances exceed the authority granted to the Township and are arbitrary, capricious, or unreasonable); (4) part of count one (the challenge to the Board of Health decisions that plaintiffs must prove the absence of an artesian condition on certain building lots by means of hydraulic head tests, as required by N.J.A.C. 7:9A-5.8(g)); and (5) counts eight and nine (claims that down-zoning of the property was a violation of plaintiffs' substantive due process rights and was inconsistent with the requirement that the Township engage in comprehensive planning).

Judge Ashrafi ruled that certain actions of the Board of Health regarding plaintiffs' septic suitability applications filed in March 1997 were capricious and unreasonable, and motivated by a goal harbored by at least one Board of Health member (Allen) to obstruct and delay the applications. He ordered: (a) the Township septic regulations in effect as of March 1997, unless superseded by Federal, State, or County regulations to the contrary, shall be used for two years from the date of judgment to evaluate septic suitability applications submitted by Lackland or its assignee; (b) Allen be disqualified from official or indirect participation in the Board of Health or Planning Board as it pertains to adjudicating any applications brought regarding the property; (c) the Board of Health and Planning Board be enjoined and prohibited from permitting Allen to participate directly or indirectly in any manner beyond that permitted to other Township residents in decisions pertaining to the property; and (d) the Board of Health be enjoined and prohibited from applying septic regulations differently and unequally to plaintiffs from their application to other property owners and applicants, and the Board of Health must consider septic suitability applications filed by plaintiffs or their assignees promptly and fairly.

These appeals and cross-appeals followed.

We reject defendants' cross-appeal arguments and affirm Judge Pursel's partial summary judgment order declaring section 906.2.41 null and void. We are satisfied that Judge Ashrafi's factual findings are well supported by the trial record and that his legal analysis and conclusions were correct. We deem it appropriate, however, to modify the remedy he ordered, by directing that the Hunterdon County Department of Health, rather than the local Board of Health, act upon all soil suitability and septic applications for the property by plaintiffs or their assignees, applying the Township regulations in effect in March 1997, and we toll the two-year time period for the time consumed by this appeal. In all other respects, we affirm the final judgment entered by Judge Ashrafi.

I.

The property consists of two lots, 26 and 40, in block 64. Lackland and Wilmark entered into two written contingent contracts, both dated April 17, 1996, one for each lot, that required Wilmark to pursue at its own cost and within certain time constraints the approvals necessary to develop the property. Wilmark sought to obtain a residential subdivision approval. In February 1999, the contracts expired.

In April 1996, Hartman appeared before the Planning Board to devise a working plan for development of the property. In July 1996, Wilmark's site engineer prepared the first layout plan for the 110-acre lot 26, a thirty-three lot subdivision. The Planning Board checklist required that an applicant obtain Board of Health location approval for all septic systems prior to making an application to the Planning Board for subdivision approval. Due to this requirement, Wilmark never made an application to the Planning Board for any subdivision or site plan approvals.

Under N.J.A.C. 7:9A-5.1 to -5.10, an applicant that seeks to use septic systems, must first obtain a soil suitability approval, which is a determination that the soil in the chosen locations on the site is suitable for treatment and disposal of effluent and that it is possible to safely design a septic system on the lot. The applicant must then design each individual septic system and obtain approval of the design. A local board of health has the authority to grant or deny a soil suitability approval and to grant or deny design approval, or to delegate this authority to a county board of health.

The Township ordinance also requires that a primary septic discharge area and a reserve area be set aside for potential future use in case of failure of the system in the primary location. Both must be approved by the Board of Health. No application for preliminary subdivision approval will be declared complete by the Planning Board until the applicant has received a septic suitability location approval.

In May and June 1997, Wilmark appeared before the Board of Health, seeking septic suitability location approvals for ten of thirty-three proposed lots. Acting upon Allen's motion, the Board of

Health denied approval of proposed lot 2, as well as all other proposed lots, and required that additional testing be undertaken during the wet season, between January and April. In January 1998, Wilmark performed the wet season testing. In May 1998, the Board of Health considered the wet season testing on proposed lots 1 and 5. During the hearing, Allen questioned the adequacy of wet season testing due to what she claimed was a drought condition in early 1998. She maintained that conflicting data had been submitted. There was also concern about an artesian condition, which she stated would preclude location of a septic system. Despite approval of the technical aspects of the testing by the County Health Department, the Board of Health voted to deny septic approval for proposed lots 1 and 5 of block 26, based on this conflicting information.

In September 1998, on reconsideration after changes to the submission, the Board of Health granted septic approval for lots 1 and 5, the only two which were approved, and this was eighteen months after Wilmark filed its application.

In November 1998, Wilmark sought approval of five proposed lots. At that meeting, Robert Starcher, a hydrogeologist hired by the Board of Health, opined that there was an artesian condition on proposed lot 6. Thus, despite a recommendation of approval from the County Health Department, the Board of Health required more testing, including a hydraulic head test. Wilmark appeared before the Board of Health in December 1998 and January 1999, but the Board did not approve any proposed lots. Instead, it required new wet season testing, because January had insufficient rainfall.

On November 4, 1996, the Township adopted ordinance 22-86, which increased open space required for properties that did not have preliminary approval for development. When Wilmark entered into contracts with Lackland, the property was in the Township's Rural Residential (RR) zone, which provided for three-acre residential zoning with clustering. On May 18, 1998, the Township adopted ordinance 17-98, which imposed new requirements for underground water storage tanks on any developments that had not already received preliminary approval.

On September 16, 1998, the Township amended its septic testing ordinance by adopting ordinance 98-2, making it more difficult to obtain approval. Ordinance 98-2 provided that all prior testing would be grandfathered for one year from the effective date of the ordinance, but after that date testing would have to be done under the new standards.

On November 23, 1998, the Planning Board adopted a Master Plan Amendment calling for the establishment of the AR district. On December 21, 1998, the Township rezoned a large area, including the subject property, as AR by adopting ordinance 43-98, which required clustered six-acre zoning for residential lots on the site.

Under the AR zone, properties of forty acres or more must have: (1) a minimum open space set-aside of seventy percent; (b) a minimum lot circle of 200 feet; (c) a minimum lot circle not more than 125 feet from the street right-of-way; (d) each building lot must have a minimum of 65,000 square feet of

contiguous useable land; (e) the open space parcel shall contain a minimum of sixty-five percent of the unconstrained tract area; (f) clustering is mandatory rather than optional; and (g) the preserved open space area shall be configured in such a manner as to facilitate continuing or future agriculture use.

Hartman believed that Wilmark was not being treated fairly by Township officials and hired private investigators who, between July 1999 and October 2001, posed as purchasers of the property and met with Allen and other Township officials. They tape-recorded twenty-five hours of conversations, which were admitted into evidence, that purportedly demonstrated the purposeful obstruction of plaintiffs' development plans motivated by a desire to depress land values and make it easier for the Township to preserve open space.

On April 30, 2002, Wilmark and Hartman filed a complaint in federal court, alleging violations of 42 U.S.C.A. § 1983, the Fifth Amendment of the United States Constitution, and Article I of the New Jersey Constitution. The suit was brought against the Township, Board of Health, and Planning Board, as well as Allen, Beatrice Muir, and Ronald Monaco, who were Township officials. The complaint addressed not only the property that is the subject of this action, but three additional properties in the Township.

In another federal complaint dated November 21, 2002, against the Township, Board of Health, Planning Board, the Township's governing body, and various individual Township officials, Lackland asserted claims of an illegal taking, denial of substantive and procedural due process, and violations of the Fifth and Fourteenth Amendments of the United States Constitution, Article 1 of the New Jersey Constitution, 42 U.S.C.A. § 1983, and the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 to -163. That complaint refers only to the property that is the subject of this action.

After consolidation of these cases, on November 30, 2006, District Judge Stanley R. Chesler dismissed with prejudice as time-barred all of Lackland's and Wilmark's federal constitutional claims against the Township and Board of Health as they relate to the property that is the subject of this action.

Judge Ashrafi heard extensive technical expert testimony during trial, and numerous reports were admitted into evidence. We briefly summarize this testimony.

Russell Sterling, plaintiffs' real estate appraiser, testified as to the value of the property under three different zoning scenarios. Robert Vance and Richard Reading, defendants' valuation experts, set forth appraisals of the property under two sets of zoning requirements as of October 8, 2001.

Plaintiffs' civil engineer, Joseph Jaworski, discussed a lot density analysis of the property, to determine the number of lots that could be placed on the property under different zoning scenarios. Helen Heinrich, a professional planner hired by plaintiffs, discussed the ability to continue to farm the property. She testified that the Township's use of the Agriculture Development Area (ADA), a

district set up by the County under the Agricultural Retention and Development Act (ARDA), N.J.S.A. 4:1C-11 to -48, as a boundary for the AR zone, was improper.[3]

Andrew Higgins, an expert in wastewater issues hired by plaintiffs, refuted the Board of Health's reading of data and claimed there was no artesian condition on the property. He claimed there was no need for reserve areas for septic systems and that lot 40 is not suitable for agriculture.

Creigh Rahenkamp, a professional planner hired by plaintiffs, testified as to why ordinance 43-98, which created the AR zone, should be invalidated. Mark Remsa, another professional planner hired by plaintiffs, opined that RR zoning was reasonable for the property, but that AR zoning was not.

Philip B. Caton, defendants' expert in land use planning, and the prime author of ordinance 43-98, testified about the process of the adoption of the ordinance. Michael Sullivan, a professional planner hired by defendants, opined that AR zoning is appropriate for the property. Francis J. Banish III, another professional planner hired by defendants, testified that AR zoning was consistent with the Township's 1998 Master Plan Amendment and with the purposes of the MLUL, and it is a reasoned response to a range of planning objectives.

Matthew J. Mulhall, a geologist and hydrogeologist, testified for defendants about the environmental constraints on the property, including why wet season testing is justified and why there is an artesian condition on the site. James E. Coe, an expert in engineering and wastewater management, testified for defendants about why it is reasonable to require two disposal fields per lot and about reasons for other requirements in the Township ordinance. Paul W. Ferriero, an engineer, testified for defendants about the suitability of septic systems on the property and why hydraulic head testing is needed to prove or disprove that an artesian condition exists.

II.

We first address Lackland's assertion that Judge Ashrafi improperly applied the test set forth in Riggs v. Township of Long Beach, supra, 109 N.J. at 610-11, and erred in failing to find that ordinance 43-98 was enacted for an unlawful purpose.

In reviewing a trial judge's conclusions in a non-jury civil action, an appellate court is bound to grant substantial deference to the trial judge. Rova Farms Resorts v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974). "Findings by the trial judge are considered binding on appeal when supported by adequate, substantial and credible evidence." Id. at 484. However, no special deference is to be accorded to a trial court's determinations on questions of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The standard of review for a challenge to a zoning ordinance is well established. "A zoning ordinance is insulated from attack by a presumption of validity, which may be overcome by a 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, supra, 109 N.J. at 610-11 (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, 289-90 (2001), cert. denied, 535 U.S. 1077, 122 S.Ct. 1959, 152 L.Ed. 2d 1020 (2002)). The party attacking an ordinance bears the burden of overcoming the presumption of validity attached to it. Riggs, supra, 109 N.J. at 611.

"In evaluating whether a zoning ordinance 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, "[t]he wisdom of a zoning ordinance or an amendment thereto 'is reviewable only at the polls.'" Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, supra, 140 N.J. at 385 (quoting Kozesnik v. Twp. of Montgomery, 24 N.J. 154, 167 (1957)). Our Supreme Court in Bow & Arrow Manor, Inc., supra, 63 N.J. at 343, explained:

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.

"[T]he 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, S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel, 92 N.J. 158, 276-77 (1983)).

In Riggs, supra, landowners brought an action challenging a down-zoning ordinance, alleging it was enacted for an unlawful purpose. 109 N.J. at 604-07. The Court found no valid purpose and declared the ordinance invalid, because the sole purpose of the ordinance was to reduce the value of the plaintiffs' property so the municipality could acquire it below market value. Id. at 604.

Lackland attempts to fit the facts in this case to the situation outlined in Riggs. It claims that courts should not condone the abuse of delegated police zoning powers for the acknowledged improper purpose of lowering compensable density and values of properties targeted for acquisition and preservation simply because, in response to litigation, the municipality is able to assemble reports that arguably show other general purposes being fulfilled. Lackland argues that it is not a relevant consideration that the new lower density zoning is also reasonable, like the replaced zoning was.

In Riggs, the Court focused on the requirement that the municipal ordinance must have a valid

purpose. Id. at 612. The Court listed two valid purposes from the MLUL: (1) "[t]o 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," N.J.S.A. 40:55D-2a; and (2) to provide for open space, under N.J.S.A. 40:55D-2c, g, and j. 109 N.J. at 612 & n.2. Further, the Court explained: "An ordinance enacted solely to reduce the municipality's cost of acquisition of the land affected by the ordinance, however, does not fulfill a valid zoning purpose." Ibid. (citing Wital Corp. v. Twp. of Denville, 93 N.J. Super. 107 (App. Div. 1966)).

The Court explained that if an ordinance has both valid and invalid purposes, courts should not guess which purpose the governing body had in mind. Id. at 613. "If, however, the ordinance has but one purpose and that purpose is unlawful, courts may declare the ordinance invalid." Ibid. When a party asserts that an ordinance was adopted for the improper purpose of depressing the value of the property in a condemnation proceeding, the judge may seek to ascertain the municipality's true purpose in enacting the ordinance. Ibid. The inquiry should be limited, however, to an evaluation of the objective facts surrounding the adoption of the ordinance. Ibid. In Riggs, the Court determined that the objective facts, from the public referendum in 1976 to the condemnation proceedings initiated in 1987, constitute a continuous attempt by the Township to acquire the property at the lowest possible price. When it could not acquire the property through negotiations, the Township unsuccessfully sued Riggs for specific performance and rezoned the property from four lots to two. Having reduced the value of the property through the zoning amendment, the Township then initiated condemnation proceedings in 1986. [Id. at 615.]

The Court summarized: "[T]he municipality simultaneously planned for open space and zoned for residential use. The purpose of the zoning amendment was not to fulfill the master plan, but to enable the municipality to pay the property owner less than fair market value under the pre-existing zoning ordinance." Ibid. Thus, there was a contradiction between the goal of preserving open space at the location and the amendment to the zoning ordinance to allow continued residential use at the same location. Id. at 616. This contradiction indicated that the amendment, which continued to permit development for residential purposes, was adopted for an invalid purpose. Ibid. That is not the situation here.

As outlined in Judge Ashrafi's opinion, the property historically has been used for agricultural purposes. It has been granted farmland assessment for taxing purposes, although the use of the property for active agriculture has been sporadic over the last forty years. A 1962 photograph showed the presence of a farmhouse. Here, unlike Riggs, the property does not have a residential use, and there was testimony that there currently is no residence on the property.

Lackland argues that Judge Ashrafi erred by completely ignoring the premise that the presumption of validity can be overcome by a showing that the new zoning is "plainly contrary to fundamental principles of zoning" independent of any need to find that the zoning was arbitrary, capricious, or unreasonable. But Lackland never proved that the ordinance is plainly contrary to fundamental

principles of zoning.

Lackland states that the zone change was done with the "admitted" purpose of lowering compensable values of properties targeted for acquisition and preservation, and that the issue here is whether a municipality can immunize itself against judicial interference after the municipality admits and acknowledges that one of the purposes of the change in zoning is to lower the compensable density and value of properties targeted for acquisition or preservation. Lackland, however, never cites to any admission in the record. We have not found any indication that the admitted purpose (or even one admitted purpose) for the change in zoning was to lower property values targeted for acquisition. There is no testimony or written evidence that the Township or its officials who adopted the ordinance had such a purpose.

Lackland relies on an excerpt from the October 23, 1995, report, "Readington Township Open Space Inventory and Recommendations for Preservation," from the Township Greenways Work Group, which states in an appendix under the title "Current Recommendations" that the Township should "[n]egotiate with principals for best method of preservation for the properties list[ed] below. Options consist of purchas[ing] in fee and resell[ing an] easement, apply[ing] for Green Acres funding, or purchas[ing an] agricultural easement for resale. . . ." Listed is "Lackland (Block 64 Lot 40)." While that document indicated that the property was among those the Township desired to purchase for preservation, it did not establish that the Township sought to change zoning to lower the property value so it could then acquire it.

Judge Ashrafi set forth testimony of Rahenkamp, plaintiffs' expert planner, who stated that the true purpose of the AR zone was to "downzone" properties within the ADA, the County-created agricultural district, to reduce and suppress land values and thus make it easier for the Township to acquire or preserve targeted properties, and to stretch money being made available for that purpose. The judge stated that Rahenkamp relied on a statement by Caton, the Township's planning expert, during a September 28, 1998 Planning Board meeting, statements of Allen from a public hearing that same day, and a statement by Mayor Wall during a public hearing on December 21, 1998. While these statements show that the Township was interested in aggressively adding to the amount of preserved farmland, they do not establish that the zoning was changed for the purpose of lowering property values to allow for more preservation.

Judge Ashrafi rejected plaintiffs' argument that inclusion of the property in the open space inventory that was part of the 1996 Master Plan Re-examination Report showed an improper purpose. He concluded that "[t]he Open Space Inventory simply identifies properties recommended for preservation." We agree that it does not indicate an improper purpose.

Further, Judge Ashrafi set forth a detailed analysis of why the ordinance was enacted for a proper purpose:

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. . . . 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.

Judge Ashrafi summarized testimony by the Township's other planning experts:

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 that 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.

Further support for the validity of the ordinance is found in its conformity with the New Jersey State Development and Redevelopment Plan (State Plan). In New Jersey Farm Bureau, Inc. v. Township of East Amwell, 380 N.J. Super. 325, 335 (App. Div.), certif. denied, 185 N.J. 596 (2005), we stated:

[A]lthough the State Plan's designation of an area as a Rural Planning or Environmentally Sensitive Planning Area is not dispositive of the validity of large-lot zoning designed to preserve the area's rural character, these designations are supportive of the reasonableness of such zoning. See Kirby v. Twp. Comm. of Bedminster, 341 N.J. Super. 276, 286-89, 775 A.2d 209 (App. Div. 2000); Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 540-45, 774 A.2d 704 (App. Div. 2001), remanded on other grounds, 174 N.J. 359, 807 A.2d 192 (2002); Sod Farm Assocs. v. Springfield Twp. Planning Bd., 298 N.J. Super. 84, 97-98, 688 A.2d 1125 (Law Div. 1995), aff'd, 297 N.J. Super. 584, 587-88, 688 A.2d 1058 (App. Div. 1996), certif. denied, 149 N.J. 36, 692 A.2d 49 (1997). Indeed, Kirby sustained one

unit per ten acre zoning similar to the zoning in the AVA district in comparable circumstances. See also Gardner v. N.J. Pinelands Comm'n, 125 N.J. 193, 593 A.2d 251 (1991) (upholding forty-acre minimum lot size with mandatory clustering in Pinelands). The record of the lengthy trial before Judge Hoens demonstrates that the AVA district in East Amwell is a quintessential agricultural community that the State Plan properly designated as a Rural Planning Area and that Ordinance 99-06 is reasonably designed to preserve that rural character.

Judge Ashrafi found that the taped conversations did not support the 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, including the property, for preservation. He concluded that the tapes "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." The record supports that finding.

The party attacking an ordinance bears the burden of overcoming the presumption of validity attached to it. Riggs, supra, 109 N.J. at 611. Lackland did not overcome the presumption, and we reject its argument that the judge improperly applied the test set forth in Riggs, and that he erred in failing to find that ordinance 43-98 was enacted for an unlawful purpose.

III.

Lackland contends that Judge Ashrafi erred in failing to find that ordinance 43-98: (1) was invalid due to vagueness; (2) delegated too much discretion to the Planning Board; and (3) was arbitrary and capricious as applied to the property. We reject these arguments substantially for the reasons expressed by Judge Ashrafi in his written decision. The first two arguments do not warrant further discussion. See R. 2:11-3(e)(1)(E). We add the following regarding the third argument.

One of the MLUL's purposes is 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." N.J.S.A. 40:55D-2a. Thus, the MLUL authorizes municipal governing bodies to "adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon." N.J.S.A. 40:55D-62a. All of the provisions of such an ordinance must generally be "substantially consistent" with the land use planning and housing plan elements of the municipality's master plan. Ibid.

Lackland emphasizes that defendants admitted that they performed no land use studies in support of changing to the AR zone. It complains that down-zoning the area was done merely because it was an area in which the ADA was coterminous with the RR zone. However, we do not deem this circumstance dispositive.

Rahenkamp, Lackland's expert, claimed that the ordinance violated N.J.S.A. 40:55D-62a because it

disregarded the actual characteristics of the zone and created a large number of nonconforming uses. However, Judge Ashrafi directly addressed Rahenkamp's assertion, and concluded that he improperly interpreted data.

Judge Ashrafi agreed with defendants that Rahenkamp had included all the previously nonconforming lots under the RR zone in his figures for nonconforming lots under AR zoning. Thus, the judge explained that 1164 lots that were nonconforming under the RR zone remained nonconforming and 442 additional lots that were conforming under the prior zoning changed to nonconforming under AR zoning. The judge stated the total number of acres in the nonconforming lots under the new zoning was less than 1600 acres, comprising only 10.25% of the area in the AR district. In addition, he stated that the AR ordinance protects the nonconforming lots through a grandfather provision, and concluded that the number of nonconforming properties and the amount of land affected was not so extensive as to invalidate ordinance 43-98. We agree with this analysis.

Judge Ashrafi concluded that the AR ordinance is facially valid. He found that it is rooted in legitimate government objectives, such as planning for residential development, that are compatible with farmland preservation and environmental protection. Further, he relied on certain admissions from plaintiffs' planning experts. For example, Remsa could not dispute that almost sixty-six percent of the AR district is farmland and open space, and that it contains environmentally sensitive areas worthy of protection. Remsa admitted that the 1998 Master Plan Amendment and implementing AR ordinance took into account the State Plan, the Hunterdon County Growth Management Plan of 1986, and the Hunterdon County Draft Strategies for Managing Growth Report. And, Rahenkamp admitted that the AR district was founded on long-standing policies in the Township to protect and preserve farmland, open space, and natural resources, and that the analysis in the 1998 Master Plan Amendment resulted in its recommendation for establishment of the AR district.

Judge Ashrafi also relied on the testimony by three defense expert planners, Caton, Sullivan, and Banisch, and found that they provided ample testimony to support the validity of the AR Ordinance. Judge Ashrafi concluded that plaintiffs failed to overcome the presumption of validity accorded the ordinance, and that the ordinance was not arbitrary, capricious, or an unreasonable exercise of the Township's zoning authority. Thus, he concluded that it was facially valid. Again, we agree.

Against this background, we consider Lackland's argument that the AR zone should be declared invalid as applied to the property.

Concerning Lackland's taking and just compensation argument, Judge Ashrafi summarized testimony by Sterling (plaintiffs' real estate appraiser), Vance and Reading (defendants' valuation experts), Mulhall and Ferriero (defendants' septic suitability experts), and Higgins (plaintiffs' septic suitability expert). The judge found that even if he accepted the conclusions of plaintiffs' experts regarding lot yield, there would be a reduction of only about ten proposed building lots resulting in the change of zoning from RR to AR. The judge relied on Sterling's acknowledgment that there was a

continued beneficial use of the property notwithstanding the change in zoning. See Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221, 238 (1992) (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); Kirby, supra, 341 N.J. Super. at 293 (mere diminution in the value of property, however serious, is insufficient to demonstrate a taking). Judge Ashrafi noted that in Bernardsville Quarry, supra, 129 N.J. at 238-40, the Court concluded that a ninety percent reduction in value was not a taking, while here, Sterling opined that there was approximately a thirty-eight percent reduction in value.

Judge Ashrafi heard conflicting testimony as to whether ordinance 43-98 fulfilled appropriate zoning purposes as applied to the property. He concluded that this was a debatable question. Therefore, based on the standard of a presumption of validity, he upheld the ordinance as applied. With specific regard to the property, he found that the ordinance's aims of facilitating farmland preservation, open space retention, preservation of natural resources, and maintenance of the rural character of the Township, which are recognized zoning purposes under the MLUL, were furthered. He also concluded that the property exhibits characteristics in common with lands in the AR district.

The judge rejected plaintiffs' reliance on Pheasant Bridge Corp. v. Township of Warren, supra, 169 N.J. at 286-301, and Obadash v. Mayor & Council of Borough of Dumont, 65 N.J. 115 (1974), as factually dissimilar from this case. He explained that in Pheasant Bridge Corp., the zoning was invalidated because the property did not contain the environmental resources that the zoning was adopted to protect, whereas here the property contained the agricultural and environmental features the AR district was created to protect. He found Obadash distinguishable, because the property is not an "isolated island" situated within other uses. Significant percentages of the surrounding area are devoted to agricultural, open space, and other similar uses.

Plaintiffs failed to satisfy their burden of proving the AR ordinance arbitrary, capricious, or unreasonable as applied to the property.

IV.

We next address the remedy imposed for actions caused by Allen's improper conduct.

Judge Ashrafi made a detailed analysis of Allen's conduct. He stated, "Ms. Allen's zeal for preservation of open space overcame her objectivity and impartiality," and she induced the Board of Health, as its de facto leader, "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." He found that she induced the Board of Health to treat this application differently than others in order to obstruct it. She admitted doing so in the taped conversations. She "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." The judge

found:

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.

[]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[, cert. denied, 519 U.S. 911, 117 S.Ct. 275, 136 L.Ed. 2d 198] (1996).

The judge concluded that 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.

These findings and conclusions are well supported by the record.

As a remedy, Judge Ashrafi disqualified Allen from participating as a member of the Board of Health or the Planning Board in adjudicating any applications regarding the property. He enjoined the Board of Health and the Planning Board from permitting Allen to participate directly or indirectly in any manner beyond that permitted other residents of the Township in decisions pertaining to the property. He enjoined the Board of Health from applying septic regulations differently and unequally

to plaintiffs from their application to other property owners and applicants, and ordered that the Board consider promptly and fairly any septic suitability application filed by plaintiffs or their assignees.[4]

The judge also ordered that the Township septic regulations in effect in March 1997, unless superseded by federal, State, or County regulations, shall be used for two years from the time of the judge's decision to evaluate any septic suitability applications submitted by Lackland or an assignee, rather than the more stringent requirements established in its septic ordinances adopted in or after 1998.

Lackland argues that in light of the above findings of fact and conclusions of law, the remedy was inadequate to protect plaintiffs from future violations. It contends the judge ignored the fact that Allen was only able to have her personal agenda actualized and implemented through the cooperation and participation of the other Board of Health members, including Muir and Allen's son.

Lackland also argues that the two-year duration is grossly inadequate to afford any relief, particularly because there is a wet season from January to April of each year. Lackland seeks at least a five-year period of protection. We find no mistaken exercise of discretion in the two-year limit, which allows for two wet seasons for testing. However, we direct that the two-year period is tolled during the pendency of the appeal.

Lackland further argues that the Hunterdon County Health Department should be the authority that reviews and approves the septic suitability for the property because the Board of Health and its members have demonstrated a lack of impartiality and desire to carry out the improper agenda and bias of Allen. We recognize the taint on the Board of Health based on what has transpired, and the apparent continued membership on that Board of Allen's allies who were influenced by her improprieties regarding the property. Therefore, out of an abundance of caution, and because the County Health Department has concurrent jurisdiction to consider such matters, we accept this argument, and we direct that the Hunterdon County Health Department shall consider and act upon all septic system applications by plaintiffs or their assigns for the property.

As modified, we sustain the remedy fashioned by Judge Ashrafi. V.

DEP regulations addressing standards for septic systems provide that "[t]he administrative authority shall not adopt an ordinance which is less stringent than this chapter." N.J.A.C. 7:9A-3.1(c). Lackland maintains that Judge Ashrafi erred by ruling that a Board of Health may adopt any standard whatsoever by simply stating that it is not less restrictive than that required by the DEP. It contends the judge erroneously affirmed the Board of Health's setback distances, which in many instances were double those required by the DEP, and the reserve area for septic tank replacement requirement for each 1.5 acre lot.

We reject these contentions. The record contains evidence of coarse soil conditions justifying greater setback requirements. See N.J.A.C. 7:9A-4.3 n.2. ("Where excessively coarse soils or fractured rock substrata are encountered, these distances may be increased by the administrative authority.") And, regarding reserve areas, Coe testified that six municipalities in Hunterdon County require reserve fields in certain zoned areas, and the United States Environmental Protection Agency has a design manual indicating that reserve areas should be considered as part of the design of a subsurface disposal system. The judge's findings on these points are evidentially supported and the provisions are valid.

Lackland further argues that the Board of Health improperly requires hydraulic head testing to disprove an artesian condition.

Judge Ashrafi devoted a considerable portion of his opinion to plaintiffs' challenge to the Board of Health's requirement of hydraulic head testing. In summarizing the testimony before him, he noted that plaintiffs' expert, Higgins, opined there was no artesian condition pursuant to N.J.A.C. 7:9A-5.8(c) because soil logs did not indicate that a uniform and continuous hydraulically restrictive horizon was present throughout the area. Based on this testimony, plaintiffs disputed that a hydraulic head test had to be conducted and instead sought to disprove the existence of an artesian condition through the use of a standpipe, a less costly alternative.

Further, plaintiffs claimed that Higgins, Starcher and the County Health Department all opined that hydraulic head tests were unnecessary and that this testimony was unrebutted. Judge Ashrafi set forth Ferriero's testimony in detail that was to the contrary.

Judge Ashrafi found that there was conflicting testimony of the experts, and concluded that the Board of Health did not act arbitrarily, capriciously, or unreasonably in requiring hydraulic head testing for Wilmark's septic suitability applications. He added that his conclusion did not mean that the Board of Health must always require hydraulic head testing. He concluded that "[a]s 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." Judge Ashrafi explained: "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."

The judge's findings are supported by the record evidence. We need not comment further on the issue, especially in light of our direction that the County Health Department will decide the septic issues, and it will interpret the applicable regulations as to which tests are required based upon the data and information before it.

VI.

Lackland argues that Judge Ashrafi erred by dismissing the civil rights claims with prejudice. Wilmark asserts that Judge Ashrafi erred in resolving claims that were not before him and that he should not have departed from Judge Bartlett's ruling. Judge Bartlett ruled prior to trial that based on the expiration of the purchase contracts Wilmark had with Lackland, Wilmark was confined to a facial challenge and could not pursue any as-applied challenges. The question here is whether Judge Bartlett's ruling precluded Judge Ashrafi's consideration of the constitutional claims, and his decision to dismiss them with prejudice.

Initially, we address the argument raised by the Township and Board of Health that, since the filing of the briefs in this appeal, the arguments raised on this issue have become moot because of the subsequent dismissal of the federal court actions with respect to the property involved in this case. Wilmark is concerned that the final judgment in this case might be viewed as a disposition on the merits of its claims, particularly constitutional claims raised in the federal action, other than a general challenge to provisions in the Township zoning ordinances.

On November 30, 2006, Judge Chesler ordered dismissal with prejudice as to all of plaintiffs' federal constitutional claims against the Township and Board of Health as they relate to this property. The dismissal was not on issue-preclusion grounds; it was on statute of limitations grounds. However, claims against individual defendants were not dismissed in federal court. Wilmark states that defendants in the federal action had moved to dismiss the case based on issue preclusion, arguing that because the individual defendants (such as Allen, Muir, Monaco, and Shamey) were in privity with the public defendants (meaning the Township, the governing body of the Township, and the Board of Health), resolution of the constitutional claims in the state case barred their prosecution in the federal case. Judge Chesler stated:

Defendants argue that the state court has determined that the public entity Defendants did not violate [Wilmark and Hartman's] constitutional rights, and therefore no individual member of the public entities could have violated [Wilmark and Hartman's] constitutional rights. Again, this argument is made without reference to any specific claim. It is simply too vague to serve as a basis for dismissal of any claim.

Wilmark agrees that insofar as defendants do not intend to renew their arguments of issue preclusion before the federal court with regard to the individual defendants, their appeal before this court is moot. However, if those arguments are to be renewed at a later date, then Wilmark claims that "it becomes important to understand the reach of the Superior Court's judgment, which is a matter of State law; and the appeal is not moot." Thus, Wilmark states that "it would seem that the motion to dismiss plaintiffs' appeal[s] is premature in the absence of a determination by Defendants to refrain from arguing issue preclusion in the Federal Court."[5] We agree and will address the merits of the issue.

In count two of the complaint, plaintiffs alleged that section 906.2.41 was ultra vires and constituted

a temporary regulatory taking, and sought a declaration that this provision violated procedural and substantive due process as guaranteed by the United States and New Jersey Constitutions. In count five, plaintiffs claimed that the land development ordinance as applied to plaintiffs' property constituted a violation of substantive due process and a taking of property, and that the open space set aside was arbitrary and capricious on its face and as applied to sites such as plaintiffs'. Plaintiffs sought a determination that the down-zoning ordinance and the land development ordinance are unconstitutional on their face and as applied to plaintiffs' property.

In count eight, plaintiffs claimed that the down-zoning ordinance and the land development ordinance are "otherwise arbitrary, capricious and unreasonable in violation of Plaintiffs' right to substantive due process of law as secured by the Fourteenth Amendment to the U.S. Constitution and the New Jersey Constitution, Art. 1, par. 1 and 20, as well as plaintiffs' right to fundamental fairness."

On the motion for clarification or modification of the judgment, Judge Ashrafi explained that when plaintiffs rested, he "was under the impression that the civil rights claims were part of the trial." He stated that this was [n]ot the amount of damages but whether or not there would be liability for civil rights violations, and when plaintiff voluntarily dismissed or abandoned those claims the issue of whether the dismissal should be with prejudice or without prejudice was raised suggesting that those claims had not been abandoned or abandoned or dismissed earlier during trial.

The Township and Board of Health point to numerous places in plaintiffs' opening statement where counsel referred to constitutional claims. They also point to ten occasions during trial where counsel discussed elements of the case and focused on constitutional claims.

Judge Ashrafi addressed this issue in six paragraphs of his decision, which we set forth at length:

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[, 84 S.Ct. 461, 468, 11 L.Ed. 2d 440, 449] (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.

217. As to the Township Committee and the 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.

Wilmark states that as a consequence of the limited role afforded to it, in its capacity as a resident, to make a facial challenge to the ordinances, it had no incentive to advance certain arguments. Judge Ashrafi prevented Wilmark from presenting evidence regarding alleged mistreatment by the Township at other development projects. Wilmark contends, relying on Desi's Pizza, Inc. v. City of Wilkes-Barre, 321 F.3d 411, 423 (3d Cir. 2003), that this evidence would have been relevant to substantive due process or equal protection claims. Wilmark explains that the evidence was barred because it was not relevant to a facial challenge. Thus, Wilmark argues that Judge Ashrafi inappropriately disposed of Wilmark's as-applied challenge without consideration of relevant evidence.

We disagree.

The challenge here only addressed the property. The constitutional claims plaintiffs raised in their complaint did not include allegations involving other properties that are part of the federal case.

Wilmark argues that the law of the case doctrine applies and, relying on Maul v. Kirkman, 270 N.J. Super. 596, 612 (App. Div. 1994), that once the law of the case is established, it can only be changed upon notice to the parties and the opportunity to present evidence made relevant by the change. The problem with Wilmark's argument is that Judge Bartlett did not specifically rule that the constitutional claims were no longer part of this case. As Judge Ashrafi stated, plaintiffs' counsel's actions demonstrated the presentation of constitutional arguments during trial, negating any asserted belief that they were not part of the case. Thus, the law of the case did not preclude Judge Ashrafi from dismissing these claims with prejudice.

Lackland cannot complain that any limitation that Judge Bartlett placed on Wilmark's standing to bring claims affected its case in the trial court. Lackland was not limited in bringing arguments relevant to any of the claims.

VII.

Lackland argues that Judge Ashrafi erred by narrowly defining and limiting issues before him, such as precluding evidence regarding other properties and limiting the use of the tape-recorded conversations, thus improperly restricting proofs, evidence, and arguments. Wilmark argues that the trial record should be reopened, or, alternatively, that if Judge Ashrafi's consideration of its as-applied challenge was proper, that judgment should be reversed because the judge improperly prevented Wilmark from introducing evidence relevant to its substantive due process claim. We find no mistaken exercise of discretion in the judge's evidential rulings and reject these arguments without further comment. See R. 2:11-3(e)(1)(E).

VIII.

Finally, we address the cross-appeals, in which the Township and Board of Health assert that ordinance section 906.2.41 requiring Board of Health septic suitability approval as a checklist requirement is authorized under N.J.S.A. 40:55D-10.3, and is valid, and that Judge Pursel erred in concluding that the requirement is invalid because it violates N.J.S.A. 40:55D-22b.

N.J.S.A. 40:55D-10.3 authorizes the use of a "checklist adopted by ordinance" to be utilized by land use boards in determining the completeness of development applications. Another provision of the MLUL, N.J.S.A. 40:55D-22b, provides:

In the event that development proposed by an application for development requires an approval by a governmental agency other than the municipal agency, the municipal agency shall, in appropriate instances, condition its approval upon the subsequent approval of such governmental agency;

provided that the municipality shall make a decision on any application for development within the time period provided in this act or within an extension of such period as has been agreed to by the applicant unless the municipal agency is prevented or relieved from so acting by the operation of law.

No one suggests that approval of soil suitability and ultimate design of septic systems cannot constitute a condition of subdivision approval. The issue is one of timing. Can a board of health septic approval be a precondition to completeness of a subdivision application under the checklist provision or must it be a condition subsequent for approval by an outside agency? We agree with Judge Pursel that it must be the latter.

The Planning Board must vote to approve or disapprove an application within the MLUL statutory period, in this case ninety-five days, see N.J.S.A. 40:55D-48c, even though other municipal or governmental approvals are ultimately required. To require prior Board of Health approval would put this statutory time period indefinitely on hold. The purpose of this provision is to eliminate prolonged planning board delays by referral to outside agencies to which the time constraints of the MLUL do not apply. Allowing soil suitability approval to be a checklist item would eviscerate that purpose.

Judge Pursel correctly determined that N.J.S.A. 40:55D-10.3, authorizing checklists, and N.J.S.A. 40:55D-22b, addressing procedures for subsequent governmental approvals, must be read in pari materia in order to reconcile their potentially contrary meanings. In doing so, he aptly reasoned:

If one were to read the two sections independently it would mean that the Planning Board first chooses in its checklist whether an approval from another agency such as the DEP or the Board of Health is a prerequisite to Planning Board completeness. If it were to make such a choice, then N.J.S.A. 40:55D-22(b) is moot.

That could not have been the intent of the Legislature.

Judge Pursel stated that in enacting the time periods in N.J.S.A. 40:55D-22b, the legislative intent "was to specifically prevent delay by town boards in the processing of development applications." He found that defendants' interpretation of N.J.S.A. 40:55D-10.3, which would allow the municipal checklist to include complete approval of all lots by a board of health,[6] which controls its own calendar, prior to consideration by the Planning Board of preliminary approval, is contrary to the legislative intent. The judge found persuasive plaintiffs' reliance on N.J.S.A. 40:55D-60, which grants a developer who has obtained preliminary approval liberal time extensions for obtaining final approval after preliminary approval, showing that the Legislature intended that preliminary approval should not require final determinations by outside agencies. See also N.J.S.A. 40:55D-49f (allowing extension of up to one year of preliminary subdivision approval where developer is unable to obtain required approvals from outside agencies).

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N.J.S.A. 40:55D-10.3 precludes a municipal agency from declaring an application incomplete for failure to include information not specified in the applicable ordinance. Eastampton Ctr., LLC v. Planning Bd. of Eastampton, 354 N.J. Super. 171, 191 (App. Div. 2002). In Eastampton Ctr., we declared that the intent of the requirement of N.J.S.A. 40:55D-10.3 that the content of a development application be governed by a checklist adopted by municipal ordinance was "to avoid ad hoc board requirements of which an applicant had no fair, advance notice." Ibid. This purpose is geared to providing information needed for consideration of the application. It does not constitute a blank check to municipalities to include anything they wish in a checklist. Such a rationale would frustrate the purpose of N.J.S.A. 40:55D-22b, and would enable municipalities to inhibit applicants from ever getting to the MLUL starting gate, as happened here.

The Township and the Board of Health assert that because of critical public health concerns, it is not uncommon that municipalities require approvals from boards of health as part of their checklist prior to consideration by planning boards of development applications. They rely on D'Anna v. Planning Board of Township of Washington, 256 N.J. Super. 78, 84 (App. Div.), certif. denied, 130 N.J. 18 (1992), where we addressed the importance of the completeness doctrine. The issue in D'Anna pertained to the automatic approval provision of the MLUL when a development application was inadvertently misfiled. Id. at 80, 84. Default approval was unconditional. Id. at 84. We held that "matters vital to the public health and welfare, such as drainage, sewer disposal and water supply must be resolved before preliminary approval is granted, where the Board has not acted in bad faith." Ibid. We did not say they must be resolved before completeness is determined.

We also find unpersuasive the reliance of the Township and Board of Health on Field v. Mayor & Council of Township of Franklin, 190 N.J. Super. 326, 332-33 (App. Div.), certif. denied, 95 N.J. 183 (1983). We did not discuss completeness in Field, but held that issues such as sewage disposal must be resolved before preliminary subdivision approval is granted. Id. at 332-33.

Like Judge Pursel, we do not find the Law Division decision in Sprint Spectrum, L.P. v. Township of Warren Planning Board, 325 N.J. Super. 61 (Law Div. 1999), to be supportive of the Planning Board and Board of Health's position. The issue there dealt with preemption of local review relating to cell towers under the Federal Telecommunications Act. Id. at 64. That decision did not mention N.J.S.A. 40:55D-22b, and, of course, did not analyze the interplay of that MLUL section with N.J.S.A. 40:55D-10.3. Discussion of the authority of a planning board to make a referral to the board of health for advisory input, see id. at 72-73, was not critical to the court's decision in that case and is not dispositive of the issue now before us.

Finally, we note that the views of a leading New Jersey land use commentator accord with our analysis and conclusion. See William M. Cox, New Jersey Zoning and Land Use Administration, §§ 19-3.2 and -3.3 (Gann 2007).

Affirmed as modified.

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1. Madden, Madden & Del Duca represent Readington Township in both appeals, but only regarding constitutional claims and substantive due process claims.

2. Our reference is to the second amended complaint. The initial complaint and first amended complaint are not part of the appellate record.

3. In Township of South Brunswick v. State Agriculture Development Committee, 352 N.J. Super. 361, 364-65 (App. Div. 2002), we stated: In enacting the ARDA the legislature found it necessary to establish "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). To this end the legislature created county agricultural development boards, N.J.S.A. 4:1C-14, which 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).

4. The remedy did not preclude Allen from acting as a member of the Township Committee regarding ordinances that may apply to the property that is the subject of this litigation along with other properties in the Township.

5. At oral argument, counsel for Wilmark also advised it intends to appeal the dismissal in federal court, which could also result in revival of the issue-preclusion issue.

6. In his written decision, the judge sometimes referred to the County Board of Health rather than the Township Board of Health. This is of no consequence. The result is the same in either case, because either body is an outside agency, i.e. one other than the municipal land use board to which the development application was made.