“Down-zoning” is the municipal practice of increasing the minimum size of a lot on which a house can be built. From 1995-2004, no fewer than 90 municipalities in New Jersey reportedly considered or engaged in down-zoning as a means of preventing further growth. By definition, it is a planning tool for the implementation of a town’s anti-development, growth management strategy. Inherently, it is exclusionary by design and impact. More often than not, its stated purpose is nothing more than rhetorical camouflage for a municipality’s no-growth policy. However, its use by New Jersey towns under the more favored, frequently used pretexts coming into vogue – e.g., “farmland preservation”, “promotion of agriculture”, “open space preservation”, “protection of environmental or natural resources”, etc. – will, for certain, proliferate rapidly in the coming months in the aftermath of two (2) conflicting, confounding decisions issued the same day by the same three-judge panel of the Superior Court of New Jersey, Appellate Division, on September 22, 2005. The significance of these two decisions and what they foreshadow for the immediate future of development, zoning and land use planning in New Jersey cannot be over-stated.

In New Jersey Farm Bureau, Inc., et al. v. Township of East Amwell, 380 N.J. Super. 325 (App. Div. 2005), the Appellate Division affirmed the trial court’s decision of August 1, 2002 upholding the validity of Township of East Amwell Ordinance 99-06. That ordinance, among other things, down-zoned 11,000 of 18,000 acres -- or 60% -- of East Amwell’s total area from minimum lot sizes of 3 acres to 10 acres, all in the name of “farmland preservation”. The Appellate Division noted that it took this course “substantially for the reasons set forth in [the trial court’s] comprehensive written opinion.”

The trial court recognized that the only permissible justification advanced for the ordinance was “to preserve and protect agriculture and farming in the community”. However, while it articulated the correct standard, the court failed to point to evidence to underwrite its holding that 10-acre down-zoning actually preserves agriculture, instead of merely causing farms to be cut up into 10-acre mini-estates with significantly fewer houses than would otherwise be built on 1- or 3-acre lots (the predecessor zoning). Thus, the court could not find that this ordinance had, under applicable case law, advanced a permissible purpose.

1 Tom and the Firm were at the forefront of the zoning fight at issue in this article. Tom represented the New Jersey Farm Bureau, Inc., the trade association of 19,000 member farmers and farm-related entities in New Jersey, as well as the United Farmers and Landowners of East Amwell and each of its nine (9) individual farm families (the “Farm Bureau Plaintiffs”), in the East Amwell case described, infra. Tom is a Partner of the Firm resident in the Princeton office. He is a member of the Firm’s Litigation and Real Estate Departments, as well as its Zoning & Land Use Practice Group and Construction Practice Group.

2 Notably, on the coattails of the trial court’s decision and barely a year after it came down, East Amwell then proceeded to further down-zone its former Sourland Mountain and Stony Brook zoning districts from 5-acre to 15-acre minimum lot sizes, such that, from and after oral argument in the Appellate Division in January, 2005 and through the present day, East Amwell down-zoned upwards of 94% of its land mass to minimum lot sizes of 10 acres or more, ostensibly in furtherance of farmland preservation and other pretexts. Most recently, East Amwell amended the zoning requirements in its 15-acre minimum lot size district to impose even further restrictions -- which prevent the creation of any new farms altogether, and severely restrict the size of outbuildings that can be erected or constructed on farms or by farming operations in existence prior to the adoption of the ordinance amendments.
The unrefuted testimony in the record of this matter was that 10-acre down-zoning will not preserve agriculture, but will instead destroy it. Farmers’ land is their currency, their asset, their equity. It’s collateral for loans; it’s their life insurance, health insurance; it’s the legacy for their children. They must retain reasonable control of its use as a hedge against a day that field crop operations in which they typically engage may no longer be profitable. Witness after witness testified at trial that farmers need to be able to borrow against their development rights in order to operate. If development rights are stripped away, the value of land will decline tremendously, thereby depriving farmers of equity to borrow against to obtain needed working capital. Farmers would be forced out of business. Moreover, because the minimum lot size would be 10 acres, farmers could not sell off smaller portions of their land for development or to support farming operations while retaining the rest as farmland, if or when needed in recurrent economic downturns. A vicious circle had thus emerged: farmers would be forced to sell off 10-acre chunks of land, thereby depleting the remaining land available for farming.3

Every local, county, and State agency concerned with agriculture objected to the East Amwell ordinance. The Hunterdon County Agricultural Development Board (charged by statute, NJ’s Right-to-Farm Act, with responsibility for evaluating the effects of municipal actions on farming); the State Department of Agriculture; the State Board of Agriculture; even East Amwell’s own Agricultural Advisory Committee, each and all of these agencies that deal daily with the State’s business of agriculture objected to it. The individual plaintiffs in this case, East Amwell farmers, and the plaintiff, New Jersey Farm Bureau, a member organization of more than 19,000 farmers and farm-related entities in the State, all objected to the down-zoning ordinance at every stage of the adoption process.

Despite the trial court’s further acknowledgement of evidence in the record supporting the farmers’ claim that East Amwell’s down-zoning was conceived and adopted with an exclusionary animus, the Appellate Division, ignoring that recognition, ultimately held that:

“The record of the lengthy trial . . . demonstrates that the [Amwell Valley Agricultural] D[istrict in East Amwell is a quintessential agricultural community that the State Plan properly designated as a Rural Planning Area and the ordinance 99-06 is reasonably designed to preserve that rural character.”

Remarkably, the Appellate Division did not reconcile its conclusion to that effect with the trial court’s finding to the diametric opposite, i.e., that the down-zoning would not achieve that stated end:

It is clear that East Amwell will not retain its overall agricultural character if every one of the parcels now owned by a named plaintiff in this litigation, in fact takes advantage of the open lands ratio or the lot averaging option. Nor will it retain its overall agricultural character if every lot takes advantage of the 10 acre zoning of right. (Emphasis added).

The trial court’s findings were amply supported by the record, but inexplicably neither court saw fit to strike down the ordinance based on those findings. However, as it noted in its very next sentence, the trial court upheld the ordinance because it was convinced that East Amwell hoped it would work, stating that

3 To the point, as one New Jersey farmer aptly put it: “You can preserve all the land you want, but if there are no farmers around, what will become of it? The farmer, not the farmland, is the real endangered species.” Reaping What They Sow, by Christina Kozma, New Jersey Monthly, Nov. 2005, Vol. 30, No. 11, at p. 94. Notably, as this article further pointed out, “Agriculture is New Jersey’s third largest industry, behind pharmaceuticals and tourism, generating $65 billion a year”. Id. at p. 79.
“it is the hope of the Planners and Plan that they devised is designed to press such development as may occur into an overall agricultural look . . .” The trial court further stated that the “Planners also hoped . . . that they might be able to encourage denser development . . .” and that “they intended to create an option which might be attractive on a particular parcel.”

The Appellate Division quoted this language approvingly. However, “hope” for an “agricultural look” is not a land use plan. An ordinance cannot be sustained merely on the grounds that its drafters hope that it will have salutary effects, or that it might work. Moreover, preservation of farming, farmland and agriculture was the stated purpose of East Amwell’s ordinance. In reality, it was a pretext for the Township’s avowed no-growth policy. Its resultant effect has been to induce sprawl, not prevent it, and to divert population elsewhere. Inevitably, such an impact will wreak havoc for land use planning, regionally and State-wide, as towns lunge at the opportunity to down-zone, with impetus to do so from the court’s decision in East Amwell.

In a startling twist, however, in its separate published opinion in Joseph Bailes, et al. v. Township of East Brunswick, 380 N.J.Super 336 (App. Div. 2005), the very same Appellate Division panel the same day invalidated a similar, but significantly less severe down-zoning ordinance in the Township of East Brunswick. In 1999, in an effort to slow growth and in a series of ordinances, East Brunswick rezoned its remaining farm-able, developable land located away from developed areas proximate to the New Jersey Turnpike, other highways, commercial/retail corridors and employment centers as “RP” – “rural preservation” – and down-zoned the area from 1-acre to 6-acre minimum lot sizes. The ordinances were amended in 2001 to permit increased densities under a number of cluster options. The stated rationale and purpose was to, among other things, “protect natural resources”, “maintain farmland” and to “preserve rural character and open space.”

However, after an unsuccessful effort at the trial level, the ordinance challenge made by the plaintiffs (some farmers) in Joseph Bailes met with success in the Appellate Division. The court in its decision struck down East Brunswick’s down-zoning finding that it was arbitrary and unreasonable, was not required to serve the stated purposes of retaining farmland, recognizing environmental constraints and conserving open space -- and for essentially the identical legal reasoning that the Farm Bureau Plaintiffs urged the Appellate Division to find invalid East Amwell’s Ordinance 99-06. Curiously, in its opinion, the Appellate Division described the prevailing farmland owners in the East Brunswick case as “. . . a relatively small group of landowners who have continued to farm and conduct other low-intensity uses of their properties. Several are elderly persons whose properties are their primary assets. . . .” And, as further support for its invalidation of East Brunswick’s down-zoning, the court concluded that “[c]onsistently, it would impose an inequitable burden upon plaintiffs to limit development of their properties to large-lot subdivisions.”

The challenging farmers in East Amwell were virtually identical, faced the same predicament, demonstrated through their economics expert at trial that Ordinance 99-06 would a result in upwards of a 50% loss in the equity value of their land, and yet were handed a contrary result. At the very least, the Appellate Division has split in its contemporaneous acceptance of the vacuous use of the phrase “farmland preservation” with honest promotion of agriculture as equally legitimate bases for down-zoning.

In the meantime, there will undoubtedly be a one-direction “ratchet” or “copy-cat” zoning effect of 99-06. Stated differently, if large lot zoning is approved and upheld by the courts in one place, e.g., East Amwell, inquiring minds will ask how other towns can be denied the same “right.” Inescapably, down-zoning will be pursued and enacted elsewhere, since the same political pressures of exclusionary zoning still flourish. Indeed, the “copycat” zoning race is well underway as towns pursue radical down-zoning schemes virtually everywhere, especially in municipalities having farmland, large land-holdings or
otherwise developable land available, and upon incantation of virtually any politically correct pretense. With similar down-zoning initiatives on the horizon, a serious “rippling effect” of “copycat” zoning is now playing itself out which, for certain, will adversely impact the general welfare on a region-to-region scale and thus impede sound land use planning from occurring uniformly throughout the State.

Because the Supreme Court has chosen not to intercede, the East Amwell decision will license municipalities whose primary landowners and occupants are long-standing operators of true active working farms – such as East Amwell – to shunt, if not eliminate, growth altogether by the simple expedient of deploying the down-zoning tool to increase permitted minimum lot sizes in upwards of 60-94% of a municipality’s land area, in the name of farmland preservation; but, in the process, actually destroy farms, farming and any incentive to farm. Conversely, the Appellate Division’s decision issued in Joseph Bailes will be properly relied upon to preclude and forbid municipalities that are, albeit, substantially developed – such as East Brunswick - from deploying the down-zoning tool and precisely because it will be inimical to farmers, farming, and both the farm-able and/or developable lands that remain.

For farmers, this predicament presents an illusion of sorts with anomalous, paradoxical results. Either way, without the Supreme Court’s intervention, farmers stand to lose – lose their land, their equity, the ability to rely upon their land to help them through recurring down cycles and hard times, the ability to conduct true active working farms with sufficient land area to make farming economically feasible, and

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4 Numerous municipalities have already begun to engage in and/or rush to adopt new “down-zoning” initiatives and ordinances since the Appellate Division’s decisions in East Amwell and in Joseph Bailes a mere three (3) months ago. For example, without limitation, Hamilton Township (Mercer County) enacted an ordinance “down-zoning” its residential districts from 1-acre minimum to 6-acre minimum lots sizes (after threatening 10-acre minimums); Washington Township (Mercer County) will imminent consider, and likely adopt an ordinance re-naming its “Rural Agriculture” zone to “Rural Residential, “down-zoning” the entire zone from 2-acre to 6-acre minimum lot size; the Planning Board of Springfield Township (Burlington County) unanimously recommended to its Township Council a change in its Master Plan proposing “down-zone” residential development in its “rural growth areas” from 3-acre minimum to 10-acre minimum lot sizes, the formal adoption of which by the Township Council via ordinance is anticipated in the coming weeks; Marlboro Township (Monmouth County) adopted an ordinance re-zoning and simultaneously “down-zoning” its former R-80 residential zone from 2-acre minimum lot sizes to a “Land Conservation” zone restricting residential lot sizes to 5-acre minimums, which action has since provoked the institution of no less than four (4) separate lawsuits by aggrieved landowners, farmers, and others seeking to overturn the ordinance. Howell Township (Monmouth County) has revived a prior down-zoning and is now pursuing a change in some of its “ARE” (agricultural, residential and estate) zones that currently permit 2-acre and 3-acre minimum lots by “down-zoning” all to 6-acre minimums. As sure as night follows day, such “down-zonings” will continue at an unprecedented pace.

5 Petitions for Certification were filed with the New Jersey Supreme Court by the “Farm Bureau Plaintiffs” in the East Amwell matter and by East Brunswick Township in the Joseph Bailes matter seeking the High Court’s review of the Appellate Division’s (and underlying trial) decisions in each. Unfortunately, the petition for certification in the East Amwell case was denied by the Supreme Court on the eve of the Christmas holidays on December 19, 2005. East Brunswick’s petition was also denied.

[Author’s Note: On December 29, 2006, the Farm Bureau Plaintiffs filed a motion with the Supreme Court seeking reconsideration of its denial of certification, and further requesting that certification be granted in light of other and further developments. The Supreme Court entered an Order on March 30, 2006 denying the Farm Bureau Plaintiffs motion for reconsideration. However, in a related development, on January 19, 2006, the High Court granted certification in the Mount Laurel Township v. Mipro Homes case that is touched upon in this article, infra.; and, the Court heard oral argument on the appeal of Mipro Homes on April 24, 2006. At least insofar as the issue of condemnation-for-open-space-preservation is concerned, the matter is now in the hands of the Supreme Court to address and resolve. Stay tuned . . . .].
any incentive to farm at all. Left unchecked, the lower courts’ endorsement of the parochial and self-serving actions of the landed gentry in the governing apparatus of East Amwell – none of whom were farmers and yet whose avowed policy and plan of “farmland preservation” here actually imposes a modern day form of feudalism on its farmers – portends the economic re-segregation of New Jersey.

Worse still, in light of the August 2, 2005 decision of the Appellate Division in Mount Laurel Township v. Mipro Homes, Inc., a mere six weeks earlier6, the Appellate Division’s endorsement of East Amwell’s down-zoning scheme will now arm towns with a dangerous, unprecedented and unbridled opportunity to pursue the cheaper way out of taking a farmer’s or large landowner’s property without having to pay just compensation. By down-zoning or constructively expropriating property in the name of farmland or open space preservation, towns with farm-able and/or developable land remaining will have license to circumvent the statutory strictures of eminent domain; radically alter and increase the minimum size of a lot on which housing can be built; and, thereby consign true farmers and “active working farms” to serfdom. Ultimately, the proliferation of down-zoning will assure a slow, painful death to farms and farming in the Garden State, and facilitate their replacement by a patch-quilt of “McMansion”-type estates and “hobby” or “life-style farms” for the affluent over the remaining countryside.

Regrettably, the “tyranny of the favored quarter” has now been silently validated. God help (and bless) East Amwell’s and New Jersey’s farmers . . . . the real endangered species.

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Thomas Daniel McCloskey, Esq.
© December 23, 2005

[Updated March 31, 2006]

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6 Where the Appellate Division upheld and sanctioned Mount Laurel Township’s exercise of its corollary eminent domain power to take private property in a concerted effort (or pretext) to preserve “open space”. Mount Laurel Township v. Mipro Homes, Inc., 379 N.J. Super. 358 (App. Div. 2005). See Footnote #5, supra.