

4 Turkey Hill Road  
Newtown, CT 06470  
Tel (203) 270-4300  
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Fred Hurley,  
*Director*

**TOWN OF NEWTOWN**  
**WATER AND SEWER AUTHORITY**

Marianne Brown,  
*Chairman*  
Richard Zang  
Louis Carbone  
George Hill  
Alan Shepard  
Eugene Vetrano  
Carl Zencey

*THESE MINUTES ARE SUBJECT TO APPROVAL BY THE WATER AND SEWER AUTHORITY*

The Water and Sewer Authority held a public meeting, Thursday, October 11, 2018 at the Waste Water Treatment Plant, 24 Commerce Road, Newtown, CT. Gene Vetrano called the meeting to order at 7:01pm.

**Present:** Gene Vetrano, Lou Carbone, Dick Zang, Carl Zencey

**Absent:** Alan Shepard, George Hill, Marianne Brown

**Also Present:** Director of Public Work Fred Hurley, Mike Burke and Julio Segarra from Suez Water Environmental Service, 5 members of the public and 2 members of the press

*Proposed amendments to the Water Pollution Control Plan adopted 1/8/15* – Correspondence was submitted and attached. F. Hurley spoke with the Attorney who requested that all documents be included in the minutes and sent to him for review. He will have a recommendation for the next meeting.

Public hearing adjourned at 7:09pm

Respectfully submitted  
Arlene Miles, Clerk

### III. Sewer Avoidance

In January, 1978 the State Department of Environmental Protection published "A Report to the Joint Standing Committee on the Environment On the Establishment and Administration of a Municipal and Town Sewer Avoidance Program." The document served as a principal basis for the 1978 amendments to Section 7-246 of the Connecticut General Statutes that provided for the preparation of a Water Pollution Control Plan by municipalities. Sewer avoidance was recognized to be a desirable policy in rural communities where sewers do not exist and are not planned.

Based on Facilities Plan as amended, the WSA concludes that sewer avoidance is an appropriate policy for areas outside the sewer service areas as defined herein. The Town does not intend extend sewers to areas outside the sewer service areas and intends to control surface and groundwater pollution problems in these areas through aggressive administration of a sewer avoidance policy to the extent permitted by zoning regulations. This policy requires the support of all Town agencies to avoid future problems with onsite disposal.

### IV. Policies and Objectives

In accordance with Town Policy, any new development outside a sewer service area shall not exceed the ability of the land on which it is located to support properly subsurface wastewater disposal on site except where specifically permitted by zoning regulations. The design of such onsite disposal systems shall meet all current State and Town regulations, standards, and codes.

A sewer avoidance policy shall be adopted which shall promote the vigorous enforcement of technical standards for new and repaired disposal systems, the proper operation of disposal systems through public education, the monitoring of disposal systems and their effects on surface water and groundwater, and the identification of malfunctioning disposal systems and implementation of effective onsite repairs or alternative solutions.

The WSA adopted a priority matrix for the central sewer service area to ensure that the limited treatment plant capacity of 332,000 gallons per day ("gpd") can be allocated in a logical manner.

Priority	Allocation (gpd)	Type of development
1 <sup>st</sup> priority	267,000	Existing average metered capacity usage as of 1/1/14
2 <sup>nd</sup> priority	31,630	Previously allocated capacity to suspended existing usage (Sandy Hook School), paid commercial/industrial property assessment, existing and pending allocation requests

Inland wetlands  
requested this language  
backed up as it is  
in the current plan



Arlene Miles <arlene.miles@newtown-ct.gov>

## Re: WSA request for review of their proposed Water Pollution Control Plan

1 message

**Rob Sibley** <rob.sibley@newtown-ct.gov>

To: Arlene Miles <arlene.miles@newtown-ct.gov>

Thu, Sep 20, 2018 at 10:27 AM

Hi,

Just confirming that the title for Conservation Commission should be changed to Inland Wetlands. And Members should also say "or designated Agent".

Thanks,

-Rob

**Rob Sibley**, Deputy Director of Planning, Land Use and Emergency Management

**Town Of Newtown**

**3 Primrose St.**

Newtown, CT 06470

Office 203-270-4351

Cell 203-364-7090

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On Fri, Sep 14, 2018 at 11:23 AM, Arlene Miles <arlene.miles@newtown-ct.gov> wrote:

Attached is the Revised Draft - Water and Sewer Authority Water Pollution Control Plan. The WSA has asked that your boards (P&Z, Conservation, Wetlands, EDC and BOS) review and forward any comments back me before October 2, 2018. The WSA will be having a public hearing regarding this plan on 10/11/18.

Arlene Miles  
Public Works Administrator  
203.270.4300

3 Primrose Street  
Newtown, CT 06470  
Tel. (203) 270-4276  
Fax (203) 270-4278

P



George Benson  
Director of Planning

**TOWN OF NEWTOWN**  
LAND USE AGENCY

**MEMORANDUM**

Date: 9/25/18

To: Fred Hurley, WSA

From: George Benson, Director of Planning

Re: Newtown WSA Water Control Plan

At the meeting of 9/20/18 the Newtown Planning and Zoning Commission reviewed and discussed the draft revision dated 9/13/2018 of the Newtown WSA Water Pollution Control Plan. The Commission had no recommendations for changes to the draft.

# It's No Longer 'The Good Old Days'

By Jim Maguire  
Monday, March 23, 2015

To the Editor:

After attending the WSA meeting last week and hearing the comments and complaints about multifamily residences in Newtown, I started to reflect on the general mood and atmosphere when the decision to install a "sewer system" in Newtown was being bantered about. What was most interesting to me then and again today is the "unspoken!"

The objections are generally environmental, increased traffic, municipal cost increases, etc. What's really going on in people's minds and hearts? What's the thought process?

The objections against the sewer system were many. Too many to address in this short missive. The driving force, though is easy to remember and relatively concise, is "a sewer system will encourage development." A lot of people did not want that, and it's raised its elitist head again today. "I'm here, I got mine" and the never spoken in public – "we don't want those people." Who are "those people?" To me "those people" are residents paying rent, which subsidizes our tax base, patrons of local restaurants, markets and stores. Some may even work in businesses in town. All of this translates into one important area – real estate taxes, as well as, a diversified tax base.

It appears to me that most people resist change. Understandable, however, this is usually detrimental. "The good old days" might have been good, but they occurred in the past. The world today, the Newtown of today, is not the same Newtown of 1975 and so on. We cannot approach municipal fiscal costs with that old Yankee reactionary mentality of yesteryear. Applying the "old thinking" results in what I see as mill rate creep! It becomes like a chronic virus that never goes away and quietly erodes the ability of folks to live and work in a city or town.

You can't have it both ways. You can have exclusionary zoning, good education system, nice parks and a top-rated police department. But with that combination, you get (you guessed it) the virus of mill rate creep.

Add planned development. Not fear-based and reactive, but, forward thinking and proactive. What's the result? No virus, a diversified tax base and a reasonable mill rate with top notch education and services.

Make your choices and place your bets. Just remember you can have it either way, just not both ways.

PS-"Those people"? Learn to love them, they'll help pay your taxes.

Jim Maguire

8 Watkins Drive, Sandy Hook

March 23, 2015



Timothy S. Hollister  
Phone: (860) 251-5601  
Fax: (860) 251-5318  
thollister@goodwin.com

October 11, 2018

VIA PDF TO ARLENE MILES  
AND FRED HURLEY

Ms. Marianne Brown, Chair,  
and Members  
Water and Sewer Authority  
Town of Newtown  
4 Turkey Hill Road  
Newtown, CT 06470

Mr. Frederick Hurley  
Director  
Department of Public Works  
Town of Newtown  
4 Turkey Hill Road  
Newtown, CT 06470

Re: 79 Church Hill Road, LLC

Dear Chair Brown, Authority Members, and Mr. Hurley:

As you know, we represent 79 Church Hill Road, LLC, which has a pending court appeal regarding the WSA's recent action on sewer that limits the acreage and density of a proposed multi-family residential development on Church Hill Road in Sandy Hook.

We have become aware of a draft revision of Newtown's Water Pollution Control Plan, dated October 9, 2018. 79 Church Hill Road, LLC objects to the proposed draft, for the reasons stated here. The undersigned is not able to attend in person at the hearing scheduled for October 11, 2018, and **thus we ask that this letter be read aloud and made part of the record of the WSA's consideration of the draft revision.**

There are several illegalities in the proposed changes to the WSA's Plan, and in this letter we will comment on both the changes and other, prior illegal aspects of the WSA's administration of Newtown's public sewer system.

First and foremost, the WSA's definition of all land that is not located within a defined sewer service area as "sewer avoidance areas" is arbitrary, baseless, and illegal. By definition

and common sense, a sewer avoidance area is land that, *due to environmental or physical characteristics*, cannot or should not be developed with sewer infrastructure. *To define a particular parcel of land as sewer avoidance, the WSA must have a factual basis for determining that such characteristics exist.* Conversely, to impose on all land that is nothing more than outside the boundary of a sewer service area (in itself, in most cases, an arbitrary line) the label "sewer avoidance area" is baseless and nonsensical, a meat-ax approach to a determination that can only be made parcel-by-parcel. It is akin to classifying land as a wetland without doing a soils analysis. Moreover, in defining sewer avoidance areas as everything outside a service area, the WSA would be acting without any basis in the Connecticut General Statutes, court cases, or even the 1978 DEP report cited in the draft.

Second, in 2010, in the *Dauti* case, the Connecticut Appellate Court told the WSA in no uncertain terms that it is authorized to manage the operation of the sewer system, but has no power to use sewer districts, maps, formulas, regulations, or capacity to control land use or zoning. Yet, in the draft's Sections 690-97.E, 690-98.B, and 690-99.A, there are explicit references to the WSA's Water Pollution Control Plan being based on zoning. These statements are plainly beyond the WSA's authority.

Third, lost in the WSA's existing Plan and proposed draft is the fact that the Newtown sewer system is a public utility, which as a matter of law means that each owner of land within a sewer service area "has a legal right to demand and receive its services."<sup>1</sup>

Finally, we must comment on a matter addressed indirectly by the draft Plan amendment. The Newtown treatment plant, according to the Plan, has 932,000 gallons per day of capacity, of which 332,000 GPD is allocated to the Newtown public. However, it is undisputed that approximately 300,000 gallons of capacity is reserved to the State of Connecticut, and due to events that have occurred since the negotiation of that amount, *will never be used*. Given this fact, the WSA and the Town have an obligation to request the State to cede that capacity back to the Town. The Town's and the Authority's refusal to do so to date is arbitrary and illegal. In effect, the WSA and the Town are freezing and hoarding capacity that should be available to owners of property in Newtown, as well as creating a *de facto* moratorium on sewer capacity allocation, and controlling land use. In 2015, in a very similar situation, the New Jersey Supreme Court invalidated a town's refusal to recapture sewer capacity that had essentially been abandoned. *See 388 Route 22 Readington Property Holdings, LLC v. Township of Readington*, 221 N.J. 318, 113 A.3d 744 (2015) (copy enclosed). Newtown is doing the same thing.

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<sup>1</sup> 69 Am. Jur. 2d, Public Utilities, § 1. *See Cedar Island Development Assoc. v. Clinton Electric Light & Power Co.*, 142 Conn. 359 (1955).

October 11, 2018  
Page 3

In summary, 79 Church Hill Road, LLC objects to the draft Plan amendment, and reiterates its previously-stated objections to other aspects of Newtown's administration – and manipulation – of its public sewer system.

Very truly yours,

A handwritten signature in black ink, appearing to read "Tim Hollister". The signature is fluid and cursive, with a large initial "T" and "H".

Timothy S. Hollister

TSH:ekf  
Enclosure

c: 79 Church Hill Road, LLC (w/ enc.)



221 N.J. 318

Supreme Court of New Jersey.

388 ROUTE 22 READINGTON REALTY  
HOLDINGS, LLC, Plaintiff–Appellant,

v.

TOWNSHIP OF READINGTON, Township  
Committee of the Township of Readington,  
Sewer Advisory Committee of the Township of  
Readington, Bellemead Development Corporation,  
Readington Commons, LLC, C. DelVecchio, S.  
Carbone, A. Carbone, Rolf Ackerman, Valley  
National Bank, Ryland Developers, LLC, Lot 3  
Development, LLC, Fallone Properties, LLC, URB–  
FI Development Corp., Fallone at Spring Meadow,  
LLC Country Classics Legacy Readington, and  
Winfield Management, Defendants–Respondents,

and

Merck Sharp & Dohme Corp., f/k/a Merck  
& Co., Inc., Defendant–Respondent,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic  
Association, Wladyslaw Zacios, Joann Zacios, Betty  
Ann Coebler, Coddington Homes Co., Inc., Tom Jr.  
Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty  
Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee  
of the Township of Readington, Sewer Advisory  
Committee of the Township of Readington, Merck  
Sharp & Dohme Corp., f/k/a Merck & Co., Inc.,  
Readington Commons, LLC, C. DelVecchio, Scott  
Carbone, A. Carbone, Rolf Ackerman, Valley  
National Bank, Ryland Developers, LLC, Lot 3  
Development, LLC, Fallone Properties, LLC, URB–  
FI Development Corp., Fallone at Spring Meadow,  
LLC, Country Classics Legacy Readington, and  
Winfield Management, Defendants–Respondents,

and

Bellemead Development Corporation,  
Defendant–Respondent,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic  
Association, Wladyslaw Zacios, Joann Zacios, Betty  
Ann Coebler, Coddington Homes Co., Inc., Tom Jr.  
Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty  
Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee  
of the Township of Readington, and Sewer  
Advisory Committee of the Township of  
Readington, Defendants–Respondents,  
and

Bellemead Development Corporation, Merck  
Sharp & Dohme Corp., f/k/a Merck & Co., Inc.,  
Readington Commons, LLC, C. DelVecchio, Scott  
Carbone, A. Carbone, Rolf Ackerman, Valley  
National Bank, Ryland Developers, LLC, Lot 3  
Development, LLC, Fallone Properties, LLC, URB–  
FI Development Corp., Fallone at Spring Meadow,  
LLC Country Classics Legacy Readington, and  
Winfield Management, Defendants–Respondents,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic  
Association, Wladyslaw Zacios, Joann Zacios, Betty  
Ann Coebler, Coddington Homes Co., Inc., Tom Jr.  
Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty  
Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee  
of the Township of Readington, Sewer Advisory  
Committee of the Township of Readington,  
Bellemead Development Corporation, Merck  
Sharp & Dohme Corp., f/k/a Merck & Co., Inc.,  
C. DelVecchio, Scott Carbone, A. Carbone,  
Rolf Ackerman, Valley National Bank,  
Ryland Developers, LLC, Lot 3 Development,  
LLC, Fallone Properties, LLC, URB–FI  
Development Corp., Toll NJ I, LLC, and Winfield  
Management, Defendants–Respondents,

and

Country Classics Legacy at Readington,  
Readington Commons, LLC, and Ryland  
Developers, LLC, Defendants–Respondents,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Ryland Developers, LLC, Fallone Properties, LLC, URB–FI Development Corp., Fallone at Spring Meadow, LLC, and Country Classics Legacy Readington, Defendants–Respondents,

and

Lot 3 Development, LLC and Winfield Management, Defendants–Respondents,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Lot 3 Development, LLC, Fallone Properties, LLC, URB–FI Development Corp., Fallone at Spring Meadow, LLC, Country Classics Legacy Readington, and Winfield Management, Defendants–Respondents,

and

Ryland Developers, LLC, Defendant–Respondent,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Ryland Developers, LLC, Lot 3 Development, LLC, URB–FI Development Corp., Country Classics Legacy Readington, and Winfield Management, Defendants–Respondents,

and

Fallone Properties, LLC, and Toll NJ I, LLC, Defendants–Respondents,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.

388 Route 22 Readington Realty Holdings, LLC, Plaintiff–Appellant,

v.

Township of Readington, Township Committee of the Township of Readington, Sewer Advisory Committee of the Township of Readington, Bellemead Development Corporation, Merck Sharp & Dohme Corp., f/k/a Merck & Co., Inc., Readington Commons, LLC, C. DelVecchio, Scott Carbone, A. Carbone, Rolf Ackerman, Valley National Bank, Ryland Developers, LLC, Fallone Properties, LLC, at Spring Meadow, LLC, and Country Classics Legacy Readington, Defendants–Respondents,

and

Lot 3 Development, LLC, and Winfield Management, Defendants–Respondents,

and

Ramyz Tadros, Shadia Samaan, Whitehouse Athletic Association, Wladyslaw Zacios, Joann Zacios, Betty

Ann Coebler, Coddington Homes Co., Inc., Tom Jr. Property, Inc., and WPS Realty, LLC, Defendants.

Argued Dec. 2, 2014.

|

Decided May 5, 2015.

### Synopsis

**Background:** After township declined property developer's demand that the township, in accordance with sewer allocation ordinance, recapture sufficient sewer capacity to allow its construction project to proceed, developer filed a complaint in lieu of prerogative writs against the township and multiple private entities to compel the transfer of allocated but unused sewer capacity. On cross-motions for summary judgment, the Superior Court, Law Division, Peter A. Buchsbaum, J.S.C., affirmed validity of the ordinance, but determined that township's blanket policy of not recalling unused sewer capacity violated principles of *First Peoples*. Township appealed. The Superior Court, Appellate Division, 2013 WL 4769373, reversed. Developer appealed.

**Holdings:** The Supreme Court, Albin, J., held that:

ordinance provided adequate standards to guide township's discretion when considering whether to repurchase sewer capacity; but

as applied, ordinance violated dictates of *First Peoples*, and

Supreme Court would order township both to undertake a detailed analysis of the unused capacity in the hands of private parties and to explain whether any of that capacity could be recalled.

Affirmed in part, vacated in part, and remanded.

### Attorneys and Law Firms

**\*\*750** Lawrence S. Berger, Morristown, argued the cause for appellant (Berger & Bornstein, attorneys).

Christopher John Stracco argued the cause for respondent Merck Sharp & Dohme Corp. (Day Pitney, attorneys; Mr.

Stracco and Jennifer Gorga Capone, Parsippany, on the brief).

Robert A. Ballard argued the cause for respondents Township of Readington, Township Committee of the Township of Readington, and Sewer Advisory Committee of the Township of Readington, (Ballard & Dragan, attorneys).

Glenn S. Pantel argued the cause for respondent Bellemead Development Corporation (Drinker Biddle & Reath, attorneys; Mr. Pantel, Florham Park, and Karen A. Denys, Princeton, on the brief).

Deborah B. Rosenthal argued the cause for respondents Winfield Management Corp. and Lot 3 Development, LLC (Gebhardt & Kiefer, attorneys; Robert C. Ward, Annandale, on the brief).

Alexander G. Fisher, Somerville, argued the cause for respondents Ryland Developers, LLC, Readington Commons, LLC and Country Classics Legacy at Readington, LLC (Mauro, Savo, Camerino, Grant & Schalk, attorneys).

Thomas W. Sweet argued the cause for respondents Fallone Properties, LLC and Fallone at Spring Meadow, LLC.

Salvatore Alfieri submitted a letter in lieu of brief on behalf of respondents Scott Carbone, A. Carbone, and C. DeVecchio (Cleary Jacobbe Alfieri Jacobs, attorneys).

### Opinion

Justice ALBIN delivered the opinion of the Court.

**\*326** Access to sewer service is vital to any major development of property. In *First Peoples Bank v. Township of Medford*, we held that a municipality cannot delegate the exercise of its land-use authority to private parties by allowing them to purchase and hoard unused sewer rights, thereby stifling development by those who are prepared to build. 126 N.J. 413, 420–21, 599 A.2d 1248 (1991). Instead, a “[t]ownship must retain sufficient control to assure that sewer permits are either used or repurchased so that others may use them.” *Id.* at 420, 599 A.2d 1248.

Plaintiff 388 Route 22 Readington Realty Holdings, LLC is seeking to construct a **\*\*751** retail outlet and a restaurant but cannot do so unless it secures access to

11,260 gallons per day (gpd) of sewer capacity. At the time that plaintiff requested access to that amount of sewer capacity from Readington Township, approximately twenty private entities possessed 322,009 gpd of unused capacity. The Township sold most of that unused capacity on the private market as a means of financing the expansion of sewer service from the Readington-Lebanon Sewerage Authority (Sewerage Authority or Authority).

Plaintiff demanded that the Township—in accordance with a municipal ordinance governing allocation of sewer rights—recapture sufficient sewer capacity to allow its construction project to proceed. Consistent with its policy of not repurchasing capacity, the Township declined to do so. Plaintiff then filed a complaint in lieu of prerogative writs against the Township and multiple private entities to compel the transfer of allocated but unused sewer capacity. Plaintiff claimed that the municipal ordinance addressing the allocation of sewer capacity was invalid either on its face or as applied by the Township.

On cross-motions for summary judgment by the parties, the trial court affirmed the validity of the ordinance. The court, however, determined that the Township's blanket policy of not recalling unused sewer capacity violated the dictates of *First Peoples*. The court issued a writ of mandamus ordering the \*327 Township to exercise its discretion under its ordinance and to provide "a reasoned basis for refusing to recapture" the unused capacity held by multiple private entities.

The Appellate Division reversed. Although the Appellate Division agreed with the trial court that the Township "simply relied on a policy of not re-taking sewer rights granted by contract," it concluded that plaintiff could not overcome the presumption of validity that attaches to municipal decision-making.

We now conclude that the Appellate Division erred. As the trial court held, the Township cannot meaningfully exercise its discretion whether to repurchase sewer capacity unless it examines the reasons given by each entity for not using capacity assigned to it. A policy of not recapturing unused sewer capacity is the functional equivalent of a moratorium on development. We approve of the sound approach taken by the trial court, requiring the Township both to undertake a detailed analysis of the unused capacity in the hands of private parties and to explain whether any of that capacity can be recalled.

# 1.

We now review the relevant parts of the record on the summary-judgment motions.

In December 2007, plaintiff purchased property and a warehouse located at 388 Route 22 West in Readington Township. The wastewater at that site is serviced by a septic tank that allows for a maximum of 2000 gpd of capacity.<sup>1</sup> The Township rezoned plaintiff's property from the Mixed-Use District to the Business District, where retail and restaurant uses are permitted. Plaintiff's septic tank does not have sufficient capability to process the wastewater generated for the uses plaintiff proposes.

\*328 Plaintiff's property is in an area serviced by the Sewerage Authority, which manages wastewater for Readington and \*\*752 Lebanon Townships. A sewer line is located directly in front of plaintiff's property. After the zoning change, plaintiff made plans to redevelop the property for use as a restaurant and for other retail purposes. Plaintiff's proposed project requires 11,260 gpd of sewer capacity, which can only be accomplished by connecting to the Authority's sewer system. However, the Township advised plaintiff that there was no available sewer capacity to allocate to the project.

Around 1999, the Sewerage Authority began the expansion of its plant capacity to allow the treatment of an additional 320,000 gpd of Readington's wastewater. As a result of the plant expansion, Readington Township was allocated, in all, approximately 939,000 gpd of sewer capacity. The Township agreed to pay the Authority \$6,024,704 for the increased capacity. To finance the project, the Township relied on private investment. The Township offered landowners the opportunity to purchase portions of the 320,000 gpd of increased capacity. In response to the offering, to name a few, Merck Sharpe & Dohme Corporation purchased 141,900 gpd of capacity for \$2,196,764, Bellemead Development Corporation purchased 58,746 gpd of capacity for \$1,106,187, and Readington Commons, LLC purchased 7628 gpd of capacity for \$143,635. The prior owner of plaintiff's property declined to invest in future sewer capacity.

Each landowner purchasing future sewer capacity entered into a sewer allocation agreement with the Township. The Township's "Sample Sewer Allocation Agreement," in part, provides:

Should Developer not begin construction on the aforementioned properties within two (2) years of the date of this agreement, then the Township shall have the option to terminate this agreement and all capacity assigned herein under shall be returned to the Township for reallocation at the discretion of the Township.

The sample allocation agreement—in compliance with the sewer allocation ordinance—places a temporal limit on the right of a landowner to hold on to unused capacity.

**\*329** The allocation agreements with Merck, however, do not follow the protocols in the ordinance or sample allocation agreement. Merck's 2003 and amended 2008 sewer allocation agreements allow Merck to maintain unused sewer capacity for the periods the Township extended Merck's site plan approvals for proposed construction in Readington. A past approval ran from 1988 to 2008, and the current approval runs from 2008 to 2018. Merck's agreements have barred the Township from recapturing unused capacity for a period lasting at least fifteen years.<sup>2</sup>

The typical allocation agreement provides that the landowner pay a certain sum for unused sewer capacity annually. The full annual amount was due the third year after acquisition. The first and second year payments were set at one-third and then two-thirds of the full amount annually due. For example, Merck agreed to pay \$48,720 the first year, \$97,440 the second year, and then \$146,160 annually for as long as the allocated gallonage remained unused.

As of December 2010, of the 322,009 gpd of unused capacity, 141,900 was held by **\*\*753** Merck, 66,060 by Bellemead,<sup>3</sup> 32,000 or 38,860 by Fallone Properties, LLC, and 30,125 by Ryland Developers, LLC. Each remaining defendant held less than 10,000 gpd of unused capacity. Merck's unused capacity represents forty-four

percent of the entire capacity yielded from Readington's portion of the Authority's plant expansion.

**\*330** Defendants have not proceeded with construction projects for a variety of reasons. One reason given by some defendants has been the downturn in the economy.

By ordinance, the Township provides the methodology for allocation of sewer capacity to landowners and for the recapturing of unused capacity. *Readington Township Code* § 187–26 states:

A. Order of priority; reserves.

(1) By existing joint agreement with the Readington Lebanon Sewerage Authority, the Township of Readington has a total sewer allocation of 935,000 gpd. Upon study by the Township, there is a limited amount of sewer capacity in Readington Township at the present time. Any remaining capacity from Readington's portion of its allotted capacity in the Readington Lebanon Sewerage Authority sewer service area shall be allocated in the following order of priority, subject to availability:

(a) First, to those projects which will enable the Township to meet its future Mount Laurel affordable housing obligations; and

(b) Secondly, to remedy those properties within the sewer service area which constitute an "emergency" due to failing septic systems.

(2) The Township reserves the right to keep that portion of sewerage capacity needed for "reserve" to meet NJDEP requirements.

B. Allocations for sewer capacity from Readington's allotted portion of sewer capacity shall be made by the Readington Township Committee upon written agreement to be entered into with the applicant, after the allocation request has been reviewed and a favorable recommendation has been made by the Readington Township Sewer Advisory Committee.

C. In the case of those development projects which have not received an approval by the appropriate township board having jurisdiction at the time a request for gallonage is made, allocation agreements shall provide that if the applicant does not make formal application to the appropriate township board within

two years of approval of the allocation, then the Township Committee may, in its discretion, terminate the agreement. If within two years after preliminary approval, construction has not commenced, the Township Committee may, at its discretion, terminate the agreement. The agreement may be extended upon application to the Township if there is a showing of good cause, at the option of the Township Committee.

D. Applicants who received capacity allocations under this section shall enter into a sewer plant expansion developer \*\*754 contribution agreement which is intended to cover the Township's share of the portion of the costs of expanding the [Sewerage Authority] treatment plant until such time as those costs have been satisfied....

E. Allocation of sewer capacity may not be transferred from the owner without prior approval of the Readington Township Committee, upon review and recommendation of the Readington Township Sewer Advisory Committee.

\*331 In March 2010, plaintiff wrote to the Readington Township Committee and the Readington Sewer Advisory Committee requesting that 388 Route 22 be permitted to hook up to the Authority's sewer system and gain access to approximately 10,000 gpd capacity. Plaintiff expressed its belief that the Township possessed sufficient sewer capacity to accommodate plaintiff's request. Alternatively, in the event that all sewer capacity had been allocated, plaintiff stated that Readington should buy back unused capacity from property owners who had "not made formal application for development of [their] properties" or who had "failed to commence construction of improvements within two years after receipt of preliminary approval from the appropriate Township Board." In making this demand for the buyback of unused capacity, plaintiff relied on paragraph C of the Readington Township sewer allocation ordinance. The Readington Township Committee replied that it did "not wish to terminate any of its existing sewer agreements."

On August 4, 2010, plaintiff's attorney and professional planner appeared before the Readington Sewer Advisory Committee, describing plaintiff's plan to develop the property at 388 Route 22 into retail space and a restaurant. They requested a hookup to the sewer system and 11,260 gpd of wastewater capacity. The Committee's chairman replied that all capacity was either used or

reserved by property owners who financed the sewer plant's expansion. He stated that the Township was bound by contracts with those property owners, although the ordinance allowed for an owner to "voluntarily" give up capacity. The chairman made clear that "the policy of this board and the policy of the Township Committee has been not to take any capacity back." The chairman finally noted that his committee's recommendation was advisory and that the Township Committee would make the final decision.

On September 20, 2010, plaintiff's attorney appeared before the Township Committee and requested 11,260 gpd of sewer capacity for plaintiff's project. He indicated that plaintiff had contacted \*332 fifteen property owners, and none were interested in selling their unused capacity. The attorney noted that plaintiff would pay the holder its costs in acquiring and retaining the unused capacity. Nevertheless, Committee members expressed concern about breaching contracts with landowners holding unused capacity.

By letter dated October 14, 2010, the Township Committee advised plaintiff that there was no sewer capacity available. The Committee invited plaintiff to present "a conceptual plan, either through the Planning Board or Board of Adjustment, whichever is applicable, ... and that the application would be conditioned on obtaining a suitable solution to wastewater."

## II.

### A.

In November 2010, plaintiff filed its lawsuit seeking an order compelling the Township to recapture 11,260 gpd of unused sewer capacity for its project. Plaintiff's complaint in lieu of prerogative writs named as defendants Readington Township, \*\*755 Bellemead, Merck, Readington Commons, and various other parties listed in the caption. Among plaintiff's claims are the following: (1) as a result of Readington Township's sewer allocation ordinance, the Township has failed to retain control over the allocation of sewer capacity and, in effect, has delegated to certain private landowners the authority to prevent other property owners from developing their land; (2) the Township's policy of not recapturing sewer capacity in the hands of private entities is arbitrary,

capricious, and unreasonable under the ordinance; (3) the "Township has sufficient unused capacity to allocate to [p]laintiff's [p]roperty"; and (4) the Township's failure to allocate to plaintiff sewer capacity amounts to an unconstitutional taking of its property. Plaintiff's claims, in essence, constitute a facial and as-applied challenge to the validity of the municipal ordinance.

Plaintiff and defendants moved for summary judgment. The trial court—the Honorable Peter A. Buchsbaum, J.S.C.—remanded \*333 the matter to the Township Committee to "review the reasoning set forth in its prior rejection" of plaintiff's request for sewer capacity and to "provide a statement of reasons as a supplement to its decision."

In response to the remand order, the Township Committee held a public hearing on July 5, 2011 and issued a resolution denying plaintiff's request for sewer capacity. The resolution referenced letters received from defendants Merck, Readington Commons, Bellemead, Fallone, and Urb-Fi Development Corp., which recited their allocation agreements with the Township and described the development status of their projects. Those and other defendants objected to the transfer of any of their unused capacity to plaintiff.

In justifying its refusal to recapture unused sewer capacity, the Township Committee adopted in the resolution "the full contents and arguments of the listed correspondence submitted by various defendants." The Township Committee gave further reasons for the denial of plaintiff's request: (1) all excess capacity held by the Township is reserved for affordable housing and emergencies; (2) the sewer ordinance allowed the Township to extend its sewer allocation agreements with defendants for "good cause" and, having done so, the Township did not act unreasonably or arbitrarily; (3) several defendants "have development approvals which fall under the protections afforded by the Permit Extension act," a separate reason constituting "good cause" for continuing the allocation agreements; (4) the previous owner of plaintiff's property expressed no "interest in acquiring sewer capacity at the time the Township announced that it was available for purchase"; (5) Township Committee members did not believe that it was "in the public interest to force the termination of ... existing sewer agreements"; and (6) plaintiff had not determined whether the holder of any unused capacity had

an "interest in voluntarily selling their capacity back to the Township."

## B.

The trial court held that Readington's sewer ordinance passed muster under *First Peoples*, *supra*, 126 N.J. 413, 599 A.2d 1248. \*334 In a written opinion, the court determined that the ordinance, on its face, ensures "municipal control of sewer rights" and "provides mechanisms" for the Township "to recapture sewer capacity." In reaching this decision, the court recognized "the tradition of judicial deference" in upholding "broad standards for local action in the land use area."

On the other hand, the court found that the ordinance as applied by the Township \*\*756 raised serious doubts about the legitimacy of the Township's sewer policy. Based on the summary-judgment record, it accepted that plaintiff was unsuccessful in its efforts to purchase sewer capacity from defendant developers and that the policy of the Township, as expressed by the Chairman of the Sewer Advisory Committee, "is *not* to take capacity back." The court described the Township's resolution as "*pro forma*" and a "brushoff" that "simply recites what was received from [defendants'] counsel." The resolution failed to "contain a development by development analysis" or to provide "a reasoned explanation" for the Township's decision not "to exercise discretion" to recapture any of the unused capacity, which constituted one third of the entire flow allocated to Readington. Further, the resolution failed to analyze whether the Permit Extension Act, N.J.S.A. 40:55D-136.1 to -136.6, applied "to each and every development." The court held that "the ordinance requires the exercise of discretion," yet the Township followed a "flat policy" of refusing to assert its right to recapture unused capacity. It construed *First Peoples* as standing for the proposition that sewer rights "cannot be held in perpetuity" and that at some point the Township has a duty to recapture unused capacity.

According to the trial court, the Township's obligation is not dependent on whether plaintiff can "beg, borrow or cadge capacity from others" but rather "to terminate agreements where it is appropriate to do so." It found that the Township's no-buy-back policy "functioned as a *de facto* moratorium on any development which requires sewerage."

Plaintiff and several defendants appealed.

## C.

The panel, however, determined that the Township Committee did not abuse its discretion \*\*757 in not recapturing unused sewer \*336 capacity for plaintiff. The panel described plaintiff's development plan as "at best speculative" and "vague." Although the panel acknowledged that the Township "Committee simply relied on a policy of not re-taking sewer rights granted by contract," it concluded that plaintiff did not "establish that the denial of its request was arbitrary because it failed to overcome the presumption of validity to which

We granted plaintiff's petition for certification. 388 Route 22 Readington Realty Holdings, LLC v. Twp. of Readington, 217 N.J. 287, 87 A.3d 773 (2014).

## III.

## A.

Plaintiff advances several arguments: (1) the sewer allocation ordinance is invalid because it does not set forth adequate standards to guide the Township in determining when unused sewer capacity should be recaptured; (2) the Township's blanket refusal to recall unused sewer capacity violates principles set forth in *First Peoples*, amounts to an unconstitutional delegation of governmental authority over land use into the hands of private parties, and constitutes an unlawful moratorium on development; and (3) the Appellate Division mistakenly ratified the Township's policy on the erroneous grounds that plaintiff "should have presented a more definitive plan for its proposed development," the holders of sewer rights expended considerable money to acquire the allocated capacity, and the Permit Extension Act expresses \*337 the Legislature's view that sewer agreements should be extended in periods of economic downturn. With regard to the last of those points, plaintiff emphasizes that developers who paid for allocations of sewer capacity did so "with full knowledge of the recapture rights of the Township under the Ordinance which, in many, if not all, instances, were embodied in the allocation agreements themselves." Plaintiff also maintains that neither the Township nor any court has determined whether any particular sewer allocation attached to a development project is protected by the Permit Extension Act. Last, plaintiff contends that the Appellate Division erred by dismissing its claim that the Township has understated its available capacity—a claim that has never been adjudicated.



## B.

Finally, various defendants represent that they are currently using or in the process of using their allocated sewer capacity because their projects are either completed or underway.

## IV.

## A.

B.

The Legislature has the constitutional authority to delegate to municipalities the "police power" to enact ordinances governing "the nature and extent of the uses of land," *N.J. Const.* art. IV, § 6, ¶ 2, and the Legislature has done so through the passage of the Municipal Land Use Law (MLUL), *N.J.S.A.* 40:55D-1 to -163. The constitutional power delegated to municipalities to enact

land-use regulations, \*\*759 however, is not unlimited. That power "must be exercised for the general welfare," and "regulations that conflict with the general welfare ... are unconstitutional." *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel*, 92 N.J. 158, 208, 456 A.2d 390 (1983) (*Mt. Laurel II*); see also *S. Burlington Cnty. N.A.A.C.P. v. Twp. of Mt. Laurel*, 67 N.J. 151, 175, 336 A.2d 713 (1975) (*Mt. Laurel I*) (noting that police power exercised by municipality must promote "the general welfare"). Consistent with this fundamental tenet, one of the express purposes of the MLUL—indeed the first enumerated purpose—is "[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-2(a).

Like all ordinances, Readington's sewer allocation ordinance is entitled to a presumption of validity, and the "party challenging the ordinance bears the burden of overcoming that presumption." See *Runson Estates, Inc. v. Mayor & Council of Fair Haven*, 177 N.J. 338, 350, 828 A.2d 317 (2003). An ordinance \*340 must be "liberally construed" in favor of its validity. *Id.* at 351, 828 A.2d 317 (quoting *N.J. Const.* art. IV, § 7, ¶ 11). Our charge is to pass not on the wisdom of a municipal ordinance, but only on whether it complies with the Constitution and the MLUL. See *ibid.*

Courts must also pay deference to the decision-making of municipal bodies, recognizing that they possess "peculiar knowledge of local conditions [and] must be allowed wide latitude in the exercise of delegated discretion." *Kramer v. Bd. of Adjustment*, 45 N.J. 268, 296, 212 A.2d 153 (1965). A municipal land-use determination should not be set aside unless the public body has engaged in "a clear abuse of discretion." *Id.* at 296-97, 212 A.2d 153. If there is "substantial evidence to support" the municipal decision, a court should not interfere by substituting its judgment. *Id.* at 296, 212 A.2d 153.

Specific to this case, "a sewer ordinance should withstand a challenge unless it is inequitable, unfair, or lacks adequate standards to insure the fair and reasonable exercise of municipal authority." *First Peoples, supra*, 126 N.J. at 419, 599 A.2d 1248 (citing 5 McQuillin, *The Law of Municipal Corporations* § 18.12 at 453 (3d ed.1989)). Nevertheless, "[t]he municipal obligation is to provide a level playing field so that applicants are treated equally." *Ibid.*

In assessing the validity of Readington's sewer ordinance and the Township's application of that ordinance, we are not addressing novel issues. We are returning to issues that we reviewed in *First Peoples*, and therefore a discussion of that case will help guide us here.

In *First Peoples*, Medford Township financed the expansion of its sewage plant through the sale of sewer permits that were available on an equal basis to all developers. *Id.* at 415-17, 599 A.2d 1248. Medford's sewer ordinance gave property owners "the option to purchase connection permits before obtaining municipal land use approvals." *Id.* at 416, 599 A.2d 1248. The plaintiff bank \*341 declined the opportunity to do so. *Id.* at 417, 599 A.2d 1248. Later, when the plaintiff wanted to develop its property, its request for several sewer permits was denied because all permits had been allocated. *Id.* at 418, 599 A.2d 1248. The plaintiff then instituted a lawsuit, challenging the validity of the ordinance and seeking an order directing Medford to repurchase unused permits.<sup>5</sup> *Ibid.*

\*\*760 Our focus in *First Peoples* was whether the ordinance articulated "adequate standards to guide the exercise of municipal discretion when considering the repurchase of permits." *Id.* at 421, 599 A.2d 1248. Ultimately, we concluded that the "ordinance, although not exquisitely drafted, contain[ed] sufficient standards to withstand the [plaintiffs] challenge." *Id.* at 422, 599 A.2d 1248. We gleaned from various clauses of the ordinance, including one that provided that "reservation of capacity is not irrevocably committed to a proposed user," that Medford "when exercising its right of repurchase, must consider the public health, safety, and welfare, a reasonable and equitable allocation of costs, and the allowance of moderate growth." *Id.* at 422-23, 599 A.2d 1248. Importantly, we considered Medford's sewer ordinance to be far from a model ordinance. *Id.* at 423, 599 A.2d 1248. We stated that

it would better serve both the Township and property owners if it contained more specific standards defining the conditions under which permits would be subject to repurchase. Such standards could appropriately include the criteria the municipality will apply when exercising its rights to repurchase permits and a formula for more closely correlating the issuance of building permits and sewer permits. In the absence of such standards, the

municipality runs the risk that in another case the ordinance might be found vulnerable as applied.

[*Ibid.*]

Significantly, in *First Peoples*, no one disputed that “the Township must retain sufficient control to assure that sewer permits are either used or repurchased so that others may use them.” *Id.* at 420, 599 A.2d 1248. We declared that “[w]ithout an adequate \*342 repurchase provision, the ordinance could result in the improper delegation of access to the sewer system to private landowners who, by purchasing permits, could prevent other owners from developing their land.” *Id.* at 420–21, 599 A.2d 1248.

We nevertheless rejected the plaintiff’s as-applied challenge to the ordinance, finding nothing to suggest that Medford had “acted arbitrarily in deciding whether to exercise its repurchase option.” *Id.* at 423, 599 A.2d 1248. We specifically noted that Medford “had repurchased approximately fifteen permits and that it was considering the repurchase of others,” and that the record did not indicate that the plaintiff “had made demand on Medford to repurchase specific permits.” *Ibid.* For those reasons, we viewed the plaintiff’s “attack on the repurchase provision as essentially facial.” *Ibid.*

With those principles in mind, we now turn first to the facial challenge to Readington’s sewer allocation ordinance and then its application of the ordinance to this case.

V.

A.

We reject plaintiff’s challenge to the ordinance itself. We find that Readington’s sewer allocation ordinance provides “adequate standards to guide the exercise of municipal discretion when considering the repurchase of permits.” *First Peoples*, *supra*, 126 N.J. at 421, 599 A.2d 1248.

First, the ordinance sets temporal limits on the right of a property owner to keep unused sewer capacity. The Township has the discretion to terminate an allocation agreement and repurchase capacity if a \*\*761 developer (1) does not make application for development approvals

within two years of having received sewer capacity or (2) has not begun construction within two years after having received preliminary approval. *Readington Code*, *supra*, § 187–26C. Second, the ordinance provides that an allocation agreement “may be extended upon application to the Township if \*343 there is a showing of good cause, at the option of the Township Committee.” *Ibid.*

As was true in *First Peoples*, *supra*, the ordinance here was not “exquisitely drafted.” See 126 N.J. at 422, 599 A.2d 1248. Nevertheless, we must “‘liberally construe[ ]’” the ordinance in favor of its validity. *Rumson Estates*, *supra*, 177 N.J. at 351, 828 A.2d 317 (quoting N.J. Const. art. IV, § 7, ¶ 11). We presume that the ordinance’s drafters intended certain practical considerations to be taken into account by the Township Committee in exercising its discretion whether to terminate an allocation agreement or extend one based on good cause. Such considerations would include (1) the length of time a landowner has possessed unused sewer capacity, (2) the development plans of the landowner to tap some or all of the unused capacity and the imminence of that happening, (3) the complexity of the development project and the importance of the project to the community, (4) whether the economy has retarded economic development, (5) proposed development projects by others that cannot proceed because of unavailability of sewer capacity and the importance of those projects to the community, and (6) any other relevant factors.

Plans for the treatment of wastewater is a critical component of any development project, for without sewer approval no development project can go forward. *Field v. Franklin Twp.*, 190 N.J. Super. 326, 328–35, 463 A.2d 391 (App.Div.), *certif. denied*, 95 N.J. 183, 470 A.2d 409 (1983). This ordinance, as written, in no way suggests that the Township as a matter of law has delegated its authority to control land use—and more specifically to control access to sewer capacity—to private parties. The ordinance suggests that access to sewer capacity is to be managed by the Township Committee for the general welfare of the community.

We conclude that the sewer allocation ordinance—when read with the commonsense considerations implied within the enactment—provides adequate guidelines for the Township to exercise its discretion whether and when to repurchase sewer capacity.

\*344 We next turn to plaintiff's argument that the ordinance, as applied, violates the dictates of *First Peoples*.

### B.

In *First Peoples*, *supra*, we did not find evidence that Medford had acted arbitrarily in deciding whether to exercise its option to repurchase sewer capacity. 126 N.J. at 423, 599 A.2d 1248. That was so because the "Township had repurchased approximately fifteen permits" and "was considering the repurchase of others" and because the plaintiff had not demanded that Medford "repurchase specific permits." *Ibid*. We noted that had Medford acted arbitrarily, "a court might direct it to exercise its option to repurchase." *Ibid*. That scenario, envisioned by our Court, presents itself here.

Based on the summary-judgment record before us, it is apparent that, despite its ordinance, Readington maintains a blanket policy of not repurchasing unused sewer capacity allocated to developers. The Chairman of the Sewer Advisory Committee told plaintiff's attorney that "the policy of this board and the policy of the Township Committee has been not to \*\*762 take any capacity back." The Chairman's statement reinforced the Township attorney's earlier communication to plaintiff that the Township Committee did "not wish to terminate any of its existing agreements."

Approximately one-third of Readington's entire sewer capacity—322,009 gpd—is not in use. That unused capacity is largely in the hands of a relatively small number of private entities. Currently, Merck has 141,900 gpd and Bellemead has 66,060 gpd of unused sewer capacity—capacity allocated for more than a decade but still not in use. Both companies received approvals for their development projects in the late 1980s. That sewer capacity was allocated by contracts to private entities that financed the plant expansion project and was paid for at considerable expense cannot be the end of the analysis. Otherwise, the ordinance requiring Readington to exercise its discretion in recapturing sewer capacity would be meaningless. Those entities that purchased unused \*345 capacity did so knowing that the ordinance placed potential temporal limits on how long that capacity could be held in reserve and gave the Township the authority to recapture unused capacity for distribution to developers with projects ready to go. The ordinance made

clear that sewer rights were not to be held in perpetuity. That other landowners did not participate in purchasing capacity to help finance the plant expansion may indicate nothing more than that they did not have a need for sewer capacity at the time.

The Township Committee invited plaintiff to present "a conceptual plan" of its development project to the appropriate land-use board, adding "that the application would be conditioned on obtaining a suitable solution to wastewater." But given the Township's stated policy not to recapture sewer capacity, the presentation of that plan would have constituted an exercise in futility. A developer may be hesitant to expend great sums of money to secure preliminary approvals for a development project that has no prospect of securing necessary sewer capacity. Plaintiff can hardly be faulted for deciding that judicial relief was the only viable option.

Plaintiff identified the entities that were holding unused capacity and contacted approximately fifteen of those entities, inquiring whether they would relinquish some of their unused capacity. The opposition to this lawsuit is the ultimate testament to defendants' unwillingness to freely give back any of their unused capacity.

The Appellate Division placed on plaintiff the burden of showing that defendant developers were acting "without good cause for delay" by not voluntarily surrendering their sewer rights for the fair value offered by plaintiff. But that defeats the purpose of the ordinance and of the policy of the MLUL, which is to have the Township exercise its decision-making authority in land-use matters. One of the objectives of the sewer allocation ordinance was to ensure that the Township exercised discretion, when appropriate, to recapture unused capacity and to avoid "the improper \*346 delegation of access to the sewer system to private landowners who, by purchasing permits, could prevent other owners from developing their land." See *First Peoples*, *supra*, 126 N.J. at 420–21, 599 A.2d 1248. The MLUL requires that townships exercise their authority to develop lands "in a manner which will promote the ... general welfare," N.J.S.A. 40:55D–2(a), and the repurchase provision of the sewer allocation ordinance was a means to that end. We concur with the trial court that the Township's obligation to terminate agreements, when appropriate, was not dependent on whether plaintiff could "beg, borrow or cadge capacity from others." The \*\*763 Township's no-buy-back policy

has rendered the ordinance toothless, and, as the trial court determined, “functioned as a *de facto* moratorium on any development which requires sewerage.”

We substantially agree with the conclusions that Judge Buchsbaum reached from the summary-judgment record. In declining to recapture unused sewer capacity for plaintiff’s project, the Township in its resolution incorporated by reference, wholesale and uncritically, the arguments of the developer defendants. That approach suggests that the Township had effectively delegated its land-use authority to private entities. The resolution failed to analyze development by development why none of the unused capacity—after years of lying idle—could be recaptured.

The resolution also failed to analyze which developments, if any, fall under the dictates of the Permit Extension Act, *N.J.S.A.* 40:55D–136.1 to –136.6. The Permit Extension Act tolls the expiration date of certain land-use approvals for a period of time “due to the present unfavorable economic conditions.” *N.J.S.A.* 40:55D–136.2(m). The Act covers “an agreement” between a developer and municipality “for the use or reservation of sewerage capacity.” *N.J.S.A.* 40:55D–136.3. Admittedly, the Permit Extension Act would take precedence over an ordinance and therefore might limit the Township’s discretion.

Last, and most significantly, the resolution did not give a “reasoned explanation” for the Township’s failure to exercise \*347 discretion, as required by its own ordinance. The Township and defendant developers cannot contract away their obligation to comply with the law—whether it is *First Peoples*, the MLUL, or the Readington sewer ordinance. Private parties do not have a right to hoard unused sewer capacity indefinitely and therefore effectively impose a moratorium on development. As a best practice, we suggest that the Township maintain updated records of the unused capacity held by private parties so that it can exercise its discretion, when necessary, with current information. In addition, a property owner seeking capacity should have access to data that is necessary to making an informed decision whether to proceed with a development plan.

We adopt the thoughtful approach taken by Judge Buchsbaum. We order the Township Committee, within ninety days, to undertake a critical review of the unused capacity identified by plaintiff and to determine whether

any such capacity can be recaptured from defendants to satisfy plaintiff’s development needs. The Committee should consider the factors outlined earlier to guide the exercise of its discretion. We add that if a property owner, presently holding a substantial amount of unused capacity, has moved its business operations to another municipality and there is no realistic prospect that approvals previously acquired will result in a project coming to fruition, that factor must be given significant weight in deciding whether to recall capacity.

Last, we address when a party has a sufficient stake to purchase unused capacity. Needless to say, the Township should not recapture unused sewer capacity from one party and allow its sale to another party that is unlikely to put that capacity to use in the near future. A party that has received preliminary site plan approval obviously will have a stake in requesting capacity, but we are loath to impose that as the necessary test because of the significant costs involved in securing such an approval. Here, the Township offered plaintiff the opportunity to present a conceptnicceptityceptniccept \*\*764 \*348 plan to the appropriate board.<sup>6</sup> If such a plan is satisfactory, and assuming that sufficient unused capacity is available, then the Township could commence the process of recapturing capacity at plaintiff’s expense and hold that capacity in escrow, contingent on plaintiff securing all necessary approvals. If plaintiff does not secure the necessary approvals, then the Township can sell that capacity to another developer that needs it for an imminent project, or resell it to the original owner.

## VI.

For the reasons given, we affirm the Appellate Division’s judgment upholding the trial court’s dismissal of plaintiff’s facial challenge to the Readington Township sewer allocation ordinance. We reverse, however, the Appellate Division’s judgment rejecting the trial court’s determination that the ordinance, as applied, violates principles espoused in *First Peoples*. The Township Committee shall undertake a critical review of the unused capacity identified by plaintiff and determine within ninety days whether any capacity can be recaptured to satisfy plaintiff’s development needs. We remand to the trial court for proceedings consistent with this opinion.

Chief Justice RABNER and Justices PATTERSON, FERNANDEZ-VINA, and SOLOMON join in Justice ALBIN's opinion. Justice LaVECCHIA and Judge CUFF (temporarily assigned) did not participate.

ALBIN, PATTERSON, FERNANDEZ-VINA and SOLOMON—5.

*Not Participating*—Justices LaVECCHIA and Judge CUFF (temporarily assigned)—2.

\*349 *For affirmance in part/reversal in part/remandment*—Chief Justice RABNER and Justices

All Citations

221 N.J. 318, 113 A.3d 744

# Footnotes

- 1 *N.J.A.C. 7:9A-1.8* prohibits the use of a septic system to manage a wastewater capacity of over 2000 gpd without permission from the New Jersey Department of Environmental Protection.
- 2 In 1988, Merck obtained preliminary site plan approvals for projects to be constructed on its Readington property. The approvals were set to expire in twenty years. In 2008, Readington granted Merck a ten-year extension of its preliminary site plan approvals, and the Township agreed that it would not seek to recapture any unused sewer capacity until 2018.
- 3 In 1988, Bellemead was granted preliminary and final site plan approval for its "Halls Mills Farm" development project. The approval was set to expire in eight years. Bellemead was granted multiple extensions with the final extension set to expire in July 2010. As a result of the Authority's plant expansion, Bellemead was allocated 58,746 gpd of capacity, making its total capacity 110,746 gpd. Bellemead is using 44,686 of that gallonage, while 66,060 gpd—the amount required to operate its Halls Mills project—remains unused.
- 4 The court excepted from the order defendants Country Classics of Readington and Readington Commons because they evidently are using their capacity.
- 5 The plaintiff also unsuccessfully sought an order requiring Medford to expand the capacity of the sewage plant. *Id.* at 418, 423–24, 599 A.2d 1248.
- 6 The concept plan suggested by the Township resembles the informal review available under *N.J.S.A. 40:55D-10.1*. A planning board is permitted to conduct "an informal review of a concept plan for a development for which the developer intends to prepare and submit an application for development." *N.J.S.A. 40:55D-10.1*. An applicant can "benefit from the exchange of ideas and expression of the board's preferences" without having to "expend[ ] the significant amounts of money required in the preparation of development plans and applications." 36 *New Jersey Practice, Land Use Law* § 13.10 (David J. Frizell & Ronald D. Cucchiaro) (3d ed.2014). However, importantly, neither the board nor the applicant are bound by the discussions. *N.J.S.A. 40:55D-10.1*. An applicant must still proceed through the ordinary approval process.

