

IN THE SHADOWS OF AFFORDABLE HOUSING – A NEW LEGACY EMERGES

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“With bulldozers continuing to rumble, New Jersey’s natural resources and open space are vanishing faster than we can understand the impacts.”²

“No matter what program a government sponsors, critics can find shortcomings.”³

Their image stigmatized by the development of the infamous exclusionary zoning decisions⁴ that bear its name,⁵ Mount Laurel Township (“Township”) has long struggled to define its own course in land development. The Township’s power to control the future of its own development was first restricted in the 1970s through judicial activism with the mandating of planned unit developments (“PUD”)⁶. Mount Laurel’s lack of early success in the courts to

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² Bradley M. Campbell, *Smart Growth and Water Quality*, New Jersey Municipalities, April 2003, at 30.

³ Greenberg, Martin, *Betwixt Cup And Lip, A Case Study of The Slippage Between The Mt. Laurel Concept and Its Implementation* 2.1 (New Jersey Public Issue Press 1992).

⁴ *Southern Burlington Co. N.A.A.C.P v. Twp. of Mount Laurel*, 391 A.2d 935(N.J. Super. Ct. Law Div. 1978) “Mount Laurel I” and *Southern Burlington Co. N.A.A.C.P. v. Twp. of Mount Laurel*, 456 A.2d 390(N.J. Sup. Ct. 1983) “Mount Laurel II”.

⁵ In a certification to court in the *Mipro* decision, Patricia Halbe, the Township Manager of Mount Laurel Township cited three overall reasons why the Township was “allowing” land to be developed instead of purchasing land for preservation prior to the late 1990s. First, property owners were permitted under the Municipal Land Use Law to develop their properties. N.J.STAT.ANN. § 40:55D-1 (1991). Second, the Township’s overall fear that attempting to purchase land while the land was under the low and moderate income housing decision overlay zone on all property residentially zoned “R-3” was not permitted because it would violate the 1985 court order. Finally, the Township could not purchase property during that time because it could not compete financially with the developers. Brief for Township at Appendix I, Exhibit 2, pp. 2-3, *Mount Laurel Twp. v. Mipro Homes, LLC*, (N.J. Super. Ct. 2002) (Docket No. BUR-L1745-02).

⁶ *Rudderow v. The Twp. Comm. of The Twp. of Mount Laurel*, 297 A.2d 583 (N.J. Super. Ct. Law Div. 1972).

determine its own future through controlled growth continues to sour the now suburban landscape of this southern New Jersey town. As the Township entered into a judgment of repose with the parties of the *Mount Laurel* decisions in 1997,⁷ the Township, with new financial incentive from the State of New Jersey⁸ and the County of Burlington,⁹ ventured on a new course of self determination by attempting to preserve as much remaining land as possible.¹⁰ This attempt at a new future has landed Mount Laurel back in the courts.¹¹ After purchasing several parcels for preservation purposes,¹² the Township attempted to use the power of eminent domain¹³ to preserve a sixteen and a half acre parcel¹⁴ for open space. The developer, who had preliminary approval for a residential subdivision¹⁵ challenged the condemnation in the courts by arguing that the public purpose of the Township's condemnation efforts was not preservation but rather a pretext for other bad faith reasons including reducing residential development and stabilizing the tax rate.¹⁶ While the Township argued that these

⁷ Southern Burlington Co. N.A.A.C.P. v. Twp. of Mount Laurel, Judgment of Repose, Doc No. L-25741-70PW, (N.J. Super. Ct. Law Div. Dec. 3, 1997).

⁸ Garden State Preservation Trust Act, N.J.STAT.ANN. §§ 13:8C-1 – 13:8C-42(2003) hereinafter.

⁹ The Burlington Co. Board Of Chosen Freeholders, Burlington Co. Open Space And Preservation Program, Strategic Plan, (Sep. 23, 1998).

¹⁰ *Green Acres Planning Incentive Plan Application: 1st Public Hearing Before the Mount Laurel Twp. Council*, (June 9, 1999)(statement of Former Councilman Larry Chatzidakis at pp.10-11). Chatzidakis speaks of the Township efforts of preserving as much remaining land as possible and the frustrations of the Township of previous development.

¹¹ Mount Laurel Twp. v. Mipro Homes, LLC, (N.J. Super. Ct. 2002) (No. BUR-L1745-02).

¹² From 1997 through the 2001 condemnation of the Elbon Farm, Mount Laurel Township made three open space purchases of land including an 88 acre parcel known as Evansco, a 153 acre farm known as Trotter's Crossing and a 94 acre parcel known as the Conrow Farm. While attempting condemnation the Township also pursued the purchase of the 11 acre Barrett Farm, the 23 acre Sunnyside Farm and numerous other parcels of land in the Township. Since the inception of the program the Township has purchased the above-mentioned five properties as well as four others totally approximately 400 acres. In 2003, the Township is also under agreement of sale or near agreement of sale on five other parcels preserving another 200 acres of farmland and woodland. Mount Laurel Twp Open Space and Planning Incentive Map, (8th ed.)(Feb 28, 2003).

¹³ Eminent Domain Act of 1971, N.J.STAT.ANN. § 20:3-1 (1997).

¹⁴ This property located at Block 600, Lots 2, 2.03 and 2.05 is known by the aliases Elbon Farm, National Assisted Living property, High Pointe Estates and Mipro Property depending on its stage in the development process.

¹⁵ Granting Preliminary Conditional Approval To Mipro LLC for the Construction of 23 Single-Family Homes at Block 600, Lots 2, 2.03 And 2.05, R-2001-13, Planning Board Approval Resolution, (Jun. 14, 2001).

¹⁶ Transcript of Oral Arguments, Docket No BURL-L-1745-02, Frances Maristch, Transcriber, (Statement by Jeffrey Baron, Counsel for Mipro Homes, LLC. pp. 34-35)(Aug. 29, 2002).

results were simply additional benefits of the preservation of land¹⁷, the developer was victorious in court.¹⁸ The Township now appeals that erroneous decision.¹⁹

After giving the reader an understanding of the background that the housing court decisions had on this community and its efforts to promote an open space preservation program to help combat the results of uncontrolled growth, this note will evaluate the *Mipro* decision and identify how the court has worked to undermine the policies of the Green Acres program and promote unfounded restrictions to using the power of eminent domain to halt land development. Additionally, this paper will evaluate the local government's attempt at self-determination coupled with the continuing promotion of policy at the state level to support self-governance and the continual attempts by the court to impede in these efforts of local control.

I. A LEGACY OF CONSTRUCTION

Prior to the three court decisions previously noted, Mount Laurel's landscapes and viewsheds were quite different from the suburban sprawl that exists today.²⁰ With the establishment of the PUD²¹ zoning districts, five large developments in the approved PUD areas changed Mount Laurel's rural community into a Philadelphia suburban town.²² The center of the Township rapidly began to fill with condominiums, townhomes and single-family homes.²³

¹⁷ Brief for Mount Laurel Twp, *Mount Laurel Twp. v. Mipro Homes, LLC*, (N.J. Super. Ct. 2002) (No. BUR-L1745-02)

¹⁸ *Mipro Homes*, p. 22.

¹⁹ *Mount Laurel Twp. v. Mipro Homes*, Appellate Division On Appeal From Superior Court Of New Jersey Law Division Burlington County, Docket No. Bur-L-1745-02 Civil Action, Notice of Appeal.

²⁰ According to the Township Master Plan of 2000, the population of Mount Laurel Township in 1960 was 5,249. The residential sections of Mount Laurel were primarily located in the southwestern and northeastern corner of the twenty-two square mile, triangular-shaped Township. The center and southeastern portions of the Township were largely vacant or farmland. Mount Laurel's commercial base paralleled two State highways that ran through the Township. The population density was approximately 239 per square mile. After 1970 the Township's population rose from 11,221 in 1970, to 17,614 in 1980, to 30,270 in 1990 and has continued to grow to 40,220 according to the 2000 U. S. Census. Today's population is approximately 1834 residents per square mile. Louis Glass & Associates, *Master Plan Mount Laurel Township, Burlington Co., N.J.*, p. E-8, August 11, 2000.

²¹ *Rudderow v. The Twp. Comm. of The Twp. of Mount Laurel*, 297 A.2d 583 (N.J. Super. Ct. Law Div. 1972). The planned unit development is a parcel of land developed to include both residential clusters and commercial clusters as permitted by Township ordinance Moskowitz, Harvey S. and Carl G. Lindbloom, *The New Industrial Book Of Development Definitions* 204 (Center for Urban Policy Research, Rutgers, The State University of New Jersey 1997)(1993). In the early 1970s, Mount Laurel approved four PUDs comprising of 1,775 acres to be developed into more than 10,000 housing units of all types. *Master Plan*, p.C-1.

²² The Larchmont Development is the largest of the PUDs with more than 1000 acres; Ramblewood at 250 acres and the Birchfield Development is just less than 200 acres. Larchmont yielded 5,677

Mount Laurel's housing construction legacy was compounded in the 1980s and 1990s as a result of the *Mount Laurel II* "builder's remedy"²⁴ option for providing low and moderate income housing.²⁵ Farmland that was previously zoned for single-family homes was devoured by developers²⁶ through the construction of high-density housing that continued to expand from the PUD areas throughout the Township.²⁷ Mount Laurel ranked at or near the top of all municipalities in New Jersey in residential housing permits issued for the years 1980 through 1999.²⁸ From 1990 through 1999 only Dover Township, a developing senior community, had more residential building permit approvals than Mount Laurel Township.²⁹

residential units, Ramblewood 1,223 and Birchfield 807. Two additional PUDs were established as Planned Adult Retirement Communities. These developments added 1,741 more single family homes, townhomes and condominiums over 415 acres. *Master Plan* at C-2 and C-3.

²³ *Master Plan*, Map C-1.

²⁴ The *Mount Laurel II* decision created a builder's remedy whereby housing developers were able to purchase land in an overlay zone, increase the residential density of the development if they provided a "fair share" element of housing. *Betwixt* at 1.2.

²⁵ The builder's remedy in Mount Laurel also allowed for developers to increase density without providing low and moderate units if they chose to pay into a special housing fund. The monies from this fund are used to help finance the courts construction mandates, a limited amount of regional contribution agreements and various other cost incurred by either the Township or the Fair Share Housing Corporation, which runs the Ethel Lawrence Homes low and moderate-income rental development. For example, in lieu of constructing 96 low and moderate-income units in one development to obtain higher density, Orleans Homebuilders was able to satisfy the court order by paying \$1.92 million to the Township's Affordable Housing Trust Fund. *Repose* at 3.

²⁶ For example, Orleans Homebuilders purchased the 113.7 acre Mars-Haven Farm which was zoned for one home per 20000 square feet (approximately 2 homes per acre.) Without the housing decision this parcel would have developed into approximately 200 single-family homes taking into account infrastructure improvements such as water retention ponds and roadways. Under the change in zoning via the builder's remedy, the developer was permitted to construct 854 units including 199 single-family homes on lots under 7,000 square feet, 175 townhomes and 480 condominiums. *Master Plan* F-7 and Mount Laurel Twp. Code, § 154-123(E.)

²⁷ For Example, the Birchfield PUD construction brought 242 single-family homes, 291 townhomes, 328 condominiums and apartments and a business center to the township on land that previously would have held only 100 homes. *Master Plan* F-7.

²⁸ New Jersey Department of Labor Website (2003), available at <http://www.wnjp.in.state.nj.us/OneStopCareerCenter/LaborMarketInformation/imi18/>. Mount Laurel ranked in the top 25 among New Jersey 565 municipalities in each year from 1980 through 1999 being 1st in the state in single family unit constructions in 1988 and 1989 and 2nd in 1987. Mount Laurel also ranked 3rd or 4th in the state for either total residential unit approval and/or single family units in 1980, 1985, 1990 -1994.

²⁹ Dover, 4,602 new home permits, Mount Laurel 4,130 permits, New Jersey Department of Labor website (2003) available at <http://www.wnjp.in.state.nj.us/OneStopCareerCenter/LaborMarketInformation/imi18/BP9099/index.html>.

Besides the low and moderate income housing which the decisions are infamous for requiring, the *Mount Laurel II* decision also created an overlay zone in 1985 as part of the builder's remedy.³⁰ The Township saw this overlay zone as an obstacle to acquiring land for open space preservation purposes.³¹ This overlay zone was lifted in December 1997 when the Township entered into a judgment of repose.³² As part of this judgment the Township negotiated a deal that allowed them to purchase a one hundred fifty three acre parcel of land slated for development of high-density townhomes as part of the builder's remedy.³³ This first purchase inspired the Township governing body to break free from Mount Laurel's infamous legal connotation and create a new legacy of land preservation.³⁴

II. OPEN SPACE – A NEW LEGACY

“The conservation movement is more active than ever before, yet daily it is losing ground to the latest subdivision.”³⁵

The desire to begin open space preservation comes as no surprise as the anti-sprawl green movement has swept across the State of New Jersey.³⁶ When then Governor Christine Todd Whitman attempted to generate support for a 1998 State Constitutional amendment in an effort to preserve one million additional acres of land throughout the state, the race for open space was off and running.³⁷ Backed by a report by the Governor's Council on New Jersey Outdoors, which noted that New Jersey has to begin to “aggressively preserve its

³⁰ Brief for Twp. in *Mipro Homes* Appendix I, Exhibit 2, pp. 2-3., (Jul. 15, 2002).

³¹ *Id.*

³² *Repose.*

³³ *Id.*

³⁴ *1st Public Hearing*, (June 9, 1999)(statement of Former Councilman Larry Chatzidakis at p.34).

³⁵ Robert H. Levin, *When Forever Proves Fleeting: The Condemnation And Conversion Of Conservation Land*, 9 N.Y.U. Envtl. L.J. 592, 592 (2001).

³⁶ Smart growth is critical to the quality of life in New Jersey. Protecting New Jersey's water, air and other precious natural resources from unrestrained, haphazard growth is among Governor James E. McGreevey's top priorities. (Oct 7, 2003) Available at <http://www.state.nj.us/dep/antisprawl/>.

³⁷ N.J. STAT. ANN. § 13:8C-1.2 (2003). The Legislature therefore determines that it is in the public interest to preserve as much open space and farmland... and it is a worthy goal to preserve one million more acres of open space and farmland in the Garden State...”

open space,³⁸ the amendment passed with relative ease as a statewide ballot question³⁹ and established a stable source to attain the Governor's laudable goal of funding the State Green Acres Preservation Trust for the next two decades.⁴⁰ This new funding mechanism was the first time the New Jersey Green Acres program had a constant source of funding, which created a viable belief that open space preservation was indeed possible.⁴¹ New Jersey residents could have the benefit of the open space program without an additional tax burden.⁴²

Governor Whitman's efforts helped sweep through a major policy initiative and created a new funding mechanism⁴³ for local governments, which used the initiative to create a dedicated source of revenue for open space funding at the municipal level.⁴⁴ Recognizing the potential for a new legacy of land use in Mount Laurel, in 1998, the Township placed the first of three open space referendums on the ballot.⁴⁵ The voters overwhelmingly supported its passage.⁴⁶

³⁸ Maureen Odgen, *Governor's Council On New Jersey Outdoors, Final Report—Summary Of Findings*, 1, (Feb. 26, 1998).

³⁹ The State referendum passed 978,686 yes votes and 498,010 no votes a 66% vote margin. Available at <http://www.state.nj.us/lps/elections/elec98/pubques.html#1st>.

⁴⁰ N.J.STAT.ANN. § 13:8C-1 (2003).

⁴¹ The new funding mechanism was a dedication of one-half cent of the sales tax for Green Acres Preservation Trust. Prior to the new funding source from the state sales tax the Green Acres Program was dependent on the sale of state bonds. For a history of the prior bond issues see *Governor's Council Final Report*, Addendum V.

⁴² *Id.*

⁴³ Prior to the passage of the 1998 Constitutional Amendment by a statewide referendum, local governments were forced to vie for open space funding with all other government entities and non-profits in New Jersey seeking open space funding through the Green Acres program. This competition among governments was often for a partial grant (usually 25%) and a low interest loan (75% of the purchase cost) to help the local entity purchase land for preservation or recreation purposes. The statutes and regulations that followed the passage of the referendum created a new category for local government to be for funding. If a Township had a dedicated open space tax of their own that Township could bypass the normal application process and create a master plan of properties that could be considered for open space preservation. N.J.STAT.ANN. §§ 13:8C-1 – 13:8C-42 (2003). Once this plan was established the Township would be eligible for a stable source of funding of a 50% grant to help purchase the property. N.J. ADMIN. CODE tit. 7, § 36-1.1(1998).

⁴⁴ To be eligible for State funding the township must have *inter alia* the parcel identified on their filed open space plan and obtain two appraisal from a list of State approved Green Acres appraisers. N.J. ADMIN. CODE tit. 7, § 36-4.2(1998).

⁴⁵ Mount Laurel Twp. Ordinance 98-06 allowed the voters to support a referendum that allowed for the creation of an open space trust fund. This first ordinance ask voters to support of \$0.02 per \$100 assessed value increase in their taxes specifically dedicated for this purpose.

⁴⁶ The vote total for the passage was 6991 yes votes to 2738 no votes, Source: Mount Laurel Twp. Clerk Office, Vote Totals for the 1998 General Election, November 3, 1998.

The Township encouraged support for this referendum through a series of letters to residents and by providing information about the benefits of the open space program.⁴⁷ The Township noted several key benefits of the open space program in its attempt to convince the voters that to raise an additional, but dedicated, open space tax was a worthy goal. Besides the addition of open space for active recreation needs, the Township highlighted the notion demonstrated in the Green Acres Preservation Act that land was becoming scarce and important to save for no other reason but preservation purposes.⁴⁸ However, there are other benefits that come from the purchase of open space and the Township was not shy in espousing these benefits as well. Most notable of these is that the preservation of open space saves land from development.⁴⁹ Additionally, the purchase of residential property “pays for itself” over time in that open space does not require the municipal services that a residential home requires.⁵⁰ For a State that continues to see its property taxes rise to pay for schools, fire services and other local government priorities, it is important that residents understand how a new tax would affect them.⁵¹

During the same election, the County of Burlington passed its own referendum that allowed for the creation of a countywide open space fund from which the Township was eligible to apply for funding.⁵² Together these programs create a system where the Township could purchase a parcel for open space and pay only 25% of the cost while the state and county open space funding mechanisms pay for the remaining 75% of the purchase cost.⁵³

⁴⁷ Letter from Mayor Geraldine Nardello to Mount Laurel residents (November 1, 1998)(on file with the Mount Laurel Township Clerk’s Office) explaining the three ballot questions (state, county and local).

⁴⁸ N.J.STAT.ANN. § 13:8C-1(2003), and N.J. ADMIN.CODE tit. 7, § 36-1.1(1998).

⁴⁹ By accepting Green Acre and Burlington County Open Space funding for the purchase of land, the parcel must be deed restricted to ensure that no development other than a minimal amount to care for the open space activities on the property is allowed. N.J. ADMIN.CODE tit. 7, § 36-1.1(1998).

⁵⁰ Homes require services including schools, additional police, trash collection, snow removal etc. See Center For Urban Policy Research, Edward Bloustein School Of Planning And Public Policy, *The Cost And Benefits Of Alternative Growth Patterns, The Impact Assessment Of The New Jersey State Plan*, September 2000.

⁵¹ *Id.*

⁵² At the start of this program the County was making each parcel purchased eligible for a grant which would provide up 25% in funding from the County. As funds have been exhausted and more Township’s have begun the process of open space and farmland preservation, the County’s source of funds has become much more competitive among the 40 municipalities. Fourteen of the 40 Burlington County towns have some variation of open space taxes. In November 2003, the county revamped its program to be more analogous to the Green Acres requirements by including separate rules for those towns that support a local open space initiative. Burlington County Local Open Space Program, Step By Step Guidelines, 3 (Nov. 13, 2003).

⁵³ Purchase cost encompasses other costs such as environmental inspections and appraisal. N.J. ADMIN. CODE tit. 7, § 36-1(1998).

With the potential funding sources available to those who qualify, Mount Laurel began to aggressively fulfill the requirements of the Green Acres program.⁵⁴ The Planning Incentive Plan adopted by the Township included both residential and industrial properties as well as sites where commercial recreation⁵⁵ currently existed, historical homes were present or properties were located that the Township considered “underdeveloped.”⁵⁶

It is equally important to identify the parcels that were not included in the plan as it was to discuss the parcels in which the planning incentive map included. Parcels were excluded if they had a prior approval for construction or if the property had a low and moderate-income element attached.⁵⁷ Although it appeared on draft maps, the plan actually adopted by the Township governing body did not include the property that the Township would eventually attempt to take by eminent domain in 2001⁵⁸. The property was excluded from the map for several reasons. First, the property had received a use variance to construct an assisted living facility on the site.⁵⁹ Second, that facility was to include four rooms

⁵⁴ In 1999, the Township hired a planning and engineering firm separate from its Township Planner and Township Engineer appointments to create a Green Acres Planning Incentive Plan. The Township chose to hire a separate firm with the hope that by allowing a fresh face to come into the Township, they would be able to provide a novel perspective on controlling future development. Additionally, the governing body believed that both the Township Planner and the Township Engineer would face hidden conflicts because a majority of their billing revolved around continual development instead of preservation of open space. The plan created by this outside engineer identified all the properties that the Township concluded were possible sites for potential acquisition. Two public hearings were held during the summer of 1999 and in the fall the Township adopted the Plan and forwarded it to Green Acres for their approval.

⁵⁵ Commercial Recreation included an existing driving range, a tennis club and a swim club among other things owned by private companies but could also serve as a public purpose for recreational opportunities if owned by the Township. Mount Laurel identified these private sources in the possibility in the event the company no longer provided the service the Township would be eligible for Green Acres funding if it chose to pursue purchasing these sites.

⁵⁶ An underdeveloped property was one in which the current use of the property did not meet the maximized zoning of the property. For example, a ten acre lot with only one single family home could most likely be developed into a ten to fifteen home subdivision depending on the zoning, environmental constraints and infrastructure improvements such as streets and retention basins.

⁵⁷ Only one parcel with a COAH element remained on the map. That parcel was a property known as Rancocas Pointe. This potential subdivision had a substantial low and moderate-income attachment as part of the builder’s remedy of the *Mount Laurel II* decision. However, the approximately 90-acre property was located in the Burlington County Rancocas Creek preservation region. The Township included the property on the map with a footnote that made clear that the Township would not consider the purchase of this property while the COAH element remained on the property. Attempts to transfer the COAH element from this environmental sensitive land and court attempts to halt the subdivision both failed and development began in 2003.

⁵⁸ Mount Laurel Township Green Acres Planning Incentive Map (revision number four), Prepared by Schoor DePalma Engineers, Adopted by the Township governing body on August 23, 1999 by Resolution 99-R-185.

⁵⁹ Mount Laurel Twp. Zoning Board of Adjustment Resolution 98-D-18, June 6, 1999.

for low and moderate-income persons helping the Township fulfill the requirements of the *Mount Laurel* decisions.⁶⁰ Attorney Peter O'Connor of the Fair Share Housing Corporation, the entity that ultimately developed from the *Mount Laurel* decisions, put the Township on the record during those earlier open space public hearings. His argument suggested that open space preservation could not be a backhanded measure to subvert the spirit of the low and moderate-income legislation.⁶¹ Third, the Township did not envision that it could afford a property with an assisted living facility approval.⁶² Finally, the Township did not expect the timeline of the construction to coincide with their ability to get Green Acres and County approval for offsetting funding since both the Township open space program and the development application were on a simultaneous approval process.⁶³

At the first public hearing, the Township heard from property owners⁶⁴ who were not interested in selling their lands to the Township and were worried about the possibility of "being forced out of their homes."⁶⁵ The Township governing body made it clear that it was not their intention to remove individual owners from their properties but that they would not rule out the possibility of preserving larger acreages of land through their eminent domain power if it meant that the property could ultimately be saved from development.⁶⁶ The Township was working to create a new legacy by breaking free from the stigma of the low and moderate income housing decisions and attempting to become known as a Township which was committed to open space preservation.⁶⁷

⁶⁰ *Id.*

⁶¹ *Green Acres Planning Incentive Plan Application: 2nd Public Hearing Before the Mount Laurel Twp. Council*, (Aug 23, 1999)(p.32).

⁶² In Green Acres purchases, the Township must pay for the land according to the best and highest use. N.J.ADMIN. CODE § 7:36-6.6

⁶³ Construction of the site would have been well underway had the property continued to receive approvals and building permits.

⁶⁴ The Township governing body was not required to send personal notice to the homeowners whose properties were to be potentially placed on the Mount Laurel Township Green Acres Planning Incentive Plan. However, the Township believed that it was better to be straightforward with the residents this program. The decision to notify the property owners also produced a large number of interested parties at the public hearing who shared both concern and support for the program. Since the owners of the farm that became subject to this condemnation proceeding were not included in the original version of the Township plan, they were not personally notified of the two public hearings that took place in the summer and autumn of 1999.

⁶⁵ *1st Hearing*, at 5, 11.

⁶⁶ *Id.* at 7 – explanation from Township Solicitor concerning the Township's potential use of the eminent domain power against a person or company attempting to develop the property.

⁶⁷ See note 9.

Once the process of qualifying for state and county open space funding was complete, the Township rushed to purchase several large parcels of property.⁶⁸ In each of these cases the Township approached the purchase as if the owner was not a willing seller.⁶⁹ However, in each case, the seller of land and the Township came to an agreement on the purchase price.

While the Township was focused on these open space purchases, little attention was paid to the assisted living facility project to be built at Elbon Farm. The property continued to deliver plan submittals to the Township's Department of Community Development in an attempt to get the Zoning Board of Adjustment approvals necessary to begin the project.⁷⁰ It was not until December 8, 2000 when a developer applied for preliminary major subdivision approval that the Township become aware that the first developer had become disinterested in the property and that a new residential subdivision was being planned at Elbon Farm.⁷¹ The new subdivision called for eighteen single-family homes on the site with no land set aside for affordable housing.⁷² Although it was a permitted use, it was vastly different from the use of the assisted living facility. The reasons cited for not including it as a potential site for acquisition under the Green Acres Planning Incentive Plan were no longer present.⁷³

⁶⁸ The 88-acre Evansco property (named after the developer's company) was purchased in April 2000; the 94-acre Conrow Farm was purchased in April 2001.

⁶⁹ Green Acres requirements and Appraiser requirements for condemnation procedures were followed.

⁷⁰ For a comprehensive review of the steps taken by the National Assisted Living Facility in order to gain approval at the Township Zoning Board of Adjustment see Moubert Brief for the Township, July 18, 2002, Appendix III, Exhibit 113 which includes a chronological listing of all Township correspondences with National Assisted Living, documents prepared by or for the Township professionals or official actions of the Board concerning this application. The last documents from the applicant on December 4, 2000 concerned the status of the escrow balance. There is no indication from the Township files that the National Assisted Living facility was not continuing with the eventual construction of this facility.

⁷¹ Mount Laurel Township Planning Board application for the High Pointe Estates subdivision filed December 8, 2000.

⁷² According to Township Ordinance § 154-131.18. Mandatory development fees. [Added 5-5-1997 by Ord. No. 1997-12], all new residential housing projects are required to pay money into the Affordable Housing Trust Fund established by the 1997 Judgment of Repose. Specifically, "All developers of residential major subdivisions or site plans of six or more units shall pay a mandatory development fee equal to 0.5% of the equalized assessed valuation for each residential unit constructed. This mandatory fee shall be calculated as follows: 0.5% multiplied by equalized assessed valuation multiplied by the number of units." This payment failed to did not consider that the previous application for the National Assisted Living had four physical units set aside for low and moderate income person.

⁷³ At this point the Township has no impediment preventing purchase. The physical units for low and moderate income housing were no longer present, the construction of these homes was not imminent in early 2001 and the purchase price of a subdivision is considerably lower than the price attached to a commercial use assisted living facility.

In July 2001, the Township instructed its special open space engineering firm to create a new revision of the Green Acres Recreation and Open Space Planning Incentive Plan map so that the Township could amend the map at a public hearing and add additional properties including the National Assisted Living property.⁷⁴ On October 15, 2001, the Township readopted the Green Acres map pursuant to the rules established by the State program.⁷⁵

Although the Township took efforts to include this property on the open space plan, the Township's local open space trust fund was almost completely dedicated to previous open space purchases.⁷⁶ In order to continue to compete with developers in purchasing remaining open space, the Township governing body asked voters to approve a second open space referendum on November 6, 2001.⁷⁷ This second referendum doubled the local open space tax.⁷⁸ Perhaps as an indication from voters that they were pleased with the Township's effort to preserve open space, this second referendum passed with an even greater margin of victory than the 1998 referendum.⁷⁹

On the night prior to the passage of the second open space referendum, the Township governing body passed resolutions to hire state-certified appraisal services on several properties including the High Pointe Estates property.⁸⁰ The

⁷⁴ The Minutes of the October 15, 2001 public hearing concerning this revision indicate that the Township added or changed the designation of three groups of parcels including adding the lots for the High Pointe Estates subdivision.

⁷⁵ 01-R-229, Resolution Authorizing Mount Laurel Township to Readopt the Recreation and Open Space Plan and Authorizing Application to the New Jersey Green Acres Program, Planning Incentive Program and/or The New Jersey Preservation Trust.

⁷⁶ The 88-acre Evansco parcel cost the Township \$2.9 million, the Conrow Farm cost the Township \$2.4 million, and the Trotter's Crossing parcel cost the Township \$1.9 million (numbers rounded). Most of the revenue from the state and county programs had not been allocated to the Township at this time so the Township had to spend its resources up front on the purchase of these parcels. Source: Tax Records, Mount Laurel Township, available at 100 Mt. Laurel Road, Mt. Laurel, New Jersey.

⁷⁷ Mount Laurel, N.J. Ordinance 01-04 (June 4, 2001). An Ordinance of the Township of Mount Laurel, County of Burlington, State of New Jersey Authorizing The Submission to The Voters of The Township of Mount Laurel at the General Election on November 6, 2001 A Proposition Authorizing The Annual Levy at The Rate of \$0.02 (2 cents) Per \$100 of Assessed Value of Real Property For the Establishment and Continuation of the Mount Laurel Open Space Preservation Fund as Permitted By N.J.S.A. 40:12-15-7, For A Period Not Exceeding Twenty Years.

⁷⁸ This second referendum created an additional two-cent tax for each \$100 of assessed value. The first referendum runs from 1999 through 2019 and the second referendum runs from 2002 through 2022, meaning that during the years 2002 through 2019, the tax would be 4 cents per \$100 of assessed value and then upon sunset of the first open space tax, the levy would return to two cents for the final three years of the second referendum. Mount Laurel, N.J., Ordinance 01-04 (June 4, 2001).

⁷⁹ Mount Laurel Township Clerk Election Results, November 6, 2001, 6,875 "Yes" votes to only 1,997 "No" votes (77% passage rate compared with the 69% passage rate in 1998).

⁸⁰ Mount Laurel Township Resolutions 01-R-262 through 01-R-264 each identified two state certified appraisal firms to perform services for four properties for potential open space acquisition.

resolutions would only take effect if the voters passed the second referendum doubling the taxpayer's participation in the open space plan from two cents to four cents per \$100 of equalized assessed value of their properties.⁸¹ As noted, *supra*, the voters demonstrated their support for the program. After the Township's appraisers completed their work, Green Acres certified the property's market value. When negotiation with the land developer/owner failed, the Township filed a verified complaint and order to show cause to condemn the property for the purpose of preserving the land as open space.⁸² The property owner objected to the municipality's use of the power of eminent domain. During discovery, the Builder's League of South Jersey moved to intervene on behalf of the land developer.⁸³ The court permitted this intervention and the three parties argued the case in Superior Court on May 27, 2003. The matter was decided in favor of the developer/intervenor on June 13, 2003.

In the ruling, the court determined, albeit incorrectly, that the Township had abused its power of eminent domain under the Eminent Domain Act of 1971⁸⁴ in attempting to acquire the property for bad faith reasons to stop development and stabilize the municipal tax rate rather than for the purpose of preserving the land. Rejecting the notion that open space preservation does not require that a future active recreation park area be established on the property, the court erroneously ruled that the Township required a plan for the property prior to condemnation.

The opinion of the court is flawed for two reasons. First, the property was purchased for a public purpose. The public purpose of open space preservation can be seen through the regulations and statutes in New Jersey and across the nation.⁸⁵ The essence of land preservation is that it will remain undeveloped and maximize both active and passive recreational opportunities. Today, generally, open space can be seen as a critical element in preventing overdevelopment, reducing congestion and environmental side effects synergistically associated with development, encouraging smart growth and protecting watersheds and critical habitat areas.

The lower court's opinion is additionally defective because it labels the Township process as one of bad faith by comparing it to illegitimate attempts by other municipalities to condemn property for open space as a pretext for other

Resolution 01-R-263 concerns the High Pointe Estate property and indicates that the property is under severe developmental pressure, has received Planning Board approvals and is included in the Township's open space plan following the Township's efforts to amend the Green Acres Planning Incentive Application in the summer of 2001.

⁸¹ *Id.*

⁸² Mipro Opinion at 1.

⁸³ *Id.* p.2.

⁸⁴ Eminent Domain Act of 1971, N.J.STAT.ANN. 20:3-1.

⁸⁵ N.J.ADMIN. CODE Tit. 7:36-1.1 (2003).

political purposes. The court unfairly levies a war between the interests of the developer with those of the state, county and local governments. Since the State government encourages open space preservation and smart growth throughout its programs including Green Acres and the Council on Affordable Housing and the Anti-Sprawl initiative, the trial court undermines both these programs and the Eminent Domain Act of 1971. This is compounded by the statutory definition of acquisition of open space by means including local condemnation.⁸⁶

Finally, this decision rejuvenates the continual struggle for local governments to define their own land use decisions and work toward creating a viable and healthy community. While all levels of open space programs and the pending regulations for the Council on Affordable Housing recognize the importance of self-determination by a municipality, this court decision forces yet another attempt of judicial activism on the local government.

A. OPEN SPACE IS A PUBLIC PURPOSE

“Great discretion is usually granted to condemning authorities in determining what property may be taken for public purposes.⁸⁷ This is because our courts recognize that it is for the Legislature to determine what constitutes a "public use.”⁸⁸

The Superior Court erred by declaring that the preservation of open space could not be accomplished through the condemnation of land that had received approval for residential housing development.⁸⁹ This decision contradicts major policy initiatives supported in the state by the last two bi-partisan gubernatorial administrations. Condemnation is valid because it fulfills the public purpose established in these policy initiatives and the laws and regulations promulgated to implement them.

Both pieces of legislation which allow the state to assist in the funding of open space purchases, the municipal open space funding mechanism⁹⁰ and the Garden State Preservation Trust,⁹¹ authorize the acquisition of available land by

⁸⁶ N.J.STAT.ANN. 13:8C-3 (1999). “Acquisition” or “acquire” means the obtaining of a fee simple or lesser interest in land, including but not limited to a development easement, a conservation restriction . . . or easement permanently restricting development, by purchase, installment purchase agreement, gift, donation, eminent domain by the State or a local government unit or devise.

⁸⁷ *Burnett v. Abbott*, 102 A.2d 16 (1954); *Texas East Trans. Corp. v. Wildlife Preserves*, 225 A.2d 130 (1966).

⁸⁸ *State v. Lanza*, 143 A.2d 571 (1958) *appeal dismissed*, 358 U.S. 333, (1959).

⁸⁹ *Mipro* decision, at 18.

⁹⁰ N.J.STAT. ANN. 40:12-15.1 (2003).

⁹¹ N.J.STAT.ANN. 13:8-1.

eminent domain, if necessary.⁹² The municipality's actions in condemning this potential residential subdivision cannot be in bad faith.

The State of New Jersey recognizes that the preservation of open space is a vital public purpose for the good of the state. The Garden State Preservation Trust Act notes that land in New Jersey is becoming increasingly scarce and that the State and local government units should do everything in their authoritative power to preserve open space.⁹³ In the act, local units are encouraged to acquire open space by various means, including utilizing the power of eminent domain.⁹⁴

Apparently for the Superior Court, the express words of the statute were not enough to convince them that open space preservation was a public purpose. The Township's action in preserving the land through condemnation must be presumed valid on its face as long as it is reasonable.⁹⁵ The Court declared that the actions of the Township were done in bad faith to stop development and to reduce future tax burdens.⁹⁶ How can bad faith be deduced when the Township is fulfilling the state's standing policy for open space preservation and the Township has correctly executed every necessary step toward purchasing the property?

Clearly, the State of New Jersey fails to understand the faulty logic of the Superior Court in the court's development-biased decision. In January 2004, the State of New Jersey filed an Amicus Curiae brief with the Appellate Division on behalf of the Township's actions.⁹⁷ In their brief the State argues that open space "unquestionably furthers an important public purpose⁹⁸" and that the trial court placed "undue constraints on the use of eminent domain."⁹⁹ The State recognizes the strong interest in preserving open space by all appropriate means, including eminent domain to further the public purpose of land preservation.¹⁰⁰ The Appellate Court allowed the State to join the dispute in February 2004.¹⁰¹

⁹² *Id.* at C-3. Definition of "Acquisition" provides through among many tools the power of condemnation.

⁹³ *Id.* at C-2. "[I]t is necessary and desirable to provide funding for the development of parks and other open space for recreation and conservation purposes." Emphasis added.

⁹⁴ *Id.* at C-3.

⁹⁵ *Riggs v. Twp of Long Beach*, 109 NJ 601, 613 (1988).

⁹⁶ Mipro Decision at 18.

⁹⁷ Brief of Amicus Curiae State of New Jersey, Docket No A-6766-02T1, January 12, 2004, Peter C. Harvey, Attorney General of New Jersey, by Rachel Horowitz, Deputy Attorney General.

⁹⁸ State Amicus Curiae at 4.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 5.

¹⁰¹ Michael Burkhart, *State Joins Open Space Dispute*, Courier Post, Feb. 11, 2004, at B2.

At the writing of this note the County of Burlington, the New Jersey League of Municipalities, the Town of West Windsor and potentially the Sierra Club were all attempting to file as Amicus Curiae on behalf of the Township.¹⁰²

The major policy initiatives of the past two gubernatorial administrations demonstrate that land preservation, smart growth and prevention of urban sprawl were top priorities of both administrations.¹⁰³ Yet, despite the historical trend of the executive branch espousing these principals, the trial court took a broad step in judicial activism to undermine the State's policy goals. The rules of eminent domain and the government's right to use the public purpose clause have become cloudy because of this action.¹⁰⁴ It is no surprise that the building lobby exalted the trial court for this setback to municipal power.¹⁰⁵

The Superior Court questioned the public purpose aspect of the Township's eminent domain action because the Township had no defined purpose for the land when it condemned the property from the unwilling seller.¹⁰⁶ The court relied on the Township's Master Plan in determining that the Township already had enough land for open space.¹⁰⁷ Taking this approach, however, undermines New Jersey's policy goals of continuing to preserve as much open space as possible. The State understood the value of preserving land in suburban areas like Mount Laurel and continues to help fund these purchases.¹⁰⁸ Therefore, Mount Laurel was awarded \$400,000 from the State Green Acres program to help fund this acquisition.¹⁰⁹

Further, the court's reliance on the Master Plan and the Township's consultation with the Township Planner was flawed in that the Township had amended the Master Plan as part of the original Green Acres Planning Incentive

¹⁰² Danielle Camilli, *County Wants To Join Mt. Laurel in Land-Seizure Fight*, Burlington County Times, Mar. 4, 2004 at B3.

¹⁰³ See Garden State Preservation Trust Act under the Whitman Administration, cited throughout, as well as the McGreevey end to urban sprawl initiative, the redefining of priorities from quantity of open space to quality of open space in the areas of land purchased, the Council on Affordable Housing proposed rules creating incentives for municipalities to change their growth trends.

¹⁰⁴ Charles Toutant, *Green Acres Acquisition Can't be Pretext for Blocking Development*, N.J.L.J., and July 7, 2003.

¹⁰⁵ *Id.*

¹⁰⁶ Mipro decision at 18.

¹⁰⁷ *Id.* at 19.

¹⁰⁸ The Township has been allocated more than \$2.5 million from the Green Acres Program to help in the acquisition of open space in Mount Laurel.

¹⁰⁹ Letter from Green Acres program to Township on 06/26/2002 awarding funding for the acquisition of High Pointe Estates (on file at the Mount Laurel Township Clerk's Office, 100 Mt. Laurel Rd., Mt. Laurel, NJ).

Plan process in 1999.¹¹⁰ As part of that process the Mount Laurel produced the Incentive Plan that calls for the Township to assist the State in achieving the goal of preserving as much land as possible.¹¹¹

Through the development process of this Plan, Mount Laurel Township has discovered its shortage of lands dedicated to recreation and open space as compared to the high demand from its present dense and growing population. The Township determined the NJDEP-Green Acres Planning Incentive Grant Program as a way to satisfy this high demand by acquiring both more and diverse sites for use as open space and passive and active recreation.¹¹²

When applying to the State Green Acres program, the Township clearly identifies two of its goals. The Township will seek to acquire sites in key locations that are in imminent threat of the danger of development and to acquire properties that help fulfill state and county open space initiatives.¹¹³

As for the contention that the Township did not rely on the expertise of the Township Planner or the Township Engineer, the Township decided to remove these two individuals from the process to avoid any perceived conflict. The conflict arose because both the Township Planner and the Township Engineer earn the majority of their income through the billing against escrow accounts of development applications.¹¹⁴ Without development, or even with limited development, the Township Planner and Engineer would see their income from Mount Laurel projects greatly reduced. Further, the Township made no attempt to interfere with the development application for the residential subdivision during the Planning Board process. The Township Planner and Engineer continued to work with the developer to ensure that the development complied with State and Township standards. If these two offices were involved in the Township's open space efforts, it would result in a conflict of interests.

The public purpose of the condemnation is present in the statutes that allow for the creation of funding mechanisms and in the Garden State Preservation trust. Mount Laurel Township fulfilled its obligations to properly condemn the land and the State concurred by contributing to the acquisition. To rule otherwise is contradictory to the policy wishes of the State of New Jersey.

¹¹⁰ R-99-39 Master Plan Amendment, Recreation and Open Space Plan, Mount Laurel Township Planning Board 10/14/1999.

¹¹¹ Mount Laurel Township Open Space and Recreation Plan Green Acres Program Planning Incentive Grant Application, prepared for Mount Laurel Township by Bay Pointe Engineering, Nov. 1999, last revised March 2001.

¹¹² *Id.* at 1.

¹¹³ *Id.* at 5.

¹¹⁴ Mount Laurel Township v. Mipro Homes, LLC, On Appeal from an Order of the Super. Ct., Law Div., Burlington County, No. A 6766-02T1, Br. on Behalf of the Pl.-Appellant at 43.

B. THE BATTLE OF LAWS

“Even amidst the general proliferation of development, conservation acquisitions protect a large amount of our most highly cherished landscapes from development.”¹¹⁵

The trial court argued that the personal rights granted to property owners under the Eminent Domain Law of 1971 and the Municipal Land Use Law usurp the public purpose of open space preservation.¹¹⁶ The Court’s argument contradicted itself when it stated that open space preservation is allowed if it does not stop development.¹¹⁷ In a township under extreme building pressure, this is both an unrealistic and unfounded burden to place upon the governing body and it limits their opportunity at self-governance. The rapid growth of the Township has made every parcel of land a target for development. To appease property owners, the court indicated that the Township could only pursue parcels where there is no interest in development and only where there is a willing seller.¹¹⁸ This undermines the public purpose of open space preservation by unfairly giving it more weight to the potential rights of the property owner than to the community. There is no justification for this balance tipping in the United States Constitution or the New Jersey State Constitution,¹¹⁹ which both recognize that the takings power may be utilized for a public purpose as long as the property owner is justly compensated.¹²⁰

Besides the intervention with the Amicus Curiae brief on behalf of the State of New Jersey, both Houses of the Legislature have introduced legislation that would repair the potential damage to the state’s open space policy initiatives as a result of the trial court’s actions.¹²¹ The legislation states that whenever a local government unit uses the power of eminent domain for the purpose of acquiring land for recreation and conservation, the public purpose will be deemed equally important to any other purpose or property right.¹²² The

¹¹⁵ Robert H. Levin, *When Forever Proves Fleeting: The Condemnation And Conversion Of Conservation Land* 9 N.Y.U. Envtl. L.J. 592, 593 (2001).

¹¹⁶ Mipro Decision at 4.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 22.

¹¹⁹ U.S. Const., Art. V; N.J. Const. Art. I.

¹²⁰ The issue of just compensation for this property has never been at issue. The argument of bad faith must be determined before the developer can raise that issue. The Township has deposited the appropriate funds as determined by the Green Acres Program certified market value with the court as part of the condemnation process.

¹²¹ S.324, Assemb. 997, 211th Leg. (N.J. 2004).

¹²² *Id.* at 5.

legislature, unwilling to allow an errant court decision to affect the future of the open space program, provided for retroactivity of the legislation to include municipal actions like this matter.¹²³

Unchecked, the results of the court's actions would be detrimental to the future of open space preservation in areas of rapid growth. The McGreevey Administration recognized the importance of slowing this rapid growth through its BIG Map initiative.¹²⁴ In a speech at the New Jersey Environmental Federation Conference on March 29, 2003, the Governor noted:

Runaway development diminishes our landscape and the very appeal of New Jersey. The time has come for change. For far too long the message has been that economic prosperity required mindless development; that New Jersey must be open for business at any cost. But we know better. For New Jersey to truly prosper, our quality of life must be considered. Our communities must be livable. Our environment must be protected. And the cycle of unchecked development must end.¹²⁵

The Governor's office has created a state overlay map with areas defined as "Red", "Yellow" and "Green." The colors, symbolic of a traffic light, indicate how parcels of land in the state should continue to be developed.¹²⁶ Although the map has not yet been formally adopted, most of Mount Laurel, including the parcel condemned by the Township, was identified as either red or yellow demonstrating that the State understands the region's need to stop sprawl in the Mount Laurel area.¹²⁷

The State of New Jersey understands the rights granted to property owners to develop their land or to provide just compensation only for a public purpose in a taking. The State is now working to ensure that the developer and the courts recognize that open space preservation either trumps or must be treated equal to the individual rights of a property owner.

¹²³ *Id.* at 7.

¹²⁴ BIG Map = "Blueprint for Intelligent Growth"

¹²⁵ Governor James E. McGreevey, Address at the New Jersey Environmental Federation Conference (Mar. 29, 2003), <http://www.state.nj.us/dep/antisprawl/govspeech.html>.

¹²⁶ The map offers clear direction to municipalities and developers, so planners can consider state regulatory issues and funding before proposing new development projects. It ensures that environmental rules are clear and predictable, based on infrastructure capacity, natural resource protection and community planning. <http://www.state.nj.us/dep/antisprawl/> (10/7/03) Last Updated: April 28, 2003.

¹²⁷ The New Jersey Department of Environmental Protection is currently updating the BIG Map. A copy of the most recent draft map is available in the Office of the Municipal Clerk, Mount Laurel Township, 100 Mount Laurel Rd. Mount Laurel, NJ 08054.

C. THE TOWNSHIP'S ACTIONS WERE NOT DONE IN BAD FAITH

The trial court's refusal to allow the Township's condemnation is based on the faulty perception that the Township acted in bad faith. The court bases its reasoning on the case of *Borough of Essex Fells v. The Kessler Inst. for Rehab., Inc.*¹²⁸ The court recognizes that "[o]rdinarily, when a municipality adopts an ordinance in the exercise of its power of eminent domain, that determination is presumed valid and entitled to great deference."¹²⁹ The court must allow the condemnation action to proceed unless there has been a showing of "improper motives, bad faith, or some other consideration amounting to a manifest abuse of the power of eminent domain."¹³⁰ Even the trial court recognizes that bad faith only exists when the Township acts with motives that are beyond the scope of the powers conferred by law.¹³¹

In the Essex Fells case, the court was able to demonstrate that the Borough was choosing one development application over another, an action not permitted by law.¹³² In Mount Laurel, the actions of the governing bodies were completely to the contrary. As noted *supra*, the Township never took action to stop the development application of either the National Assisted Living or the proposed residential development. The Township, when creating its Green Acres Planning Incentive Plan, recognized that the National Assisted Living Center would provide a public purpose of incorporating several low and moderate-income units for senior citizens. Additionally, because the application for development was viewed in conjunction with the Township application to Green Acres for the Planning Incentive Plan, the Township recognized that this was one race with the developer that they were not going to win.¹³³ When it became apparent to the Township that the National Assisted Living idea would not come to fruition and the land was sold to a residential developer, the Township began to consider this property with several others in its open space program.¹³⁴ The Township sent

¹²⁸ 289 N.J. Super. 329 (Law Div. 1995).

¹²⁹ See, *Essex Fells* at 337 *citing* Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 364 A.2d 1016 (1976); *City of Trenton v. Lenzer*, 109 A.2d 409 (1954).

¹³⁰ See, *Id.* *citing* *Tenn. Gas Transmission Co. v. Hirschfield*, 120 A.2d 886 (App. Div. 1956).

¹³¹ *Mipro decision*, p. 18.

¹³² *Essex Fells* at 333, 342-343. The Borough of Essex Fells wanted single-family homes on the property rather than a rehabilitation center. When citizen opposition rallied against psychiatric and drug abuse patients destroying the fabric of their community, the Township began working on a plan to condemn the property as a park.

¹³³ See *supra* note 62.

¹³⁴ See *supra* note 70.

proper notice to the property owner that it was adding the property, as well as others, to the map and could potentially pursue the property for open space.¹³⁵

Mount Laurel Township does not have the same discrepancy in its reasoning for condemning the property as did the Village of Essex Fells because there was no ulterior motive behind the Township's actions. The Township properly added the property to its Green Acres map and performed the necessary administrative tasks to condemn the property. More clearly, the Township's addition of the property to the Green Acres map was not done to gain allowance for their condemnation action, rather it was done to become eligible for State funding to help fund the purchase. The Township was permitted to condemn the property because, as noted *supra*, the Garden State Preservation Trust allows condemnation as a municipal means of "acquiring" open space.

The trial court adopted the developer's argument that bad faith existed because the Township was only saving land to stop development and to protect its taxpayers from the necessary improvements required when a developer builds and runs. As Judy Jengo, the Executive Director of the Garden State Preservation Trust, noted "towns are realizing the economic benefit of preservation."¹³⁶ "Folks really used to think, understandably, that all development would bring in the ratables and help the budgets, but as more and more people have been doing the math, they realize it's not that simple . . . if you build in places that can't sustain it. . . .In those places it just raises taxes."¹³⁷

The growth of a town through residential development causes the need for more services.¹³⁸ The Township used this idea to help sell the open space referendum to the taxpayers to demonstrate that the open space program not only achieves the goal of saving trees and watersheds, but the program would even pay for itself over time.¹³⁹ Even the trial court, which so broadly misconstrued state law and facts of the *Mipro decision*, recognized that saving open space and stopping development are two sides of the same proverbial coin.¹⁴⁰

¹³⁵ See Mount Laurel Township Green Acres Planning Incentive Map, Revision #4, Adopted by the Township governing body on 9/13/01.

¹³⁶ Laura Mansnerus, *Trying to Figure Out What Space to Save*, The N.Y. Times, Nov. 28, 1999, at Section 14NJ;Page 4.

¹³⁷ *Id.*

¹³⁸ See *supra* note 49.

¹³⁹ See *supra* note 46.

¹⁴⁰ *Mipro decision* at 7.

III. EMINENT DOMAIN IS A NECESSARY TOOL FOR SAVING LAND

Unmistakably, the State of New Jersey allows municipalities to use eminent domain in their constant race against developers to define the future of their landscape. The power is defined in the enacting law as a means of acquiring open space for either recreation or conservation purposes. The “needs” test that the trial court would suggest municipalities follow contradicts the stated purpose of the Garden State Preservation Trust and Governor McGreevey’s Anti-Sprawl Initiative. The need is for government to save as much open space as possible and to do so, sometimes it must use all of the legislative tools permitted. Mount Laurel Township has a long history of fighting for self-determination. While the alleged discriminatory actions in the 1960s and 1970s leading to the *Mount Laurel* housing decisions can certainly be debated, clearly modern Mount Laurel is permitted to use the laws of the State to fight urban sprawl and to save open space for conservation and recreation purposes.