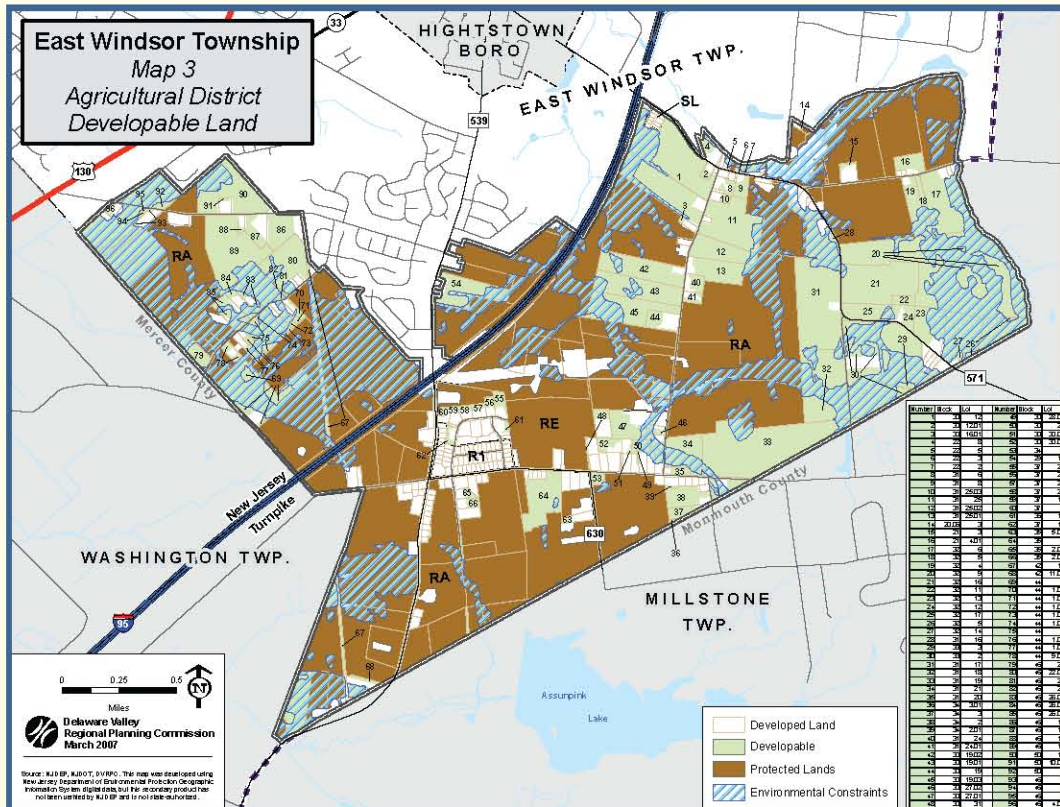


# AGRICULTURAL ZONING ANALYSIS

FOR  
*East Windsor Township,*  
**MERCER COUNTY, NJ**



March 2011

Prepared by:



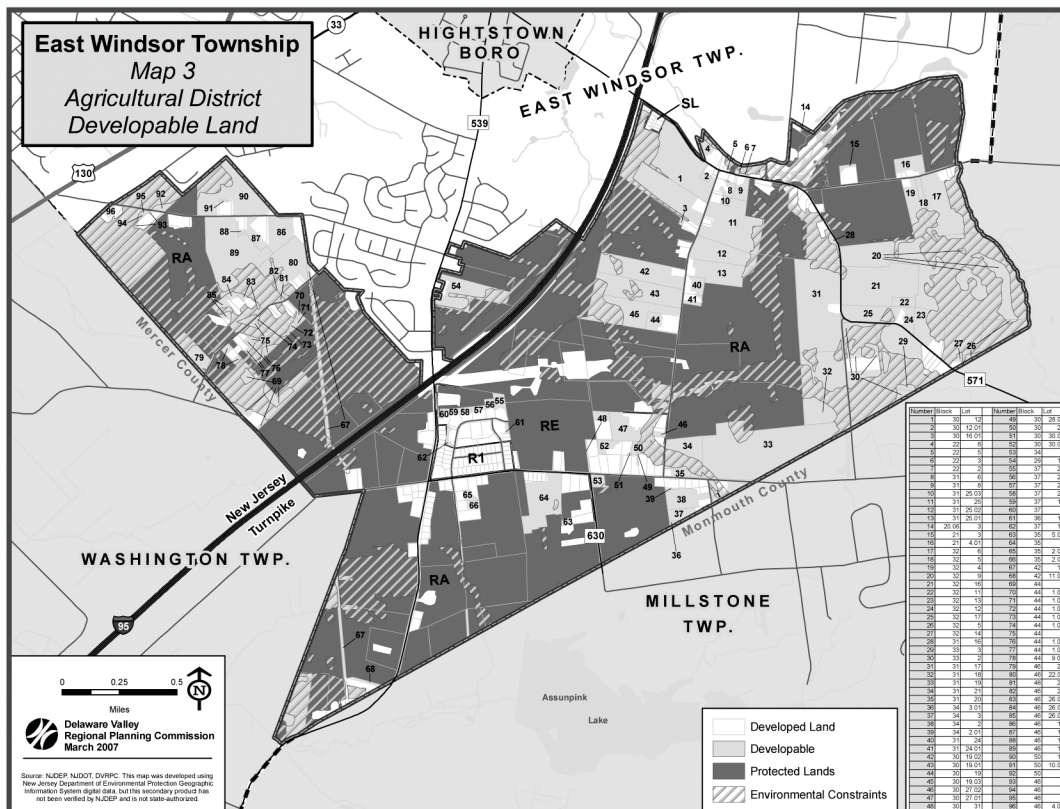


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## EXECUTIVE SUMMARY

East Windsor Township in Mercer County is a community of 15.6 square miles that has a well-defined and largely permanently preserved agricultural region in the southeastern and eastern parts of the municipality. The Township has aggressively sought to preserve farmland within this area, called the “Study Area” in this report. As of 2006, 931 farm-assessed acres on 15 farms were permanently deed-restricted, within the 1,160 acres of the Rural Agricultural (R-A) and Rural Estate (R-E) zoning districts. East Windsor’s efforts to protect the remaining lands in the Study Area have been largely unsuccessful, due to lack of landowner interest.

This analysis focuses on the question of whether East Windsor Township should adopt agricultural zoning within its agricultural zones, as a means of protecting the agricultural industry and the existing preserved farms of the Township. The main issues are whether the Township should downzone in these districts and what legal concerns might arise as a consequence of such a change.

Based on an extensive analysis of the literature on downsizing, it is clear that East Windsor Township has addressed key issues in its Master Plan, Open Space Plan, COAH plans, and consistency with the New Jersey Development and Redevelopment Plan. The Township has designated an agricultural region that does not have water or sewer infrastructure. Most importantly, East Windsor has made extensive efforts to encourage farmland preservation through Purchase of Development rights and some Fee Simple acquisitions of farmland, as well as through persistent efforts to contact landowners of unpreserved farmland. The Township also has a well-developed open space program that has preserved additional acreage in the Study Area. Over \$2 million in funding from state, county, and municipal sources has been utilized in these efforts.

This report analyzes New Jersey legal cases pertaining to downzoning for agricultural land protection, and summarizes at length two such cases that are most relevant to East Windsor Township: *New Jersey Farm Bureau v. Township of East Amwell* and *Bailes v. Township of East Brunswick*. Both cases eventually reached the New Jersey Superior Court on appeal, where the ordinance at issue in the East Amwell case was upheld and that in the East Brunswick case was struck down. The cases are instructive for East Windsor Township as it considers its own agricultural protections and possible zoning changes.

The difference in Superior Court decisions between the two New Jersey township cases hinged largely on the differing natures of the communities involved and especially on the districts at issue. East Amwell is primarily an agricultural township, while in East Brunswick the remaining agricultural lands constituted only 9 percent of the Township and were surrounded by development or had received development approvals. Other major factors in the decisions related to the amount of effort each township had made in the past toward protecting its agricultural industry before arriving at the rezoning. The Court also considered how many landowners were affected and how fair the impacts would be, and whether the downzoning would actually protect agriculture or was simply a mechanism to stem growth in the areas.

East Windsor Township is somewhere between the two municipalities in its characteristics. While it is a heavily developed community in its central and western areas, its agricultural district occupies about 32 percent of the Township, is compact and cohesive, and abuts agricultural areas in adjacent municipalities. The Township has also made every effort to preserve the agricultural viability of the district through acquisition of development rights at fair market value. Remaining landowners are generally non-farmers who rent out their land.

A comparison of the two legal cases suggests that East Windsor has fulfilled most of the recommendations for emulating the success of East Amwell Township in facing any legal challenge that might arise. The specific recommendation for amending East Windsor's zoning ordinances is to consider downzoning to at least 10 acres per development unit. While the question of whether there is adequate funding to defend a possible legal challenge must be answered, the Township's previous steps may reduce the threat of a legal challenge or may reduce the costs of defending it. Given the investment in preserving farmland and agriculture that East Windsor has already made, further steps to assure its continuing viability may be worth the risks of potential legal costs.

Some additional recommendations to strengthen East Windsor's position include compiling data on agricultural viability and promoting the future of agriculture within the township by developing an agricultural economic plan and, possibly, a farmland preservation plan. Other actions include working with local farmers to guide data gathering and planning; and seeking collaboration with adjacent municipalities on farmland protection and agricultural economic measures.



## AGRICULTURAL ZONING ANALYSIS

### I) OVERVIEW OF EAST WINDSOR TOWNSHIP, NEW JERSEY

East Windsor Township is located in central New Jersey and is bisected by the New Jersey Turnpike, Route 33, and Route 130. The municipality spans 10,032 acres, forming a ring around the municipality of Hightstown Borough.<sup>1</sup> According to 2000 U.S. Census data, East Windsor's 24,919 residents occupy 15.6 square miles at a density of 1,597 individuals per square mile.<sup>2</sup> The area to the west of the New Jersey Turnpike has undergone significant development, but East Windsor has taken aggressive steps to preserve farmland located in the southeast and eastern portions of the township. Currently, about 20 percent of the township is under farmland assessment and over 23 percent of the township is preserved open space.<sup>3</sup> Farming operations are protected from nuisance claims by encroaching development by a municipal right to farm ordinance.<sup>4</sup> See **Map 1: East Windsor Township 2005 Aerial Imagery**, **Map 2A: East Windsor Township Agricultural District**, and **Map 4: East Windsor Township Agricultural District Open Space [and Preserved Farmland]** for additional information.

### II) CURRENT ZONING REGULATIONS IN EAST WINDSOR

Consistent with the goals of the Municipal Land Use Law (MLUL), New Jersey's zoning enabling act, the stated goals of the Township of East Windsor zoning regulations include conservation of open space and farmland preservation.<sup>5</sup> Specifically, one of the stated purposes of East Windsor's zoning scheme is:

To recognize the land as a prime community resource that is both finite and irreplaceable, and to take steps to protect the land from poor development practices and to conserve appropriate lands for permanent open space and actively seek practical methods for preserving farm lands.<sup>6</sup>

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<sup>1</sup> East Windsor Township Open Space and Recreation Plan, p. 5. Amended Sept. 2004.

<sup>2</sup> East Windsor Township At A Glance, available at <http://www.mercercounty.org/planning/aag/ew.pdf>.

<sup>3</sup> East Windsor Township Open Space and Recreation Plan, p. 5. Amended Sept. 2004.

<sup>4</sup> Right to Farm ordinance, available at <http://www.state.nj.us/agriculture/sadc/rtflocalordinances.htm#merc>.

<sup>5</sup> Township of East Windsor Planning Board, Master Plan. Adopted October 4, 1993.

<sup>6</sup> Township of East Windsor Ordinances, 20-1.0006.a (2004) Rev.Ord.Supp. 10/81.

Additionally, East Windsor’s zoning seeks “[t]o preserve agricultural activities as part of the economic base of the township.”<sup>7</sup> In furtherance of these goals, a series of zoning districts have been established which include a “Rural Agricultural” (R-A) district and a “Rural Estate” (R-E) district, located in the southeastern portion of the township.<sup>8</sup> The R-A and R-E districts, combined, account for about 32 percent of the township’s total land area and remain largely undeveloped.<sup>9</sup> East Windsor’s “Master Plan” is consistent with the districts and reflects these designations accordingly. Both R-A and R-E districts permit farms, greenhouses, golf courses, and single unit residences.<sup>10</sup>

The minimum permissible lot size for residential development in the R-A district is four acres per unit, and three acres per unit in the R-E district.<sup>11</sup> A residential cluster provision permits clustering in both districts and provides a bonus density option of one unit per 1.5 acres.<sup>12</sup> The provision requires a minimum tract size of 10 acres. At least 20 percent of a tract, not less than two acres, must be deed-restricted for agriculture, open space, common property, conservation, schools, recreation, parks, or a combination thereof.<sup>13</sup> Furthermore, at least half of the land to be set aside, or 10 percent of the total tract size, must lie outside wetlands, wetlands transition areas, and 100-year floodplains.<sup>14</sup> See **Map 2B: Agricultural District Zoning**, **Map 3: Agricultural District Developable Land**, **Map 5: Agricultural District Soils**, and **Map 6: Agricultural District Soil Quality** for additional information.

### III) KEY QUESTIONS FOR EAST WINDSOR

The following questions provide a basis for East Windsor Township to determine the potential viability and effectiveness of a downzoning ordinance for agricultural protection.

#### A) Does a viable agricultural industry exist within East Windsor Township?

Currently, East Windsor has a total of 1,830 acres under farmland assessment.<sup>15</sup> Of that, over 1,160 acres of farmland-assessed property is within the R-A and R-E districts. Although East Windsor

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<sup>7</sup> Township of East Windsor Ordinances, 20-1.0007.f.

<sup>8</sup> Township of East Windsor Ordinances, 20-4.0100.

<sup>9</sup> DVRPC GIS Mapping, Dec 2006.

<sup>10</sup> Township of East Windsor Ordinances, 20-6; 20.7, et al.

<sup>11</sup> Township of East Windsor Ordinances, 2061/2062. Schedule of District Regulations, Rev. Ord. Supp. 3/04.

<sup>12</sup> Township of East Windsor Ordinances, 20-4.1500.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> DVRPC, GIS mapping, Dec. 2006.

Township can no longer be considered a predominantly rural community, its agricultural district is sizeable, well-defined, and largely permanently preserved. In addition, the district abuts farming areas and protected lands in the adjoining municipalities of Millstone (Monmouth County) and Washington (now Robbinsville, Mercer County). Millstone Township, which has 4.7 miles of contiguous border with East Windsor on the southeast side of the East Windsor farming district, is dominated by agriculture in this part of the township although, unfortunately, there are few preserved farms. However, 1.3 miles of the border between the two townships is occupied by the Assunpink Wildlife Management Area. The section of Robbinsville Township that borders East Windsor's agricultural district border on the southwest (3.0 miles) has almost exclusively agricultural land use, with numerous preserved farms. The characteristics of land use in the adjoining regions of these two municipalities thus enlarge the coherence of the farming district in East Windsor and provide it with additional measures of protection and viability.

East Windsor's agricultural industry generates substantial revenue per year and contributes to the local economy through tax revenues, employment, and other secondary impacts. East Windsor farms contribute more dollars in local taxes than the municipality expends on these properties in services and infrastructure costs. Unlike residential development, East Windsor farms represent a net gain to the municipality. Additional information to compile includes:

- Total income from farming within the township
- Size of industry in comparison to other industries in the township
- Tax revenues per year from agricultural lands
- Ratio of tax revenue to cost of township services per acre of farmland
- Number of persons employed by agriculture within township
- Economic benefits of local farmers markets and roadside stands
- Profitability of farm operations
- Crop productivity
- Agri-tourism (Lee Turkey Farm)

**B) What attributes define the character and quality of the community?**

East Windsor should consider the community's strong agricultural history, the growth of the township from predominantly rural lands to suburbs, the speed and locations at which development has occurred, the quality and character of the existing agricultural community, and to what degree

remaining farms are threatened due to rapid conversion. Specifically, the township should consider:

- History of farming in the community (including how many generations have farmed some East Windsor properties). For example, during the generation prior to the American Revolution, 40 to 70 farms were settled within the current boundaries of the township.<sup>16</sup> By the time of the Civil War, the number of farms was likely double that amount.<sup>17</sup>
- Farms with Revolutionary War significance
- Farmers markets and the benefit of fresh farm products to the community
- Agri-tourism and the value to the community to be able to buy from and visit local family farms.

**C) What studies, reports, and organizations have been created in support of local farming and farmland protection?**

Comprehensive studies that demonstrate a well-conceived, long-range strategy for preserving viable agricultural lands are important because this information will serve as the underlying data to justify a downzoning ordinance. East Windsor Township has created several organizations, and compiled a number of relevant reports and studies, including:

- 2003 East Windsor Environmental Resource Inventory
- 2001 East Windsor Township Open Space and Recreation Plan Element (amended 9/2004) which calls for preservation of all unpreserved farmland in the township's southeastern sector (R-A and R-E Zones)
- Environmental Commission
- Economic Development Committee
- East Windsor Greenspace, Inc. (Non-profit organization created to leverage additional preservation funding from the state.)

**D) What steps has the municipality already taken to preserve and retain farmland?**

Since 1994, over 960 acres of farmland have been preserved within the municipality, primarily within the R-A district.<sup>18</sup> East Windsor Township has leveraged more than \$6.8 million in state,

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<sup>16</sup> Township of East Windsor Planning Board, Master Plan, p 47. Adopted October 4, 1993.

<sup>17</sup> Ibid.

<sup>18</sup> New Jersey State Agricultural Development Committee, Summary of State, County and Municipally Preserved Farmland, available at <http://www.mercercounty.org/planning/planning%20farmland%20list.htm>, August 2006.

county, and local funding to preserve farmland. To date, 15 farms have been preserved.<sup>1</sup>

East Windsor Township has created an Open Space and Recreation Plan which targets specific farms that the township is actively attempting to preserve. For several years, East Windsor's Mayor has mailed a letter annually to each owner of every unpreserved farm, inviting discussion of preservation options. Regretfully, there has been no response to these overtures or to any other efforts to contact owners, most of whom are not active farmers.

A comparison of **Map 11: Open Space and Recreation Plan Map (February 2000)** to **Map 4: Agricultural District Open Space [and Preserved Farmland]** illustrates both the planning for farmland preservation and the success of the planning that was done in East Windsor Township over the past decade.

**E) Will increasing minimum lot size promote agriculture within the municipality?**

Some additional analysis may be needed to determine the minimum lot size that will best protect the type of agricultural production specific to East Windsor Township. The current minimum lot size of four acres per unit in the R-A district and three acres per unit in the R-E district, both with bonus density clustering options, would tend to encourage development, rather than protecting agriculture. Ideally, a zoning change in the R-A zone could reduce densities to 20-25 acres per lot or greater.<sup>2</sup> In New Jersey, where the average size farm is only about 80 acres, such densities are considered extreme. They are also impractical, especially in East Windsor Township, where the average size of unpreserved farms is 39 acres.

Minimum lot sizes of 10 acres are viewed as a compromise between retaining farmland and preserving some amount of farmer's land equity, although some argue that densities below 20 acres per unit will do little to achieve the goals of preservation and smart growth in a community. It is fairly clear that densities under 10 acres per unit are ineffective at retaining agriculture, however.<sup>3</sup>

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<sup>1</sup> Ibid.

<sup>2</sup> Evans, Tim, "Race to the middle: The Homogenization of Population Density and What It's Costing New Jersey," in NJ Future [Newsletter], 2004.

<sup>3</sup> Ibid.

densities respect the carrying capacity of the land and ensure that residential development will not compete with farms for potable water supplies. Additionally, zoning ordinances should be reviewed to determine whether they support agricultural operations and promote the kind of development that does not impede or compete with farming operations.

**F) Who is most likely to be affected by downzoning?**

If the pool of potentially affected landowners is very small and a change in the zoning ordinance will result in substantial equity losses, overcoming a legal challenge may be more difficult. The key is to ensure that any resulting effects will be distributed over a sufficient group of property owners. Courts will evaluate whether the group of affected landowners is sufficient in light of the specific facts of a case. Furthermore, it is important to establish that other, perhaps less inequitable, means of farmland retention have been utilized or at the very least have been investigated. For example, creating a municipal Transfer of Development Rights (TDR) program, if feasible, would be a more effective and more equitable method of retaining farmland.

The pool of affected landowners in the agricultural district of East Windsor is fairly small. There are only fifteen landowners of the 33 unreserved parcels. However, the township has a proven record of utilizing Purchase of Development Rights, via County and State programs, as its principal means of farmland retention, which maintains owner equity through the independent appraisal process. Township efforts to discuss preservation options with the largely absentee owners of these unreserved parcels have not been successful. The affected properties would continue to be of primary interest to the township for preservation, through the County and State, at current or future zoning densities. They are all quite likely to be approved for preservation under County and State Agriculture Development Committee (SADC) rules because of their proximity to already-preserved farmland and their high agricultural/soil value.

Additionally, a municipal TDR program was investigated by East Windsor Township and is not a feasible option, due to insufficient acreage in which to establish a receiving area.

**G) What is the political climate of the community?**

East Windsor residents have been highly receptive to preservation efforts and it has the highest priority under current leadership. Every biannual township newsletter discusses open space acquisition at length, and the township has formed a non-profit organization, East Windsor

Greenspace, Inc., to assist in preservation. As of January 2010, East Windsor Green Space, Inc. had received funding totaling \$2,150,000 to use in efforts to preserve open space and farmland.

Proposed downzoning is likely to be met with strong resistance by affected landowners whose property has not been preserved, but may be welcomed by nearby farm owners whose farms are deed-restricted, because limiting neighboring development will likely protect the viability of farming operations. The owners of the remaining farms that East Windsor wishes to preserve, who have been unresponsive to East Windsor's inquiries regarding preservation, are primarily property owners who lease their properties to other farmers and no longer farm the properties themselves.

**H) Does the proposed downzoning contain the elements necessary to overcome legal challenges?**

Recommendations from Howard Cohen, the attorney who successfully represented East Amwell Township against challenges to an agricultural downzoning ordinance, are applied to the specific circumstances found in East Windsor Township, in the following discussion.

**1) Preparation of an Adequate Record**

East Amwell Township had a well-documented planning rationale in their master plan that was supported by underlying studies and analyses and competent expert opinion. The town had already articulated public policy objectives to conserve countryside, rural character, natural resources, scenic resources, agriculture, and open space. East Windsor should compile a thorough summary report detailing all its efforts towards farmland preservation and support of local farming operations.

**2) Compliance with Riggs v. Long Beach Township**

East Amwell's zoning ordinance advanced one of the zoning purposes in the MLUL, and was consistent with the Land Use and Housing Plan elements in the master plan. The town was in accordance with constitutional constraints on the zoning power, which state that as long as the zoning ordinance advances a legitimate state interest based on sound planning and does not deny the property owner of all economically beneficial use of the land, a regulatory taking does not occur. The property owner is not necessarily entitled to the most profitable use of the land. Any zoning changes in East Windsor Township should clearly state a similar rationale. Are there any changes needed to Master Plan language, to the same end?

### 3) Advancement of One of the Purposes of the MLUL<sup>22</sup>

- Guiding appropriate land use to promote public health and welfare
- Providing open space
- Ensuring that development does not conflict with neighboring towns, county, or State
- Establishing appropriate population densities
- Providing sufficient space for agricultural, residential, and open space uses
- Promoting a desirable visual environment
- Promoting conservation of open space and valuable natural resources and preventing sprawl and environmental degradation

Any zoning changes in East Windsor Township should clearly state goals in terms of furthering the purposes of the MLUL. Again, there may be a need to revise some Master Plan language.

### 4) Defined Growth Areas

Defined growth areas should demonstrate balanced zoning with both development and preservation opportunities. East Windsor should compile a record to demonstrate careful and deliberate efforts to retain farmland both through Purchase of Development Rights (PDR) and past zoning.

### 5) Compliance with New Jersey Affordable Housing Requirements

Once a municipality has satisfied its affordable housing obligation, it may engage in measures such as “large lot zoning” to “maintain its beauty and communal character.” Mt. Laurel “is not designed to sweep away all land use restrictions or leave our open spaces and natural resources prey to speculators . . . municipalities consisting largely of conservation, agricultural, or environmentally sensitive land will not be required to grow because of Mt. Laurel.”<sup>23</sup>

Currently, East Windsor Township has fulfilled all of its Council on Affordable Housing (COAH) requirements. The Township received Second Round certification of its Housing Element and Fair Share Plan on September 6, 2000. Its Third Round petition was submitted December 30, 2008 and deemed complete on March 18, 2009.

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<sup>22</sup> As set forth in N.J.S.A. 40:55D-2.

<sup>23</sup> Mt. Laurel II 92 N.J. 158 (1983) 28.



## 6) Consistency with the State Plan

The New Jersey State Development and Redevelopment Plan (State Plan) is not a regulatory instrument, but consistency with State Plan goals and objectives can be used to support the reasonableness of zoning ordinances. East Windsor’s R-A and R-E zones are consistent with the State Plan. The R-A and R-E zones in the southeastern part of the municipality fall generally within the State Plan’s Rural Planning Area (PA4) designation, which, according to the State Plan, is “. . . supportive of agriculture and other related economic development efforts that ensure a diversity within New Jersey.”<sup>24</sup> Although the East Amwell and East Brunswick decisions emphasize that compliance with State Plan planning areas alone is not adequate justification for agricultural downzoning, this can be a factor in support of a downzoning ordinance.

## 7) Relationship between Zoning and Sewers

Sewer service should follow planning and zoning —not vice versa.<sup>25</sup> There is no sewer service to the East Windsor agricultural district currently. Both the R-A and R-E districts lay outside the approved Sewer Service Area, per Section 208 of the Mercer County Water Quality Management Plan and, therefore, sewer service can not be extended to these districts without amendment of the Plan. See **Map 10: Sewer Service Areas** for a depiction of the sewer service area in East Windsor Township.

## 8) Integration of the Public and Stakeholders into the Planning Process

The process of zoning should address and accommodate the concerns of the public and stakeholders, when possible, without sacrificing significant resource management goals and objectives.

An Agricultural Advisory Committee, made up of operating farm owners who have preserved their own land, should be established. Plans to involve this group in downzoning changes should be laid out and followed. Presumably, owners of preserved farms would be strong advocates for such a change, barring any questions of impacts on their operations such as loan financing due to changes in equity.

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<sup>24</sup> New Jersey State Planning Commission. *New Jersey State Development and Redevelopment Plan*, pp. 182, 205. Adopted March 1, 2001.

<sup>25</sup> N.J.S.A. 7:15-15:18.

## 9) Putting it All Together

Four additional steps can make an enormous difference to successful zoning changes, especially if a legal challenge occurs. They are:

- Engage appropriate consultants and experts to fortify records (planners, engineers, appraisers, economists, wastewater management planning experts, traffic engineers, ecologists, hydrologists, and soil scientists, for example).
- Use demonstrative exhibits to tell the story, such as photographs, maps, etc., when presenting to the public.
- Hire competent counsel to guide the downzoning process and defend it, if sued.
- Ask for a judicial tour to help understand the evidence if a suit is initiated.

## IV) LEGAL ANALYSIS

### A) Relevant Law

#### 1) Ground Rules – Riggs v. Long Beach Township

The analysis developed by the New Jersey Supreme Court in Riggs v. Long Beach Township provides a framework that enumerates many of the factors by which an agricultural downzoning ordinance will likely be judged by New Jersey courts.<sup>26</sup> Municipalities possess the power to zone, insofar as that power is delegated to the municipalities by the Legislature.<sup>27</sup> A zoning ordinance is entitled to a “strong presumption of validity.”<sup>28</sup> Generally, a zoning ordinance must: 1) advance one of the purposes of the MLUL (Refer to Appendix B), 2) be “substantially consistent with the master plan,” 3) comport with the legal requirements of due process, equal protection, and the prohibition on uncompensated takings, and 4) adhere to municipal and judicial procedural requirements.<sup>29</sup>

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<sup>26</sup> Riggs v. Long Beach, 109 N.J. 601, (1988). Appellant owners challenged a zoning ordinance, enacted shortly after negotiations with appellee township failed over the purchase of appellants' property. The court held the ordinances were invalid, were not rationally related to a valid zoning purpose, and were unreasonable and arbitrary.

<sup>27</sup> Riggs v. Long Beach, 109 N.J. 601, 610-612 (N.J. 1988) (citing Taxpayer Ass'n of Weymouth Township v. Weymouth Township, 80 N.J. 6, 20 (1976). Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335, 343 (1973); accord Zilinsky v. Zoning Bd. of Adjustment of Verona, 105 N.J. 363, 368 (1987); Weymouth Township, supra, 80 N.J. at 20.

<sup>28</sup> Bailes v. Twp. of E. Brunswick, 380 N.J. Super. 336, 348-349 (App. Div. 2005). (quoting Pheasant Bridge Corp. v. Twp. of Warren, 169 N.J. 282, 289, 777 A.2d 334 (2001), cert. denied, 535 U.S. 1077, 122 S. Ct. 1959, 152 L. Ed. 2d 1020 (2002)).

<sup>29</sup> Riggs v. Long Beach, 109 N.J. 601, 610-612 (N.J. 1988); as set forth in N.J.S.A. 40:55D-2; N.J.S.A. 40:55D-62, unless the requirements of that statute are otherwise satisfied; (citing Home Builders League of S. Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 137 (1979); Southern Burlington County N.A.A.C.P. v. Mount Laurel Township, 92 N.J. 158, 208-09 (1983); AMG Assocs. v. Township of Springfield, 65 N.J. 101, 111-12 (1974); (citing P. Rohan, Zoning & Land Use Controls § 36.02[1] at 36-15 (1986)).

The presumption of validity may be overcome by showing that the ordinance is “clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the [zoning] statute.”<sup>30</sup> The party challenging the ordinance has the burden of overcoming this presumption by showing that the zoning ordinance is invalid on its face, or in its application to particular properties.<sup>31</sup> In determining the zoning ordinance’s reasonableness, a court must consider “the relationship between the means and ends of the ordinance.”<sup>32</sup> To make this determination, a court should consider the history of zoning in the district and existing patterns of development.<sup>33</sup> To determine if an ordinance is valid as applied to particular properties, a court must consider whether the stated purposes of the ordinance justify the restrictions placed on the use of that property.<sup>34</sup> The question in any challenge to the validity of a zoning ordinance “is whether the requirements of the ordinance are reasonable under the circumstances.”<sup>35</sup> If the ordinance is debatable, it should be upheld.<sup>36</sup>

## 2) Conflicting Appellate Decisions: The Tale of Two Opinions

On September 22, 2005 a New Jersey Appellate Court issued two opinions determining the legality of the agricultural downzoning ordinances of two separate municipalities. The ordinances appeared relatively similar, yet one ordinance was upheld and the other was struck down. Although these opposing decisions immediately created much confusion, the New Jersey Supreme Court declined to hear either case on appeal.

<sup>30</sup> Bailes v. Twp. of E. Brunswick, 380 N.J. Super. 336, 348-349 (App. Div. 2005). Id. at 290, 777 A.2d 334 (quoting Bow & Arrow Manor, Inc. v. Town of West Orange, 63 N.J. 335, 343, 307 A.2d 563 (1973)).

<sup>31</sup> 380 N.J. Super. 336, 348-349 (App. Div. 2005). see Home Builders League of S. Jersey, Inc. v. Twp. of Berlin, 81 N.J. 127, 405 A.2d 381 (1979) see Pheasant Bridge, supra, 169 N.J. at 289-90, 777 A.2d 334; Odabash, supra, 65 N.J. at 125, 319 A.2d 712.; Riggs v. Long Beach, 109 N.J. 601, 610-612 (N.J. 1988) (citing Ward v. Montgomery Township, 28 N.J. 529, 539 (1959); LaRue v. East Brunswick, 68 N.J. Super. 435, 454 (App.Div.1961).

<sup>32</sup> 380 N.J. Super. 336, 348-349 (App. Div. 2005). (quoting Pheasant Bridge, supra, 169 N.J. at 290, 777 A.2d 334. [T]he means selected must have real and substantial relation to the object sought to be attained, and the regulation . . . must be reasonably calculated to meet the evil and not exceed the public need or substantially affect uses which do not partake of the offensive character of those which cause the problem sought to be ameliorated [Ibid. (quoting Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251, 281 A.2d 513 (1971)).] See also Home Builders League of S. Jersey, supra, 81 N.J. at 138, 405 A.2d 381.

<sup>33</sup> 380 N.J. Super. 336, 348-349 (App. Div. 2005). See Pheasant Bridge, supra, 169 N.J. at 293-95, 777 A.2d 334; Odabash, supra, 65 N.J. at 123-25, 319 A.2d 712. Such a determination “depend[s] upon the peculiar facts in each case.” Bailes v. Twp. of E. Brunswick, 380 N.J. Super. 336, 348-349 (App. Div. 2005). Id. at 123-25, 319 A.2d 712.

<sup>34</sup> 380 N.J. Super. 336, 348-349 (App. Div. 2005). Pheasant Bridge, supra, 169 N.J. at 293, 777 A.2d 334.

<sup>35</sup> 380 N.J. Super. 336, 348-349 (App. Div. 2005). (quoting Pheasant Bridge, supra, 169 N.J. at 290, 777 A.2d 334 (quoting Vickers v. Twp. Committee of Gloucester Twp., 37 N.J. 232, 245, 181 A.2d 129 (1962), appeal dism. and cert. denied, 371 U.S. 233, 83 S. Ct. 326, 9 L. Ed.2d 495 (1963)); see also Rumson Estates, Inc. v. Mayor of Borough of Fair Haven, 177 N.J. 338, 358-59, 828 A.2d 317 (2003).

<sup>36</sup> Riggs v. Long Beach, 109 N.J. 601, 610-612 (N.J. 1988) (citing Bow & Arrow Manor, supra, 63 N.J. at 343; see also Zilinsky, supra, 105 N.J. at 368-69 (“[a] mere difference of opinion as to how an ordinance will work will not lead to a conclusion of invalidity; ‘no discernible reason’ is the requisite standard”).

**a) New Jersey Farm Bureau v. Township of East Amwell**

The Township of East Amwell is located in southeastern Hunterdon County and spans 18,000 acres. With a population of 4,332, this predominantly rural, agricultural community has one small village and several small crossroads communities.<sup>37</sup> A significant portion of the farmland located within East Amwell’s designated agricultural zone is classified by the United States Department of Agriculture (USDA) as prime farmland. At the time of trial, 70 percent of all land in East Amwell, totaling 12,500 acres, was assessed as farmland.

Beginning in 1999, East Amwell adopted zoning laws designed to preserve the viability of its local farms and the town’s rural character.<sup>38</sup> Ordinance 99-06 rezoned agricultural land from one unit per three acres to one unit per ten acres and included density cluster options.<sup>39</sup> The ordinance affected 11,000 acres, or two-thirds of the entire township.<sup>40</sup> Several local landowners, including farmers, a real estate developer, and the New Jersey Farm Bureau challenged the ordinance, contending that it unfairly decreased the value of the affected properties.<sup>41</sup>

In September 2002, a New Jersey Superior Court upheld East Amwell’s right to reduce the development densities on those 11,000 acres.<sup>42</sup> The judge in East Amwell concluded

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<sup>37</sup> N.J. Farm Bureau, Inc. v. Twp. of E. Amwell, 380 N.J. Super. 325, 328-330 (App. Div. 2005).

<sup>38</sup> N.J. Farm Bureau, Inc. v. Twp. of E. Amwell, 380 N.J. Super. 325, 328-330 (App. Div. 2005). In August 1998, the East Amwell Planning Board issued a land use plan amendment for the Amwell Valley Agricultural (AVA) district and a reexamination report. The overriding goal stated in the land use plan amendment was to preserve farmland. The Planning Board concluded that the three-acre zoning in effect at that time would not meet East Amwell’s goal of preserving large tracts of farmland. Citing the 1995 Master Plan Consistency Review prepared by the Office of State Planning, the Planning Board concluded that “the 3 acre zoning currently provided in the Amwell Valley District is a prescription for suburban residential sprawl and over time will signal the end of agricultural land uses in East Amwell.” The Board noted that “[r]esidential densities should be low enough to be compatible with farming, and to discourage land speculators, but not so low as to substantially affect land equity.” The Board also stated even mandatory clustering would not “preserve large blocks of contiguous acreage for long term agricultural production.” The Board stated that “professional literature indicates that a minimum lot size of 20 to 25 acres is appropriate agricultural zoning in a moderate strength farming area.” The proposal to rezone the AVA district to one unit per twenty-five acres met strong opposition from farmers, so the Board ultimately decided that the area should be zoned for one unit per ten acres. The reexamination report reaffirmed East Amwell’s commitment to the State Plan’s recommendations to preserve farmland and discourage development in Planning Areas 4 and 4B, except in centers. The report urged adoption of the zoning changes recommended in the land use plan, adding that recent subdivisions were “destructive” of the municipality’s rural character and that three-acre zoning would not effectively preserve valuable farmland. Accordingly, the report recommended ten-acre zoning with lot-size averaging density clustering options.

<sup>39</sup> N.J. Farm Bureau, Inc. v. Twp. of E. Amwell, 380 N.J. Super. 325, 328-330 (App. Div. 2005). The ordinance permitted two cluster development options: (1) lot size averaging, which allows homes on one-and-one-half acres provided that the overall density remains 0.1 unit per acre; or (2) “open lands ratio zoning,” which permits a 50% density bonus (0.15 units per acre) provided 75% of the tract is deed restricted for agricultural use and at least 65% of the designated open lands have prime soils or soils of state-wide importance.

<sup>40</sup> Hopf, “Municipal Ordinance Review Project Lower Delaware River Corridor: Natural Resource Protection—The Case for Local Responsibility,” p. 26, 2006 (taken from Howard Cohen and Barbara Wolf at New Jersey Future’s Dec. 2, 2002 Members and Friends event at Rutgers University’s Eagleton Institute of Politics).

<sup>41</sup> Hopf, p. 26, 2006.

<sup>42</sup> Hopf, p. 26, 2006.

that the zoning changes were consistent with the New Jersey State Plan and local and county planning goals.<sup>43</sup> The appellate court affirmed the lower court's decision upholding the validity of East Amwell Ordinance 99-06.<sup>44</sup>

**b) Bailes v. Township of East Brunswick<sup>45</sup>**

The Township of East Brunswick spans approximately 14,300 acres across central Middlesex County with more than two-thirds of the township developed at full capacity. At the time, East Brunswick's population was 45,000 with an approximate density distribution of 2,129 persons per square mile.<sup>46</sup> The more sparsely populated southern portion of the township, the location of the remaining undeveloped area, consisted of two zones intersected by the New Jersey Turnpike. The area east of the Turnpike encompassed 1,639 acres comprising 1,110 acres of publicly-owned property, 140 acres with residential, commercial, or industrial development, and 360 acres—properties owned by plaintiffs—of undeveloped property under farmland assessment. This area was dominated by Jamesburg Park, which covered more than 1,050 acres. The land outside Jamesburg Park was relatively level and had few environmental constraints. The land west of the Turnpike consisted of 2,680 acres. Farrington Lake, a source of potable water for surrounding communities, formed the western border of this section and several stream corridors formed its other edges. The western portion comprised 800 acres of public land; 600 acres of farmland; 790 of developed property with most residences on lots less than one acre; and 600 acres of undeveloped property.

From 1999 to 2001, East Brunswick adopted ordinances that merged the two zones into a single rural preservation (RP) district and rezoned the RP district from previous densities of one residential unit per one or two acres to one unit per six acres with cluster options. Several actions, filed by affected landowners, challenged the ordinances; the trial court granted a preliminary injunction barring enforcement of the ordinances.<sup>47</sup> At trial, the court ruled that the ordinances were valid and dismissed the

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<sup>43</sup> Hopf, "p. 26, 2006.

<sup>44</sup> 380 N.J.Super. 325 (App. Div. 2005); McCloskey, 2006, Down-zoning Paradox in New Jersey, *New Jersey Lawyer*, available at <http://www.foxrothschild.com/articles/artDetail.asp?id=689>.

<sup>45</sup> Bailes v. Township of East Brunswick, 380 N.J.Super 336 (App. Div. 2005).

<sup>46</sup> 2000 Census Report.

<sup>47</sup> Mazier, E.E., "Ordinances Void as Applied; Downzoning Is Unnecessary," *New Jersey Lawyer*, Vol. 14, No. 40, p. 17, (2005); Bailes v. East Brunswick.

complaints. Although the trial court did not make express credibility findings regarding the planning experts or factual findings on the issues addressed by the experts, it determined that there was “...clearly a difference of opinion among the experts” as to whether the affected area was rural or suburban.<sup>48</sup> The trial court resolved that difference in favor of East Brunswick, finding that the town was trying “to control sprawl” while also trying “to maintain a rural character to the area, thereby preserving farmland and open space.”<sup>49</sup> On plaintiffs’ appeal, the Appellate Division reversed, holding that the ordinances were invalid because they were arbitrary and unreasonable and could not be justified by environmental considerations.<sup>50</sup>

### 3) Legal Analysis of East Amwell and East Brunswick

#### a) East Amwell

Upholding the validity of the East Amwell ordinance, the appellate court cited the comprehensive opinion of the trial court judge. First, the trial court dismissed Plaintiffs’ takings claims as well as other federal statutory claims.<sup>51</sup> Next, the trial court concluded that the rezoning was reasonably related, facially and as applied, to the objectives of encouraging agricultural uses and preserving farmland and furthered the goals of the MLUL.<sup>52</sup> Plaintiffs, farmers and farmers’ lobby, claimed that the zoning scheme created by Ordinance 99-06 would not achieve the stated purposes encouraging agriculture or preserving farmland, and therefore was arbitrary, capricious and unreasonable. The appellate court, agreeing with the trial court, disagreed with plaintiffs, reasoning that the three-part approach of the ordinance embodied the goals of preserving farming and promoting “. . . active agriculture in new and creative ways.”<sup>53</sup>

The Court stated:

The heart of that analysis is the focus on 10[-]acre zoning as of right. While [East Amwell’s planning consultants] originally hoped to create 25 acre zoning of right based upon a theory that 25 acres is the minimum size needed for a working farm for traditional farming pursuits[.] [T]hat

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<sup>48</sup> Mazier, E.E., “Ordinances Void as Applied; Downzoning Is Unnecessary,” *New Jersey Lawyer* Vol. 14, No. 40, p. 17, (2005).

<sup>49</sup> *Ibid.*

<sup>50</sup> *Ibid.*

<sup>51</sup> *N.J. Farm Bureau, Inc. v. Twp. of E. Amwell*, 380 N.J. Super. 325, 330-332 (App. Div. 2005).

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

approach was abandoned in 1998 . . . in reaction to the vigorous objection by the Farm Bureau and the United Farmers group. At the time the approach then changed to 10[-]acre zoning of right, but the selection of 10 acres as a minimum lot size for subdivision of a larger parcel was not arbitrary.

... The hope of the Planners in creating the 10[-]acre zoning aspect of Ordinance 99-06 was to create parcels of a size that the majority of prospective purchasers would intentionally utilize in a fashion consistent with the tax savings to be achieved through participating in the farmland assessment program and that the end result would be a series of parcels devoted to a variety of agricultural pursuits. . . . The suggestion of the Planners, therefore, was that activities including specialty vegetable farms or horse farms or even what might otherwise be described as exotic animal farming would, while not necessarily identical to traditional farming pursuits, nonetheless constitute the kind of agricultural activity that today represents a vision for a future for East Amwell.<sup>54</sup>

The Planners also hoped that the inclusion of a density cluster bonus option would encourage pockets of development and at the same time create large contiguous parcels permanently deed restricted for agricultural use. The town compromised on the density in order to ensure significantly sized, permanently preserved tracts on prime agricultural soils bordered by small developments.<sup>55</sup>

... The contention that the 10[-]acre minimum will permit the great majority of parcels . . . for farmland assessment and thus . . . required to engage in some [form] of farming is [a] rational and a reasonable means of achieving the goal of preserving agriculture. [T]he open lands ratio [provision] that the good agricultural soils be retained for agriculture with slightly increased development consistent with . . . septic [requirements] is rationally related to the preservation of agriculture. . . . For all of these

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<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

reasons, Ordinance 99-06 is rationally related to the purposes of the MLUL it asserts it will achieve.<sup>56</sup>

[The trial court] also concluded that the rezoning of the [Amwell Valley Agricultural (AVA)] district was consistent with the State Plan: [T]he evolution of the various Master Plans over time focused not only on farmland preservation and agricultural pursuits as a worthwhile goal for the Township, but also did so in an effort to comply with the vision of the State Plan. ...[T]he overarching goal of the State Plan ... is to continue revitalizing urban areas, continue channeling growth toward areas already developed and not merely to accommodate growth in terms of housing and other types of development in places like East Amwell.<sup>57</sup>

Plaintiffs further contended that Ordinance 99-06 was in effect, “exclusionary zoning,” in violation of the Mount Laurel doctrine, requiring that developing communities, through land use regulation, afford living opportunities to low and moderate income families.<sup>58</sup> The appellate court dispensed with those claims, stating that “ ... under *Mount Laurel II*, once a municipality discharges its obligations regarding housing for low and moderate-income households, which East Amwell has concededly done, it has no constitutional obligation to provide through zoning for a variety of other forms of housing.”<sup>59</sup> According to the East Amwell court:

The Court in *Mount Laurel II* also held that although every municipality has an obligation to provide a realistic opportunity through its zoning for decent housing for its resident poor, the constitutional duty to meet a regional need applies only to municipalities, or portions thereof, that are in growth areas.<sup>60</sup> “This obligation, imposed as a remedial measure, does not extend to those areas where the [State Plan] discourages growth[—]namely, open spaces, rural areas, prime farmland, conservation areas, limited growth areas, parts of the Pinelands and certain Coastal Zone areas.”<sup>61</sup>

“Municipalities consisting largely of conservation, agricultural, or

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<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

<sup>58</sup> S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151, 187, 336 A.2d 713, appeal dismissed and cert. denied, 423 U.S. 808, 96 S. Ct. 18, 46 L. Ed. 2d 28 (1975).

<sup>59</sup> N.J. Farm Bureau, Inc. v. Twp. of E. Amwell, 380 N.J. Super. 325, 334-335 (App. Div. 2005).

<sup>60</sup> S. Burlington County N.A.A.C.P. v. Twp. of Mount Laurel (Mount Laurel I), 67 N.J. 151, 214-15, 456 A.2d 390.

<sup>61</sup> Ibid. at 215, 456 A.2d 390.



environmentally sensitive areas will not be required to grow because of Mount Laurel.”<sup>62</sup> Once a municipality has satisfied its fair share, the “Mount Laurel doctrine will not restrict other measures, including large-lot . . . zoning, that would maintain its beauty and communal character.”<sup>63</sup> If a municipality meets its affordable housing obligations, “the Mount Laurel doctrine requires it to do no more.”<sup>64</sup> The [Mount Laurel II] Court also stated: “The Constitution of the State of New Jersey . . . does not require suburban spread. It does not require rural municipalities to encourage large[-]scale housing developments. It does not require wasteful extension of roads and needless construction of sewer and water facilities for the out-migration of people from the cities and the suburbs.”<sup>65</sup> The record in this case clearly shows that the AVA district in East Amwell is a rural area that the municipality may preserve for agricultural uses consistent with the Mount Laurel doctrine as explained in Mount Laurel II.<sup>66</sup>

Lastly, the East Amwell court addressed Ordinance 99-06 as related to the designations in the State Plan:

[A]lthough the State Plan's designation of an area as a Rural Planning or Environmentally Sensitive Planning Area is not dispositive of the validity of large-lot zoning designed to preserve the area's rural character, these designations are supportive of the reasonableness of such zoning.<sup>67</sup> The record of the lengthy trial...demonstrates that the AVA district in East Amwell is a quintessential agricultural community that the State Plan properly designated as a Rural Planning Area and that Ordinance 99-06 is reasonably designed to preserve that rural character.<sup>68</sup>

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<sup>62</sup> Ibid. at 219, 456 A.2d 390.

<sup>63</sup> Ibid. at 219-20, 456 A.2d 390.

<sup>64</sup> Ibid. at 260, 456 A.2d 390.

<sup>65</sup> [Ibid. at 238, 456 A.2d 390.]

<sup>66</sup> N.J. Farm Bureau, Inc. v. Twp. of E. Amwell, 380 N.J. Super. 325, 334-335 (App. Div. 2005).

<sup>67</sup> N.J. Farm Bureau, Inc. v. Twp. of E. Amwell, 380 N.J. Super. 325, 335 (App. Div. 2005) See Kirby v. Twp. Comm. of Bedminster, 341 N.J. Super. 276, 286-89, 775 A.2d 209 (App.Div.2000); Mount Olive Complex v. Twp. of Mount Olive, 340 N.J. Super. 511, 540-45, 774 A.2d 704 (App.Div.2001), remanded on other grounds, 174 N.J. 359, 807 A.2d 192 (2002); Sod Farm Assocs. v. Springfield Twp. Planning Bd., 298 N.J. Super. 84, 97-98, 688 A.2d 1125 (Law Div.1995), aff'd, 297 N.J. Super. 584, 587-88, 688 A.2d 1058 (App.Div.1996), certif. denied, 149 N.J. 36, 692 A.2d 49 (1997). Indeed, Kirby sustained one unit per ten acre zoning similar to the zoning in the AVA district in comparable circumstances. See also Gardner v. N.J. Pinelands Comm'n, 125 N.J. 193, 593 A.2d 251 (1991) (upholding forty-acre minimum lot size with mandatory clustering in Pinelands).

<sup>68</sup> N.J. Farm Bureau, Inc. v. Twp. of E. Amwell, 380 N.J. Super. 325, 334-335 (App. Div. 2005).

**b) East Brunswick**

Applying the Riggs analysis to Bailes v. East Brunswick, the appellate court analyzed the facts and circumstances specific to the case that ultimately led the court to find that the six-acre downzoning ordinance did not pass judicial review. East Brunswick argued that the downzoning ordinance advanced various purposes of the MLUL, but the appellate court concluded that East Brunswick could not establish that six-acre zoning in the RP district was necessary to effectuate the ordinance's stated purposes of recognizing environmental constraints, retaining farmland, and conserving open space, "at least as applied to plaintiffs' properties."<sup>69</sup> This determination was the result of the appellate court's review of evidence presented at trial. The appellate court criticized the lower court for failing to make findings of fact and proceeded to review the evidence, making its own factual findings, which ultimately led to a reversal of the trial court decision.<sup>70</sup>

The appellate court found that although parts of Plaintiffs' properties had environmental constraints including floodplains and wetlands, East Brunswick's ordinance was not necessary to prevent environmental damage. The Court reasoned that the requirements of the Freshwater Wetlands Protection Act, the Flood Hazard Area Control Act, and the corresponding regulations under those statutes sufficiently ensured that development at one unit per one and two acres would not detrimentally affect environmentally sensitive areas.<sup>71</sup>

The Court relied on a map prepared in 1996 for East Brunswick by a planning consultant as part of a Natural Resource Inventory, declaring that it was "... the only credible evidence of septic suitability."<sup>72</sup> Using the map, the Court found that most of the properties in the western part of the RP district were suitable for septic systems. For those properties under "... severe septic limitations," the Court decided that the permitting and certification process of the New Jersey DEP would prevent inappropriate development that might result in environmental damage.<sup>73</sup> Next, the Appellate Division found that development on one- and two-acre lots would adequately protect the

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<sup>69</sup> Mazier, E.E., "Ordinances Void as Applied; Downzoning Is Unnecessary," Vol. 14, No. 40, p. 17, (2005).

<sup>70</sup> Bailes v. Township of East Brunswick, 380 N.J. Super 336 (App. Div. 2005).

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.* (under the Realty Improvement Sewerage & Facilities Act and other statutes).

aquifer, stating that the record indicated that “. . . such low-density residential development . . .” posed less risk of ground water contamination than “. . . many of the agricultural activities currently being conducted.”<sup>74</sup>

The stated purposes of the East Brunswick ordinance included retention of agricultural lands and support of agricultural activities. But unlike the trial record from East Amwell, the Court found no substantial evidence to support the conclusion that downzoning Plaintiffs’ properties with cluster options would “. . . preserve agricultural uses any more effectively than one- or two-acre zoning.”<sup>75</sup> Even if the downzoning was shown to “. . . make it somewhat more likely . . .” to retain farming operations, this would not adequately justify Plaintiffs’ equity losses.<sup>76</sup>

Addressing the ordinance’s stated purpose of conservation of open space, the Court noted that East Brunswick could not force private property to remain as open space through “. . . restrictive zoning that is not justified by environmental constraints or other legitimate reasons.”<sup>77</sup> The appeals court indicated that East Brunswick should acquire any properties that it deemed necessary for open-space preservation by paying fair market value to the owners.<sup>78</sup>

Finally, the appellate court rejected East Brunswick’s assertion that the ordinance advanced the policies of the State Plan.<sup>79</sup> The Appellate Division could not reconcile the State Plan’s Equity Clause with the resulting equity loss to Plaintiffs’ properties.<sup>80</sup> Having made extensive findings of fact on review, the Court concluded that the restriction of development under the ordinances was arbitrary and unreasonable and therefore invalid.<sup>81</sup>

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<sup>74</sup> Ibid.

<sup>75</sup> N.J. Super. (App. Div. 2005) [digested above].

<sup>76</sup> Mazier, E.E., “Ordinances Void as Applied; Downzoning Is Unnecessary,” Vol. 14, No. 40, p. 17, (2005).

<sup>77</sup> Bailes v. Township of East Brunswick, 380 N.J. Super 336 (App. Div. 2005).

<sup>78</sup> Ibid.

<sup>79</sup> N.J.S.A. 52:18A-196, et seq.

<sup>80</sup> Mazier, E.E., “Ordinances Void as Applied; Downzoning Is Unnecessary,” Vol. 14, No. 40, p. 17, (2005).

<sup>81</sup> Ibid.

#### **4) Legal Challenges Conclusions**

Because the New Jersey Supreme Court has declined to address the issue of agricultural downzoning for farmland preservation, the East Amwell-East Brunswick appellate decisions represent the most recent and most significant case law on this matter. While the ordinances at issue in both cases seem similar, the outcomes were very different. East Amwell downzoned from three- to 10-acre minimum lot sizes while East Brunswick downzoned from one- and two-acre zoning to six-acre minimum densities (which correspond to the six-acre minimum requirement for farmland assessment.) Paradoxically, East Amwell's more restrictive ordinance, potentially imposing even greater equity losses on affected properties, was upheld, while East Brunswick's less extreme ordinance was struck down. These outcomes may seem counterintuitive, but upon closer investigation, the rulings begin to make more sense.

The fact patterns in East Amwell and East Brunswick seem to exemplify two extreme scenarios when describing the composition and make-up of each municipality. Simply put, the character of each community was very different. East Amwell is located in a remote region in the northwest part of the state, and had undergone very little development compared to East Brunswick, which is centrally located — literally bisected by the New Jersey Turnpike — and had already achieved two-thirds build-out. East Amwell's small population of just over 4,000 residents formed several communities — small pockets of development — within the 18,000-acre municipality. Conversely, East Brunswick's population of over 45,000 was densely distributed inside 14,300 acres, averaging about 2,129 persons per square mile. In East Amwell, 70 percent of all land was under farmland assessment and the downzoning ordinance affected 11,000 acres, fully two-thirds of the entire township.

Conversely, East Brunswick's ordinance affected a little over 4,300 acres which appears to be a substantial amount of land, but this figure is misleading. Of that amount, almost 2,000 acres was already publicly owned and another 930 acres had been developed, mostly with residential densities less than one acre per lot. Only about 1,500 acres remained as privately-owned, undeveloped land, and of that, only about 960 acres was under farmland assessment. Of the remaining farmland, the 360 acres located on the east side of the RP zone was surrounded by residential development. By the time of trial, only half of the 600 acres on the west side of the

RP zone remained in agricultural use because development applications were either pending or approved for the other half.

Furthermore, during the East Brunswick trial, experts testified that there was no agricultural character left to the community, which was one of the stated purposes of the East Brunswick ordinance. The appeals court concluded that other stated justifications, including protection of natural resources and respecting the carrying capacity of the land, were concerns already regulated by New Jersey Department of Environmental Protection (NJDEP) regulations that were not as restrictive as the six-acre per unit requirement. The appellate court concluded that because the stated purposes were not reasonably related to the requirements of the ordinance, and because of the harsh impact on a small number of property owners, that East Brunswick's ordinance could not survive appellate review. The court concluded that, if the township wanted the relatively small amount of remaining, undeveloped land, East Brunswick ought to acquire the development rights at fair market value.

East Amwell can be further distinguished from East Brunswick. East Amwell Township, realizing that the former zoning of three acres per unit was an invitation for development, conducted thorough investigations and studies in an effort to preemptively preserve farmland. Initially East Amwell considered downzoning to the recommended 20 acres per unit, but compromised at 10 acres per unit. Following the East Amwell decision, the municipality further increased minimum densities to 15 acres. The trial court and appellate court found that the stated purposes of the ordinance—retaining a viable agricultural industry and preserving the rural character of the community—were reasonably related to the ordinance's zoning restrictions and consistent with the MLUL. Because Ordinance 99-06 was so sweeping, affecting 60 percent of the township, any resulting diminution of property values would be more evenly distributed across a substantial number of property owners rather than requiring only a small portion of residents to absorb equity losses, as was the case in East Brunswick.

Additionally, other relevant factors seemed to influence the East Amwell and East Brunswick decisions. Both cases made clear that compliance with the State Plan, alone, was not a sufficient legal justification for a downzoning ordinance. This cuts both ways. In East Amwell, compliance with the State Plan bolstered the municipality's claim. However, in East Brunswick, compliance with the State Plan worked against the municipality. Here the appellate court

noted the Equity Clause of the State Plan as an important consideration to ensure that adverse affects of the plan did not unfairly burden the small group of property owners.

Next, the appellate court noted the thoroughness of the opinion in East Amwell while criticizing the failure of the East Brunswick court to make sufficient findings of fact. Specifically, the appellate court criticized the lower court's failure to make credibility findings regarding the testimony of expert witnesses and their analyses of factual evidence presented at trial. While seemingly insignificant, this procedural error at trial, which could have been avoided by counsel, ultimately was the technical discrepancy that opened the door for the appellate court to find the East Brunswick ordinance invalid.

Emotional appeals also factored into each decision. The East Brunswick Court ended its analysis by noting that Plaintiffs were “. . . a relatively small group of landowners . . .” who had continued to farm while other farms were converted for development. Some property owners were elderly and had relied upon the proceeds from the sale of their land for their retirement. Therefore, the appeals court concluded that limiting the development of the plaintiffs' properties to large-lot subdivisions pursuant to the ordinances “would impose an inequitable burden” on the plaintiffs.<sup>82</sup> Conversely, the East Amwell Court included within its opinion comments from the trial court judge after touring the AVA district, describing the district as “a place of breathtaking beauty, comprised overwhelmingly of large parcel farms and fields dotted with barns and silos stretching virtually as far as the eye can see.”<sup>83</sup>

From these two cases, one may reasonably conclude that predominantly agricultural municipalities, in which the character of the community is clearly rural and agricultural, are the most likely to overcome legal challenges to downzoning ordinances. East Amwell, at two-thirds agricultural, satisfied the “agricultural character of the community” standard, but East Brunswick, with only about nine percent remaining as farmland and undeveloped property, did not. Municipalities with a demonstrated record of actively promoting and protecting agriculture are more likely to overcome legal challenges to downzoning ordinances. However, if an ordinance affects too few property owners, this works against the municipality. Clustering bonus options were included in the ordinances in both cases, yet it is unclear if a clustering provision is a necessary element of a downzoning ordinance. As a practical matter, downzoning

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<sup>82</sup> *Ibid.*

<sup>83</sup> N.J. Farm Bureau, Inc. v. Twp. of E. Amwell, 380 N.J. Super. 325, 327 (App. Div. 2005).

ordinances should include density clustering provisions to avoid unnecessary judicial scrutiny. Perhaps most important is demonstrating that a viable agricultural industry currently exists within the municipality. Downzoning ordinances adopted by municipalities as a last-ditch effort to save a few remaining farms, as in the case of East Brunswick, are likely to be struck down. Ultimately, many questions will remain unanswered until the New Jersey Supreme Court makes a ruling on downzoning for farmland preservation.

#### 5) **How East Windsor Fares under East Amwell—East Brunswick Jurisprudence**

Analysis of the circumstances specific to East Windsor Township according to East Amwell—East Brunswick jurisprudence is appropriate because, in the absence of New Jersey Supreme Court guidance, these cases provide the most relevant legal analysis of agricultural downzoning ordinances.

The facts particular to East Windsor fall somewhere along the East Amwell—East Brunswick continuum, but neither decision, alone, is determinative when applied to East Windsor's circumstances. While East Windsor's character as a community is no longer predominantly rural, its agricultural district is sizeable and occupies roughly 32 percent of the township<sup>84</sup>. The district also borders on agricultural land in adjoining municipalities. Unlike East Brunswick Township, East Windsor's agricultural district is not surrounded by or fragmented by residential development.

The factor of most importance in East Windsor's situation is that the township has made every effort to preserve the agricultural viability of the district through acquisition of development rights at fair market value. This has been done via Mercer County's agricultural preservation program. The acquisition of the 38-acre farm on Etra Road in fee simple is of particular importance in support of this effort. So, too, are the Mayor's outreach efforts to owners of remaining unpreserved parcels in the agricultural district.

A strong case can be made that downzoning unprotected farmland is a last resort for East Windsor Township in trying to protect its agricultural district, rather than being a replacement for fair market value compensation to owners. Such a step would also protect the substantial

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<sup>84</sup> DVRPC GIS Mapping, Dec 2006.

investment that has already been made by the State, Mercer County, and East Windsor in preserving contiguous farms to maintain a viable agricultural community.

There is perhaps one action that would demonstrate and strengthen East Windsor's efforts to preserve agricultural viability in the township. That is to develop and adopt a Farmland Preservation Plan as an element of the Master Plan. This would document the value of East Windsor's agricultural industry, lay out any other actions that the township might take to strengthen the industry, record ownership details and the agricultural value of the unpreserved land, and articulate the relationship of East Windsor's plans to the NJ Development and Redevelopment Plan and Mercer County planning. It would have the added benefit of involving operating farm owners in township protective efforts, including using downzoning as a tool for this purpose, through the appointment of an Agricultural Advisory Committee to help shape the Plan.

## 6) Eminent Domain

Given the importance of protecting agriculture in East Windsor's agricultural district, and given the recalcitrance of non-farming landowners to consider farm preservation, East Windsor could consider use of eminent domain powers to preserve remaining farms in the R-A and RE zones, as an alternative to downzoning. The New Jersey Supreme Court has upheld the use of eminent domain to take farmland for various purposes such as open space, recreational facilities, or building schools. Most recently, the Court announced, in Mt. Laurel v. Mipro, that a township could properly use the power of eminent domain to preserve open space and stop further development.<sup>85</sup>

Because of the US Supreme Court's recent *Kelo* decision, the government's power to use eminent domain to take private property has finally reached the consciousness of the general public, which does work against this option. There is national outrage that a municipality can plan to take homes and businesses that are not blighted in order to give the property to another private landowner who would develop a project with the potential to generate more tax revenue. For the first time, everyone can see how far governments have gone beyond the use

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<sup>85</sup> NJFB 2006 Policies, pp. 20-21, 2005.



of eminent domain to clean up blighted areas, or to build roads, railroads, or schools.<sup>86</sup> Of course, preservation of farms does not necessarily fall into the category of transferring property of one private landowner to another for the sake of generating tax revenue.

The New Jersey Agricultural Development and Retention Act recognizes the possibility of using eminent domain to take farmland by setting up a process within the Act (NJSA 2:4C- 19) through which County Agricultural Development Boards (CADBs) can “determine the effect of the use of this power upon the preservation and enhancement of agriculture in the Agricultural Development Area (ADA), the municipally approved program, and upon overall State agricultural preservation and development policies.” Governments contemplating using eminent domain to acquire farmland in an ADA are required to notify the CADBs, or in counties with no CADB, the State Agricultural Development Committee (SADC). These boards review the reasons offered and can hold a public hearing before deciding whether or not there will be adverse effects on the ADA. In using this process, there have been instances when a CADB or the SADC did determine that there would be no effects harmful enough for them to oppose the action.<sup>87</sup>

The New Jersey Eminent Domain Act and the Local Redevelopment and Housing Act establish a set of conditions for condemnation proceedings. The Kelo decision does not affect New Jersey’s process that much but the public outrage about it may help to alert judges, municipalities, and the State to be more sensitive to concerns about private property rights and the risk of reduced public support if “public purpose” is defined too broadly.<sup>88</sup>

Since Kelo, however, Farm Bureau members report that municipal officials seem to believe they are encouraged by Kelo to use eminent domain even more, especially when trying to control development on farmland or open space. Farmers are being told by township officials that there is one more tool in addition to downzoning in their arsenal of weapons to manage agriculture and growth in their towns.

In many cases, the first a landowner knows that his/her property is being considered for eminent domain as part of some development project is when he or she receives a certified

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<sup>86</sup> The threat of eminent domain is nothing new to New Jersey farmers. Many had first-hand experience in losing farms and homes to eminent domain when the Tocks Island Dam was being planned in northwest New Jersey. The dam was fought by environmentalists in 3 states and finally canceled. The land now belongs to the federal government as the Delaware Water Gap National Recreation Area. [NJFB 2006 Policies, pp. 20-21], 2005.

<sup>87</sup> NJFB 2006 Policies, pp. 20-21, 2005.

<sup>88</sup> Ibid.

letter from the municipality stating that they are sending an appraiser to inspect the property. This actually comes after a long chain of planning board discussions and actions about which landowners would receive no special notice. If able to participate in these planning discussions, however, landowners and other residents could present their reasons against the eminent domain taking, perhaps causing the governmental body to withdraw the proposal.<sup>89</sup> Being caught up in an eminent domain proposal may not be totally negative for a farmland owner or for the farm community. Typically, in urban or suburban areas, or areas where redevelopment is envisioned, a municipality along with a developer may want to implement part of a regional or local redevelopment plan. The new development may offer opportunities for existing farmland uses.<sup>90</sup>

Furthermore, farmland taken through eminent domain for farmland preservation would provide the usual SADC appraisal process, the landowner receiving two fair market appraisals with SADC choosing between them, instead of only the one appraisal ordered by the condemning party.

## **V) CONCLUSIONS**

The Township of East Windsor has taken proactive measures to preserve and protect farmland and agricultural production in the R-A and R-E districts located in the eastern portion of the municipality. Townships that have dedicated municipal funds for preservation and have effectively utilized county and state funds for preservation are in a better position than municipalities where previous preservation efforts have been negligible.

Engaging affected property owners early in the process of considering zoning changes is important for crafting ordinances that effectively support local farming operations and adequately address farmers' concerns as to the effect of such zoning changes. Farmers' fears of equity losses can be addressed to some limited extent, if the township wishes to use its own funds for acquisitions. Changes to zoning may occur, as well, under the rules for the Wastewater Management Plans currently being developed by New Jersey counties and due for completion in 2011. Under these rules, land areas that are outside sewer service areas and where wastewater is handled by septic systems, may be required by the State to change zoning minimums in order to meet new standards for discharge to groundwater. Greater land area is required, on average, for a residential septic

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<sup>89</sup> NJFB 2006 Policies, pp. 20-21, 2005.

<sup>90</sup> *Ibid.*

system to meet the new nitrate dilution standard, up to as much as 10 acres per unit, depending on soils and permeability of the watershed in which a development project is located. Such zoning changes would eliminate the need for all the discussion and recommendations included in this report. It is not yet certain exactly how or how well this part of the wastewater rules will be implemented, however.

Finally, if a legal challenge to an agricultural downzoning ordinance is likely, it is necessary to consider whether adequate funding is available to properly defend such a challenge. For example, East Amwell Township spent 10 percent of its annual budget defending Ordinance 99-06.<sup>91</sup> However, recent legal decisions in New Jersey, most notably the New Jersey Supreme Court decision in Mount Laurel Township. v. MiPro Homes, suggest that municipal efforts to prevent development on land that is targeted for open space are more likely to be upheld than has been the case in the past<sup>92</sup>. This may reduce the threat of a legal challenge or may reduce the costs of defending it. Given the investment in preserving farmland and agriculture that East Windsor has already made, further steps to assure its continuing viability may be worth the risks of potential legal costs.

## VI) RECOMMENDATIONS

### A) Amend Zoning Ordinance 20-1.0006.a

The stated purpose of the ordinance should specifically enumerate the goal of farmland retention, not just preservation. This purpose might also reference East Windsor's extensive Open Space and Recreation Plan. In addition, **Map 5: Agricultural District Soils** and **Map 6: Agricultural District Soil Quality** show that nearly all of the agricultural district has soils of the highest importance, which strengthens the case for agricultural retention.

### B) Amend Zoning Ordinance 20-6: Rural Agricultural (R-A)

Remove golf course from principal use because golf courses attract residential development and traffic.<sup>93</sup> Remove clubhouse from accessory use.

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<sup>91</sup> Mazier, E. E., "Land Use: Ordinances Void as Applied; Downzoning Is Unnecessary," *New Jersey Lawyer*, Vol. 14, No. 40, Oct 3 2005.

<sup>92</sup> 379 N.J. Super. 358, 878 A.2d 38 (2005).

<sup>93</sup> Daniels and Bowers, p. 117, 1997.

**C) Amend Zoning Ordinance 20-7: Rural Estate (R-E)**

Remove Standard golf course from principal use because golf courses attract residential development and traffic. Remove clubhouse from accessory use.

**D) Amend Zoning Ordinance 20-4.1500: Residential Cluster Development**

Make the clustering ordinance mandatory and revise it to increase the percentage of land required to be deed-restricted (up to 50 percent). Design standards for deed-restricted land should be included so that such land is connected to existing or planned open space and/or adjoining agricultural lands. Consider modifying the clustering ordinance so that it is utilizing the Growing Greener model for conservation design clustering developed by Randall Arendt. This would also include netting out from housing yield calculations not only the primary conservation areas which cannot be built upon (wetlands, wetland transition areas, and floodplains), but also any required farmland buffers. Density bonuses should only be allowed in exchange for increasing the percentage of deed-restricted land beyond the minimum mandatory level.

**Map 7: Agricultural District Critical Areas, Map 8: Agricultural District Groundwater Recharge, and Map 9: Agricultural District Landscape Project [Habitat Priorities]** all provide substantiation of the important natural resources in this part of the township and the need to protect its rural character.

**E) Develop an Agricultural Economic Inventory**

Such an inventory should provide an analysis of the type of agricultural economy within East Windsor in order to devise policies that will effectively enhance and support the local agricultural economy. Additionally, an economic inventory should include information on the revenues and tax base generated by the local farming industry. A highly productive, highly profitable agricultural industry, even when occupying a relatively small area of land, can provide substantial economic benefits.

**F) Create an Agricultural Economic Plan**

East Windsor should create an economic development strategy for its farming industry to sustain and improve profitability that will increase the likelihood of continued farm operations. An agricultural economic plan should identify and recommend strategies to enhance farming and could include a plan to promote and expand agri-tourism, such as exists at the Lee Turkey Farm. An

economic strategy should include recommendations for how best to protect the multi-million dollar investment in farmland preservation in the township.

**G) Create a Farmland Preservation Plan and Obtain a Farmland Planning Incentive Grant**

Develop a Farmland Preservation Plan following the guidelines of the State Agriculture Development Committee. Identify remaining unprotected farmland in the R-A zone as a Project Area and apply for a Farmland Planning Incentive grant to fund acquisitions in this Area. Doing this will not only provide additional revenue for use in preservation, but will demonstrate the township's commitment to protection of its agricultural industry. Availability of funding is always dependent on renewal of the Garden State Preservation Trust.

**H) Create a Multi-Municipal Plan**

Attempt to create multi-municipal agreements with Robbinsville Township in Mercer County and Millstone Township in Monmouth County. Because land use in adjoining townships will have impacts on East Windsor's farming area, discussion with those neighbors may help to protect and even enlarge the region's farming activity, especially if farmers are brought directly into the conversation.

**I) Modify Zoning Density in R-A Zone to a Minimum of one unit per 10 acres**

If the decision is made to downzone the R-A zoning district for the purpose of protecting agriculture in East Windsor Township, the most protective density would be one unit per 15 acres. At a minimum, one unit per 10 acres appears to be needed for agricultural protection purposes.



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Wright, Danaya C.				University of Florida, Frederic G. Levin College of Law			n.d.	

## Additional Information

The following information summarizes various additional, and sometimes innovative, approaches to farmland preservation and protection of the farming industry. Some are not available to New Jersey municipalities but could become so, especially if promoted by municipalities, or they could be adapted for municipal use so as to accord with current New Jersey law. They are arranged alphabetically.

### i) **AGRICULTURAL ENTERPRISE DISTRICTS**

The Agricultural Enterprise District is a tool for preservation of farmland and protection and enhancement of farm viability that was initiated through a joint effort of the Cumberland County Board of Agriculture and Cumberland County Agricultural Development Board, with potentially wide application in other parts of the state. Modeled after the very productive Urban Enterprise Zones in Cumberland County, the program was designed to be managed at the county level to meet the needs of farmers in that county. Incentives would be jointly developed between farmer groups; the county and municipalities would encourage farmers to restrict voluntarily their ability to develop their land for a period of eight or 20 years.<sup>94</sup>

The concept was endorsed by the State Board of Agriculture and most of the County Agricultural Development Boards throughout the State as an idea worthy of further investigation and consideration, but it has not yet been implemented. No more work in other areas of the State has been done up to now but the concept is discussed when towns and farmers wrestle with maintaining land values and rural character simultaneously.<sup>95</sup>

The New Jersey Farm Bureau should work toward enactment of an Agricultural Enterprise District concept as developed by Cumberland County. The benefits of Agricultural Enterprise Districts can be one more set of tools to use in enhancing agricultural viability, strengthening the Right to Farm, and offsetting losses which State Plan local implementation may bring to farm landowners.<sup>96</sup>

### ii) **EIGHT -YEAR PROGRAM**

In these programs, farmland owners agree to voluntarily restrict nonagricultural development for a

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<sup>94</sup> NJ Farm Bureau 2006 Policies, p. 12, 2005; and Cumberland County Planning Department, 2007.

<sup>95</sup> NJ Farm Bureau 2006 Policies, p. 12, 2005.

<sup>96</sup> Ibid.

period of eight years in exchange for certain benefits. There are two types of eight-year programs: municipally approved programs, which require a formal agreement among the landowner, county, and municipality, and non-municipally approved programs, which require an agreement between only the landowner and county.<sup>97</sup>

Landowners enrolled in both municipally and non-municipally approved programs receive no direct compensation for participating but are eligible to apply to the SADC for grants that fund up to 50 percent of the costs of approved soil and water conservation projects. Additionally, those in municipally approved programs enjoy greater protections from nuisance complaints, emergency fuel and water rationing, zoning changes, and eminent domain actions.<sup>98</sup>

### III) **GREENWAYS AND TRAILS**

Greenways and trails provide a variety of recreational opportunities, such as walking, running, biking, and horseback riding, and can link residential areas with schools, parks, and commercial areas to minimize the use of cars. Greenways along waterways provide important buffers to keep the impervious surfaces of developed areas at a distance from water resources, to intercept and filter storm water runoff, and to absorb floodwaters and thus protect built-up areas. Greenways along highways help to absorb exhaust fumes, noise, and bright lights. Greenways also break up monotonous roadsides and can reduce the number of curb cuts for commercial or residential areas. Greenways can provide important wildlife habitat corridors and promote a variety of recreational pursuits, such as boating, canoeing, fishing, and bird watching.<sup>99</sup> Daniels and Daniels<sup>100</sup> note that the creation of regional trails and greenways can be a catalyst for counties and municipalities to undertake other beneficial regional planning efforts such as water resources planning, habitat conservation, floodplain management, and recreation plans.

Since the early 1980s, Boulder, Colorado, has spent millions of dollars to buy up a 27,000-acre greenbelt that separates the city and Boulder County as well as preserving city land above the 5,750-foot mark<sup>101</sup>. The greenbelt has helped to limit urban expansion and complements restrictive zoning in the countryside. Correll, Lillydahl, and Singell<sup>102</sup> reported that the average value of

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<sup>97</sup> SADC Eight-Year Preservation Fact Sheet, 2006.

<sup>98</sup> Ibid.

<sup>99</sup> Little, 1990.

<sup>100</sup> Daniels and Daniels, 2003.

<sup>101</sup> Pollock, 1998.

<sup>102</sup> Correll, Lillydahl, and Singell, 1978.

properties adjacent to Boulder's greenbelt were 32 percent higher than those just more than half a mile away.<sup>103</sup>

The creation of a greenway belt can help define development boundaries and focus farmland preservation efforts. Connecting nodes of upland forest, which is the least protected habitat in most municipalities, can also serve to buffer a farming district.

#### **IV) INSTALLMENT PURCHASE AGREEMENT (IPA)**

The Installment Purchase Agreement (IPA) is essentially a way to turn a development rights payment into a municipal bond. Like a municipal bond, the landowner receives a piece of paper in which the local government agrees to pay the landowner a certain fixed amount of tax-free interest over the life of the Agreement. At the end of the agreement, say 20 years, the landowner receives the principal payment for the development rights and capital gains taxes are then due. Also, like a municipal bond, the landowner may sell the Agreement on the municipal bond market at any time before the end of the term of the Agreement, such as in year seven.<sup>104</sup>

Burlington County has had considerable success with installment purchases of development rights and, in fact, now does all farmland and open space acquisition on an installment basis. Not enough New Jersey counties have followed Burlington's lead. Installment purchase at the municipal level is also possible. It is beneficial to the municipality and also to the seller of development rights or land. When a landowner conducts tax planning, an installment sale may provide equal or greater financial benefits that convince the owner to opt for preservation over an immediate sale to a developer.

The advantage of an IPA to a local government is that the government can leverage funds and preserve more land sooner than under a traditional lump sum payment approach. The local government can sell deep discount zero coupon bonds to cover the future cost of paying the development rights principal. The local government then has to come up with the annual interest payments, which are small compared to what the lump sum principal costs would be.<sup>105</sup>

#### **V) LAND TRUSTS**

The land trust movement, in which private, non-profit organizations pursue land preservation, has

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<sup>103</sup> Daniels and Lapping, pp. 321-322, 2005.

<sup>104</sup> Daniels, pp. 12-13, 2005-6.

<sup>105</sup> Ibid.

grown in response to rapid development and the failure of local planning to effectively protect landscapes and natural resources.<sup>1</sup> From 1980 to 2002, land trust organizations tripled throughout the United States from 400 to over 1,200. Today at least one land trust exists in each state.<sup>2</sup>

New Jersey has several land trusts, including the state-wide New Jersey Conservation Foundation. Since 1960, the New Jersey Conservation Foundation has completed dozens of projects, protecting more than 100,000 acres, from the Highlands to the Pine Barrens to the Delaware Bayshore, from farms to forests to urban and suburban parks<sup>3</sup>.

Another regional land trust in the Mercer County area is the D&R Greenway Trust which since 1989 has preserved over 9,000 acres. The D&R Greenway Land Trust works with municipalities and nonprofit open space groups to provide technical assistance and to leverage funds. The upper Millstone River corridor is of particular interest to the Trust but it shares its expertise and assistance widely.

## **VI) LANDPOOLING**

Landpooling offers a private sector approach to protecting the various public-good services of farmland while enabling the owners to benefit from the mix of farmland private goods that can be marketed. Land owners in an area form a limited liability company or cooperative to develop and market the various services that their land generates – farm crops, wildlife viewing or hunting, camping and other recreation, wetland services retained through public payments, secondary treatment of municipal waste, farmers markets and agri-tainment, as well as residential development on a portion of the land pool. Owners share in the returns based on their investment in the company<sup>4</sup>.

## **VII) MULTI-MUNICIPAL PLANS**

The states of New Jersey, New York, and Pennsylvania have thus far rejected county-level zoning where a municipal zoning ordinance is in effect. Yet, there are three examples of land preservation that may encourage a sub-county, multi-municipal type of planning. In 2000, Pennsylvania enacted

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<sup>1</sup> Daniels and Lapping, p. 317, 2005.

<sup>2</sup> Daniels and Lapping quoting Land Trust Alliance 2003 (Transfer of Development Rights. NJ Future Recommendation Series, May, 2004).

<sup>3</sup> New Jersey Conservation Foundation at [www.njconservation.org](http://www.njconservation.org), 2005.

<sup>4</sup> Renkert, 2004, and Libby, p. 5, 2004.



a law that allows two or more municipalities to draft a “multi-municipal plan.” The plan enables the municipalities to identify and zone for where development should go and where lands should be protected or minimally developed. The plan allows for a multi-municipal vote on developments of regional impact, such as a proposed Wal-Mart, for revenue sharing across municipalities, and for the transfer of development rights across municipal boundaries. Similarly, in the Long Island Pine Barrens program, three townships have participated in the transfer of development rights away from the core water quality protection area. In 2004, New Jersey approved a statewide TDR program, in effect allowing for TDRs to be transferred across the state and between municipalities. This could encourage greater cooperation between municipalities, although questions about revenue sharing must be addressed before multi-municipal TDR programs are possible. In the interim, multi-municipal coordination and support to each other, focused around specific preservation districts, could be highly beneficial.<sup>5</sup>

#### **VIII) PLANNING INCENTIVE GROWTH (PIG) PROGRAM**

The Planning Incentive Grant (PIG) program is one of New Jersey’s newer farmland preservation programs. The program enables the State Agriculture Development Committee (SADC) to provide grants to eligible counties and municipalities to purchase development easements for permanent preservation of farmland in designated project areas.<sup>6</sup>

The goal of the PIG program is to preserve significant areas of reasonably contiguous farmland that will promote the long-term viability of agriculture as an industry. This goal includes many related agricultural objectives beyond the preservation of farmland alone. The PIG program integrates the premise that the preservation of agriculture depends on both retention of the land base and supportive planning measures for the viability of the industry.<sup>7</sup>

Municipalities must have an agricultural advisory committee; for counties, county agriculture development boards serve this function. Municipal applications must contain a farmland preservation plan element of the master plan, while county applications should correlate with adopted county comprehensive farmland preservation plans. Municipalities or counties must

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<sup>5</sup> Daniels, pp. 13-14, 2005-6.

<sup>6</sup> State Agriculture Development Committee, 2006, at <http://www.state.nj.us/agriculture/sadc/pigprogram.htm>.

<sup>7</sup> Ibid.

establish and maintain a dedicated source of funding or alternative means of funding farmland preservation.<sup>113</sup>

The SADC prioritizes applications that leverage state funding through installment purchases, option agreements and donations. The maximum initial allocation is \$1.5 million per municipal/county applicant per year which can cover up to 60 percent of costs, depending on the cost of a farm, with the balance provided by the municipality and, usually, the county.<sup>114</sup>

**ix) PUBLIC-PRIVATE PARTNERSHIP**

One concern about land preservation is that it can limit the amount of developable property and hence push up land and housing costs. In 1987, the State of Vermont created the Vermont Housing and Conservation Board (VHCB), with the dual responsibility of providing funds for low- and moderate-income housing projects and purchasing development rights to farmland.<sup>115</sup> The VHCB receives an annual appropriation from the state legislature and works with the Vermont Land Trust to package farm and forest land preservation projects. Farmland easements in Vermont are often jointly held by the VHCB, the Vermont Department of Agriculture, and the Vermont Land Trust. Through an agreement with the VHCB, the Vermont Land Trust monitors the preserved farms. As of 2005, the VHCB has preserved more than 100,000 acres of land and created or protected more than 7,600 units of affordable housing.<sup>116</sup>

**x) 1031 EXCHANGE**

Lancaster County, PA, pioneered the use of a development rights payment in a “like kind exchange” under Section 1031 of the Internal Revenue Code<sup>117</sup>. The county received two private letter rulings from the Internal Revenue Service; the first defining development rights as an interest in real estate and hence “real estate”; and the second ruling allowed the use of development rights payments in a 1031 exchange for any real estate involved in business, trade, or investment.<sup>118</sup> A landowner does not receive a check for the development rights. Instead, the check is written to the landowner’s intermediary, such as a bank or attorney. The landowner then instructs the intermediary to purchase additional real estate involved in business, trade, or investment. In the process, capital

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<sup>113</sup> SADC PIG Fact Sheet, 2006.

<sup>114</sup> Ibid.

<sup>115</sup> Libby and Bradley, 2000.

<sup>116</sup> Everhart, 2005, and Daniels, p 13, 2005-6.

<sup>117</sup> Daniels and Bowers, 1997.

<sup>118</sup> IRS, 1992.

gains taxes that would have been due on the sale of the development rights are deferred. The real estate acquired may be additional farmland, apartments, or other investment real estate. The like-kind exchange has been used by more than 200 landowners in Pennsylvania as well as landowners in New York and New Jersey. One caveat is that from the date a landowner signs the deed of easement, the landowner has 45 days to identify the property to be acquired and 180 days to complete the transaction.<sup>119</sup>

**xi) TRANSFER OF DEVELOPMENT RIGHTS (TDR) PROGRAMS**

The New Jersey Pinelands transfer of development rights program has been cited as one of the most effective TDR programs in the nation. To date, the program has preserved more than 20,000 acres. The program has complemented strict zoning of one house per 40 acres in the Pinelands preservation area.<sup>120</sup>

TDR programs, outside conservation areas, have been established in Chesterfield Township and Lumberton Township, both located in Burlington County where a “pilot” TDR program has existed for the past 20 years. In 2004, the TDR program was expanded by the State Legislature to allow all municipalities to create TDR programs.<sup>121</sup> Additional programs are currently under development in Robbinsville Township (Mercer County), Alexandria Township (Huntingdon County), Hillsborough and Montgomery Townships (Somerset County), Berkeley and Stafford Townships (Ocean County), Woolwich Township (Gloucester County), Hopewell Township (Cumberland County), Mannington Township (Salem County), and Fanwood Borough (Union County).<sup>122</sup>

TDR is an example of a program that often uses downzoning in combination with transfer of development rights. Because a receiving area must be designed to accommodate all the development rights that will be generated in the designated sending area, some municipalities have found that their high zoning densities will generate substantially more development rights than can be accommodated in a receiving area with adequate infrastructure.<sup>123</sup> This can lead to a need to downzone in order to bring the two areas into balance.

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<sup>119</sup> Daniels, p 12, 2005-6.

<sup>120</sup> Daniels, 2005-6.

<sup>121</sup> N.J.S.A. 40:55D-148.c

<sup>122</sup> New Jersey Office of Smart Growth, 2007.

<sup>123</sup> Personal communication, Mayor of Mannington Township.

A TDR program is the best program that New Jersey has, thus far, to address the issues of farmland preservation and to provide a comprehensive solution to sprawling growth. It resolves equity issues, allows for high-density development according to smart growth principles, and has broad-based support. The problem is that there are numerous requirements established by the State TDR Act that must be fulfilled before a town/county can get a program up and running. To begin with, in addition to establishing the detailed framework for transferring the rights and approving development in the receiving area, a municipality/county must also develop a Capital Improvement Plan pertaining to infrastructure and a Utility Services Plan, and must conduct a Real Estate Market Analysis.<sup>124</sup>

Further, Initial Plan Endorsement must be obtained from the State Planning Commission, which involves preparing capacity and transportation analyses and school and infrastructure assessments, developing comprehensive housing, environmental, agricultural retention, and economic development programs, enacting appropriate local ordinances and design standards, and generally making local planning consistent with county, regional, and state plans. While these requirements make good sense, they are time consuming and expensive. The cost of planning for a properly-designed, comprehensive TDR program can be well over a half million dollars.<sup>125</sup> Unfortunately, by the time TDR programs are up and running across the state, the train may have already left the station in regard to farmland preservation.

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<sup>124</sup> New Jersey Office of Smart Growth, 2007.

<sup>125</sup> Statement by Mayor, Woolwich Township, Farmland Preservation conference, 2005.

## **APPENDICES**

**Appendix A – Open Lands Acreages**

**Appendix B – Unpreserved Farms**

**Appendix C – Study Area Zoning Buildout Calculations**

**Appendix D – Maps**



## Appendix A – Open Lands Acreages

<b>East Windsor Township Open Lands Acreages</b>	
<b>Township</b>	<b>Acres</b>
East Windsor Twp – Total Acres	<b>10,004.73</b>
<b>Study Area</b>	
East Windsor Twp – Total Acres	<b>3,270.11</b>
<b>Farm-assessed Acres – Township-wide</b>	
Property Class 3A	543.05
Property Class 3B	1,496.58
<b>Total</b>	<b>2,039.62</b>
<b>Farm-assessed Acres - Study Area</b>	
Property Class 3A	406.42
Property Class 3B	509.09
<b>Total</b>	<b>915.51</b>
<b>St-Co-Muni Open Space acres - Study Area</b>	
E. Windsor Muni Open space	507.20
Mercer County Open space	249.03
State Open space	38.98
Other Municipal Public Property (15C)	31.93
Other Mercer County Public Property	23.21
NJDEP Other Public Property	2.52
<b>Total</b>	<b>852.86</b>
<b>NJ Turnpike Authority Property - in Study Area</b>	
Farm [NJ Tpk Authority]	5.48
Linear corridor along Turnpike	56.73
Exempt Property (15F)	69.56
<b>Total</b>	<b>131.76</b>
<b>Preserved Farms - Study Area</b>	
Preserved Farm	492.17
State Preserved – Private	438.43
<b>Total</b>	<b>930.60</b>
<b>Vacant Acres - study area</b>	
Vacant – Total Acres	<b>85.33</b>
<b>Proposed Open Space – Township-wide</b>	
Proposed County (P-C)	191.47
Proposed Township (P-T)	391.95
<b>Total</b>	<b>583.42</b>

<b>Proposed Farm Preservation (Numbered Farms) – Study Area</b>	<b>Acres</b>
Farm 1	117.46
2	9.27
3	34.78
4	32.03
5	43.35
6	42.78
7 - 2 parcels (48.1 + 38.75)	86.85
8	67.21
9	36.79
10	31.63
11	28.16
12	15.37
13	21.70
14	30.10
15 - 2 parcels (14.3 + 15.05)	29.35
16	21.10
<b>Total</b>	<b>647.93</b>
<b>Average size farm</b>	40.50



## Appendix B – Unpreserved Farms

BLOCK	LOT	Property Location	Acreage	Owner's Name
32	16	519 Etra Rd	35.00	Davino, Louis S. Jr.
31	25	47 Cedarville Rd	26.39	Docherty Garret et ux
32	5	104 Disbrow Hill Rd	3.64	Estenes, Michael & Henry S.
34	3	Gordon Rd Rear	4.01	Karkalits, Richard & Novis, Mindy
34	3.01	Gordon Rd Rear	0.52	Karkalits, Richard I. E. & Novis, Mindy
32	17	539 Etra Rd	10.08	Notterman, D. & A. C/O Notterman Prop
31	18	50 Feldsher Rd	39.80	Notterman, D. & A. C/O Notterman Prop
33	3	610 Etra Rd	31.50	Notterman, D. & A. C/O Notterman Prop
32	9	499 Etra Rd	120.60	Notterman, D. & A. C/O Notterman Prop
46	7	86 Conover Rd	3.52	Real Ventures, Inc. C/O J. Kaiser
46	9	98 Conover Road	9.99	Real Ventures, Inc. C/O J. Kaiser
46	6	82 Conover Road	3.84	Real Ventures, Inc. C/O J. Kaiser
31	21	949 Windsor Perrineville	15.70	Riggenbach, Ronald
30	19.03	140 Cedarville Rd	22.00	S & J Green Land, LLC
30	19.01	130 Cedarville Rd	20.64	Skeba, Stanley & Joseph
30	12	290 Etra Rd	42.97	Skeba, Stanley & Joseph
46	12	150 Conover Rd	36.53	Stives, C., Estate Of Mary Valasek
50	10	159 Conover Rd	31.74	Stives, C., Estate Of Mary Valasek
31	25.02	77 Cedarville Rd	13.31	Van Handel, James J. et ux
35	4	820 Windsor Perrineville	19.11	Ward, John T. & Cynthia M.
50	6	879 Route 130	29.90	Zeloof, E. & E. & Ann & Haskel
34	2	20 Gordon Rd	0.50	Bonacorda, Fred
46	22.01	60 Woods Road	4.00	Bulb Barn, Inc.
29	12	805 Old York Rd	0.50	Deangelis, R. & A. C/O Sterling Home Pr
21	4.01	105 Disbrow Hill Rd	0.50	Estenes, Michael
31	19	999 Windsor Perrineville	0.00	Hom, Fay & W. & Moore, Helen & Marj
32	4	94 Disbrow Hill Rd	0.50	Jackson, William J.

<b>BLOCK</b>	<b>LOT</b>	<b>Property Location</b>	<b>Acreage</b>	<b>Owner's Name</b>
30	19.02	110 Cedarville Rd	1.89	Lahens, Alfonso & Matilde
33	2	570 Etra Rd	1.00	Notterman, Joseph M. & Rebecca F.
31	17	550 Etra Rd	1.00	Notterman Properties LLC
34.01	1	978 Windsor Perrineville	1.00	Rupp, Valerie M.
32	14	665 Etra Rd	1.00	Schoenefeld, Walter
34	1	39 Imlaystown Rd	0.50	Skeba, Joseph & Stanley, Jr.
46	14	194 Conover Rd	1.67	Stives, Christine V.
44	7	513 Windsor Perrineville	0.50	Theofanis, Joanna
32	6	120 Disbrow Hill Rd	0.00	Tommaso, Ladevaia & Son Contr Co
31	25.01	79 Cedarville Rd	0.50	Van Handel, James J. et ux
30	14	50 Cedarville Rd	1.25	Van Handel, James M. et ux
42	17	1400 Old York Rd	0.50	Williams, Hosea

### Appendix C – East Windsor Township Study Area Zoning Build-Out Calculations

Residential Zoning Districts	Total Acres	- Developed Acres	= Developable Land (Acres)	- Water (Acres)	- Protected or Undevelopable Land (Acres)	- Approved Development (Acres)	- Environmentally Constrained Land (Acres)	= Buildable (Acres)
R1	30.64	30.59	0.05					0.05
RA	3,030.94	240.96	2,789.98	29.59	1,672.14		431.84	656.41
RE	268.47	77.27	191.20	0.87	131.01		11.91	47.40
SL	3.75	3.67	0.08				0.03	0.05
<b>Total</b>	<b>3,333.80</b>	<b>352.49</b>	<b>2,981.31</b>	<b>30.46</b>	<b>1,803.15</b>		<b>443.79</b>	<b>703.91</b>

Non-Residential Zoning Districts	Total Acres	- Developed Acres	= Developable Land (Acres)	- Water (Acres)	- Protected Undevelopable Land (Acres)	- Approved Development (Acres)	- Environmentally Constrained Land (Acres)	= Buildable (Acres)
<b>Total</b>	<b>3.75</b>	<b>3.70</b>	<b>0.05</b>				<b>0.03</b>	<b>0.02</b>

<b>Total Residential and Non-Residential Acres</b>	<b>3,337.55</b>	<b>356.19</b>	<b>2,981.36</b>	<b>30.46</b>	<b>1,803.15</b>		<b>443.82</b>	<b>703.93</b>
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## **Appendix D – Maps**

- 1A East Windsor Township 2005 Aerial Imagery
- 2A East Windsor Township Agricultural District [Aerial with Parcel Boundary Overlay]
- 2B East Windsor Township Agricultural District Zoning
- 3 East Windsor Township Agricultural District Developable Land
- 4 East Windsor Township Agricultural District Open Space [and Preserved Farmland]
- 5 East Windsor Township Agricultural District Soils
- 6 East Windsor Township Agricultural District Soil Quality
- 7 East Windsor Township East Windsor Township Agricultural District Critical Areas [Wetlands, Flood Plains, Steep Slopes]
- 8 East Windsor Township Agricultural District Groundwater Recharge
- 9 East Windsor Township Agricultural District Landscape Project [Habitat Priorities]
- 10 Sewer Service Areas
- 11 Open space and Recreation Plan Map (February 2000)

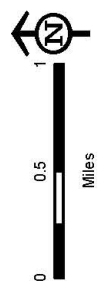
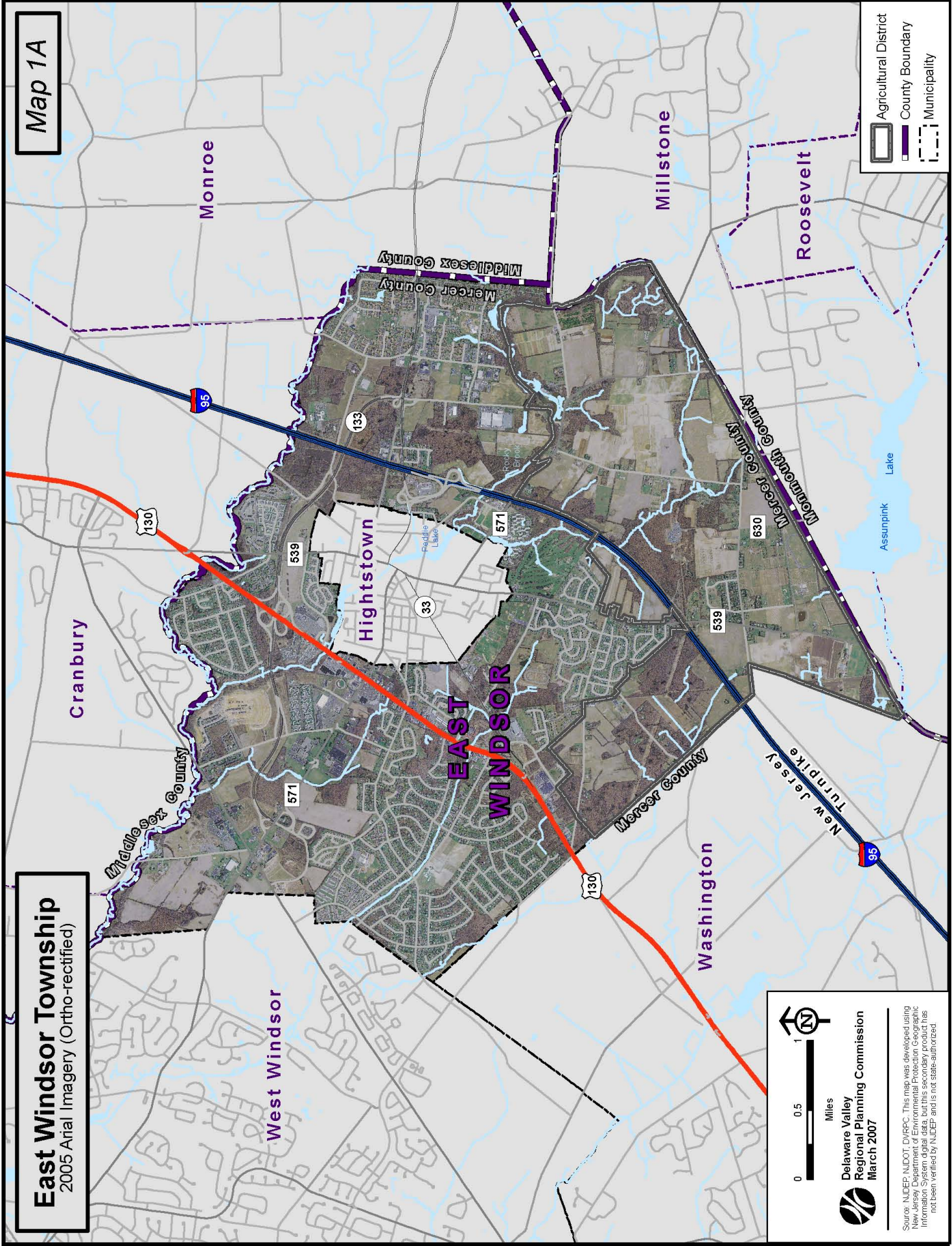


Map 1A

# East Windsor Township

2005 Aerial Imagery (Ortho-rectified)

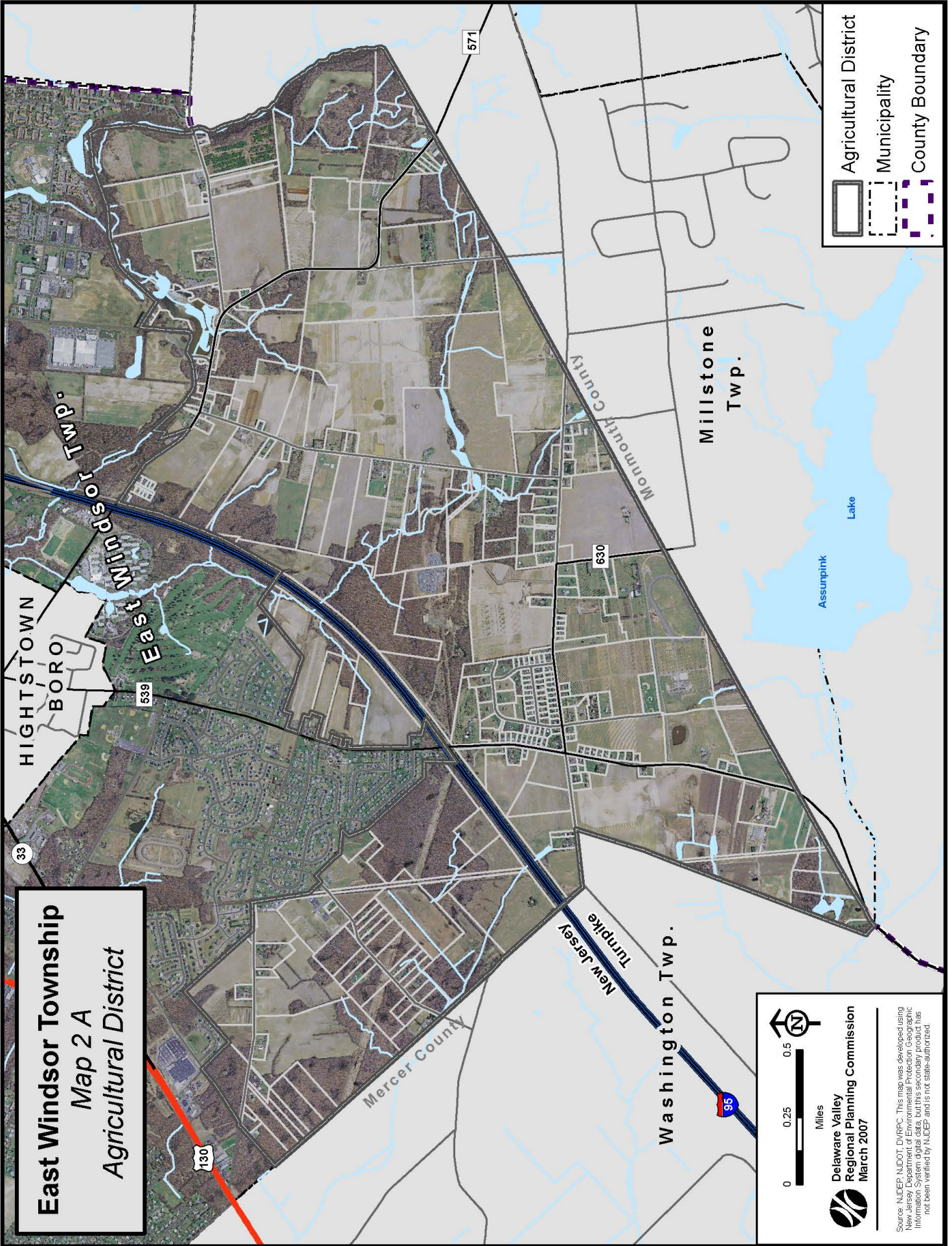
 Agricultural District  
 County Boundary  
 Municipality



  
 Delaware Valley  
 Regional Planning Commission  
 March 2007

Source: NJDEP NJDOT, DVEPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state-authorized.

**East Windsor Township**  
**Map 2 A**  
**Agricultural District**







0 0.25 0.5  
 Miles

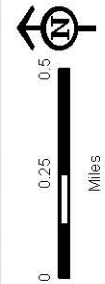
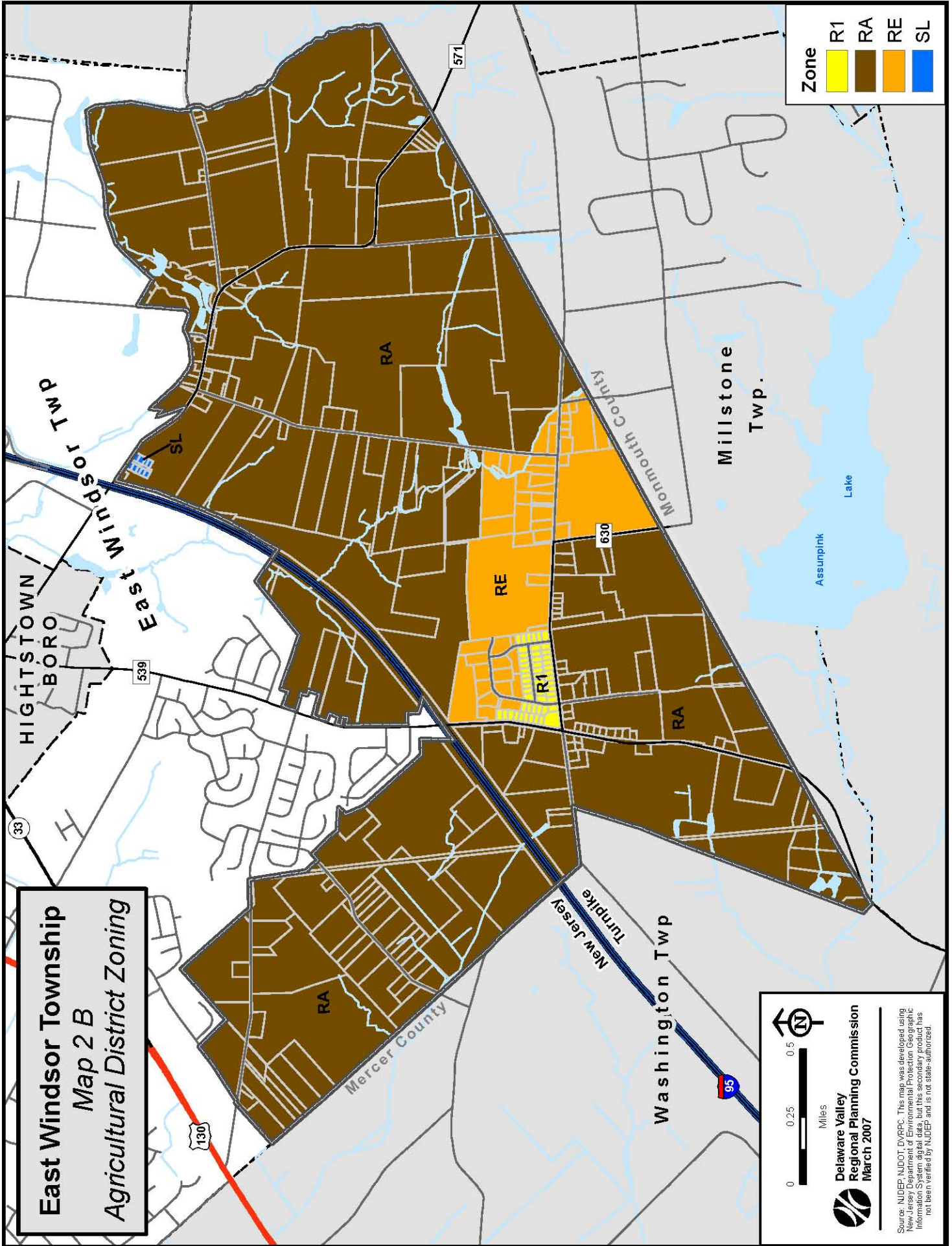
Delaware Valley  
 Regional Planning Commission  
 March 2007

Source: NJDEP, NJDOT, DVRPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state-authorized.



**East Windsor Township  
Map 2 B  
Agricultural District Zoning**

Zone	R1	RA	RE	SL
				

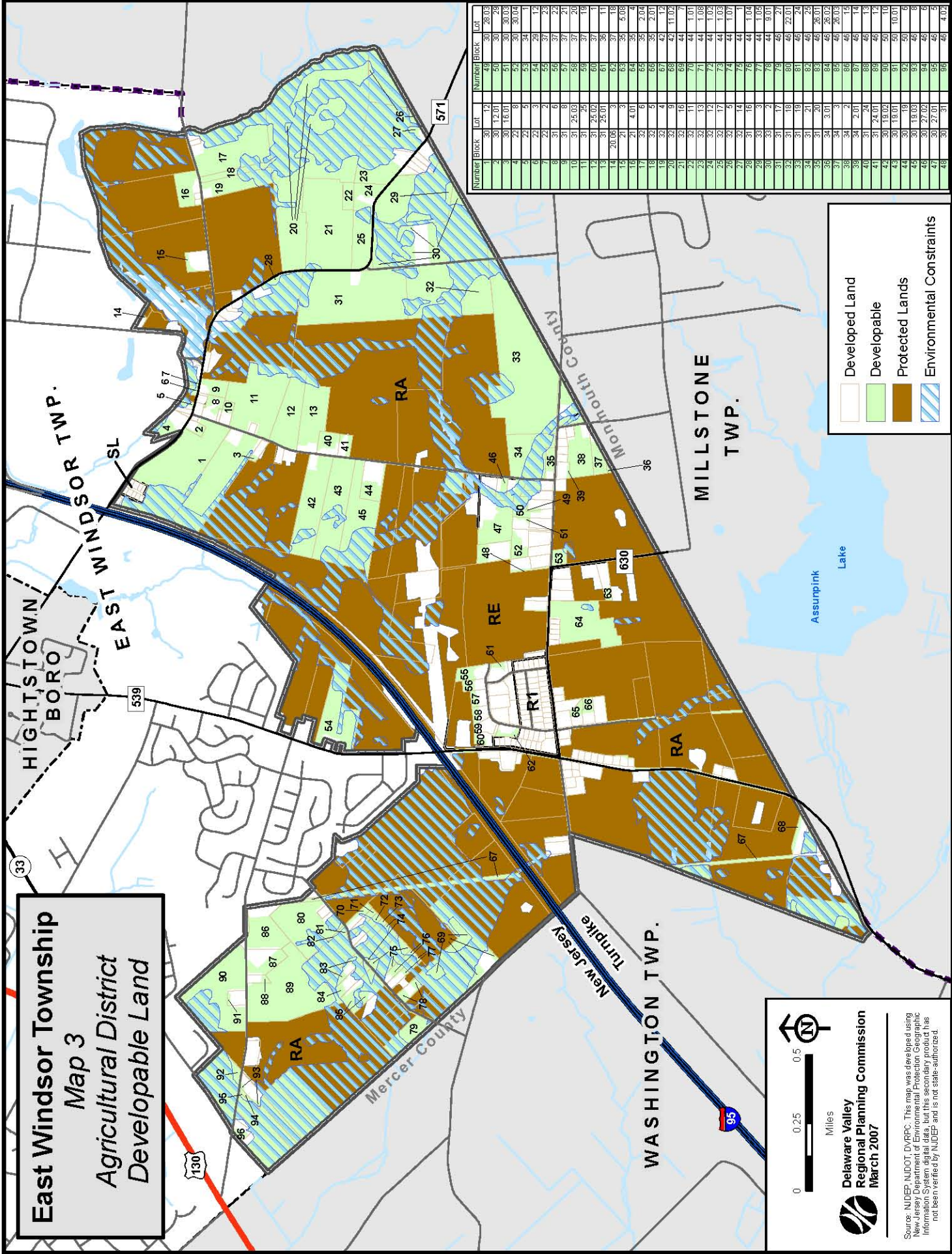


**Delaware Valley  
Regional Planning Commission  
March 2007**





Source: NJDEP, NJDOT, DVRPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state-authorized.

# East Windsor Township Map 3 Agricultural District Developable Land



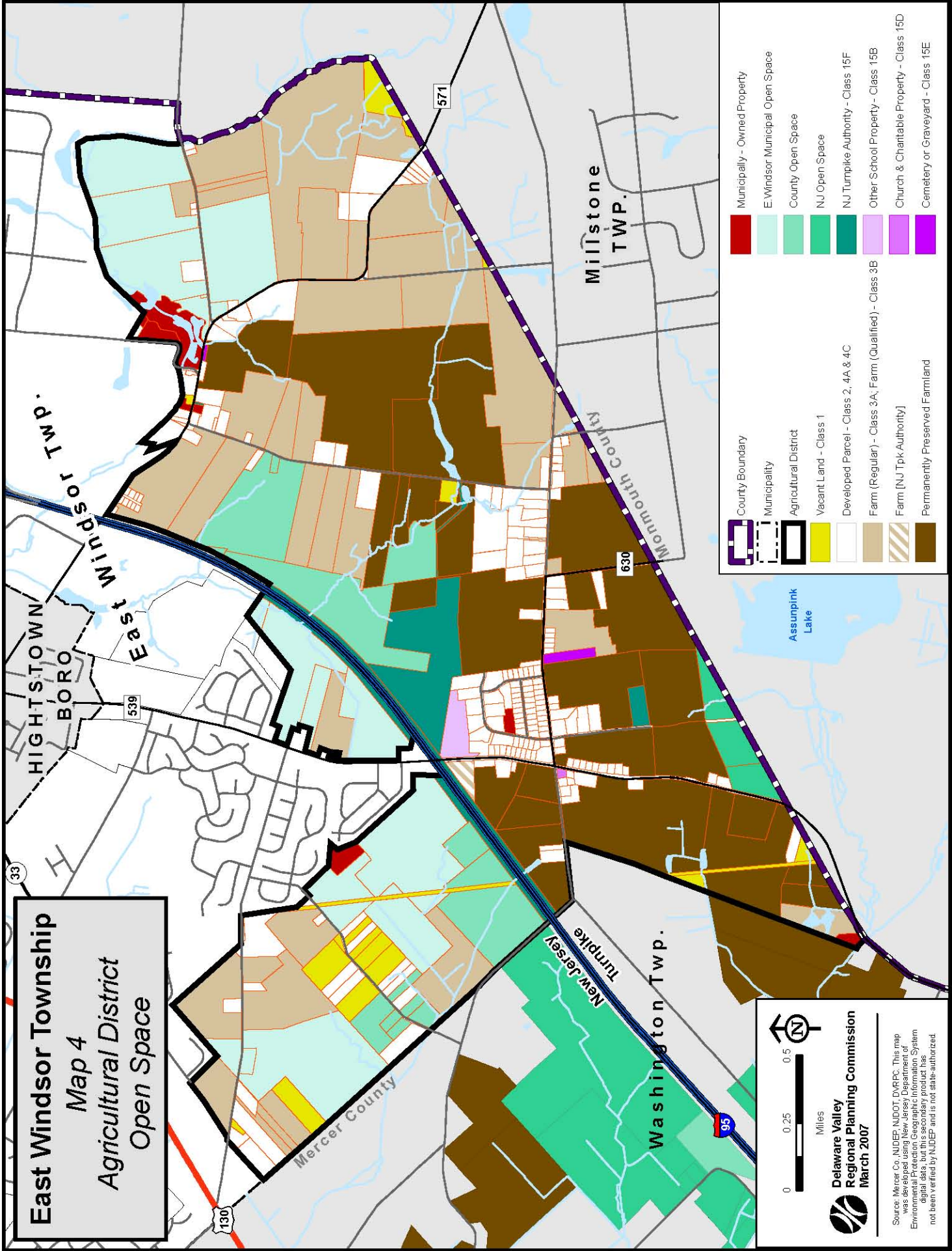
Number Block	Lot	Number Block	Lot
1	30	12	49
2	30	12	50
3	30	12	51
4	22	8	52
5	22	5	53
6	22	3	54
7	22	2	55
8	31	8	56
9	31	9	57
10	31	25	103
11	31	25	104
12	31	25	105
13	31	25	106
14	20	06	3
15	21	3	63
16	21	4	01
17	32	6	65
18	32	5	66
19	32	4	67
20	32	8	68
21	32	10	69
22	32	11	70
23	32	13	71
24	32	13	72
25	32	17	73
26	32	5	74
27	32	14	75
28	31	16	76
29	31	25	01
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31	31	17	79
32	31	18	80
33	31	19	81
34	31	21	82
35	31	20	83
36	31	3	01
37	34	3	86
38	34	2	87
39	34	2	88
40	31	24	89
41	31	24	90
42	31	24	91
43	31	24	92
44	31	24	93
45	30	18	03
46	30	18	04
47	30	27	01
48	30	31	95

Developed Land  
 Developable  
 Protected Lands  
 Environmental Constraints

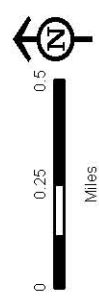
  
  
**Delaware Valley  
Regional Planning Commission**  
 March 2007

Source: NJDEP, NJDOT, DVRPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state-authorized.

**East Windsor Township**  
**Map 4**  
**Agricultural District**  
**Open Space**



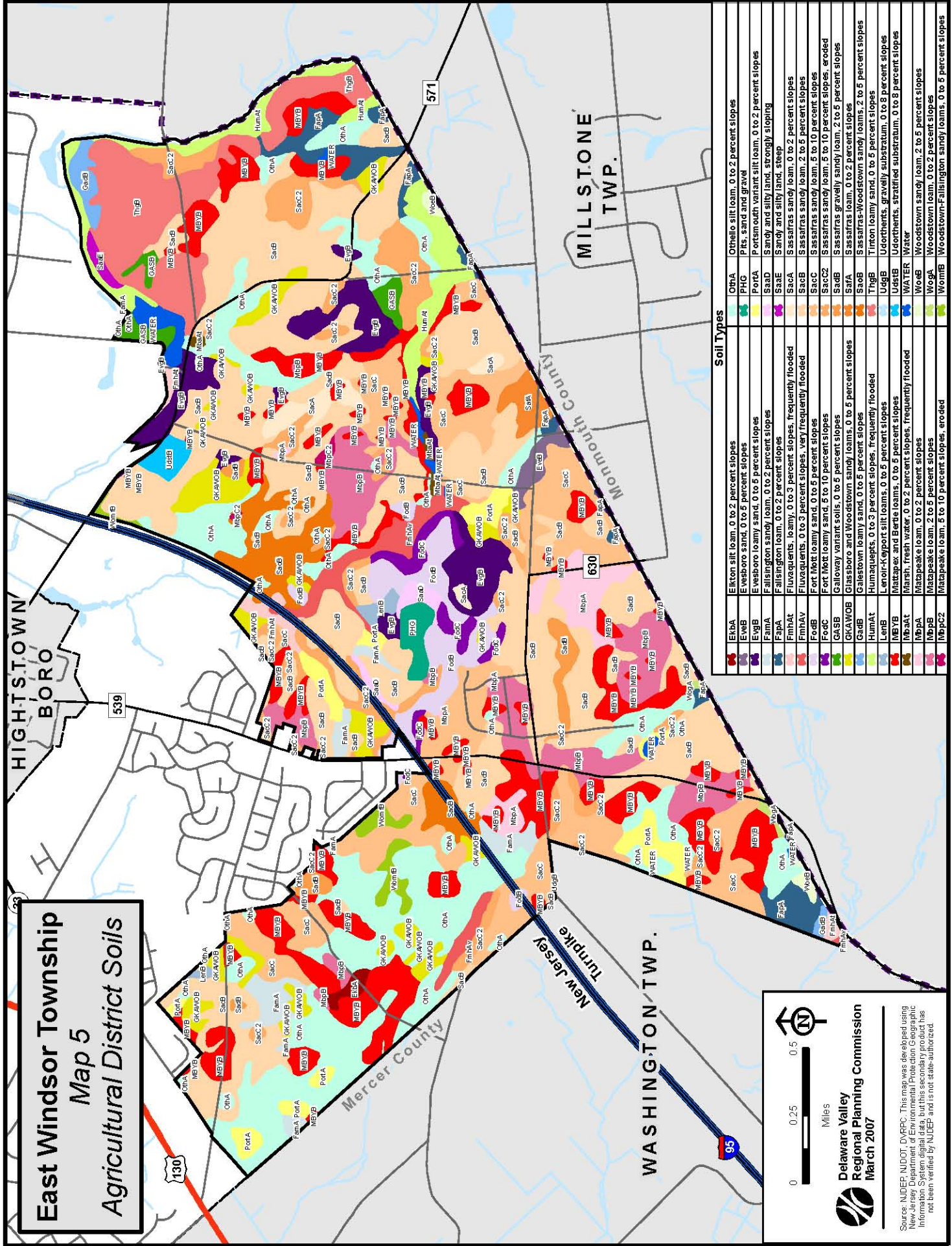
	County Boundary		Municipally - Owned Property
	Municipality		E Windsor Municipal Open Space
	Agricultural District		County Open Space
	Vacant Land - Class 1		NJ Open Space
	Developed Parcel - Class 2, 4A & 4C		NJ Turnpike Authority - Class 15F
	Farm (Regular) - Class 3A, Farm (Qualified) - Class 3B		Other School Property - Class 15B
	Farm (NJ Tpk Authority)		Church & Charitable Property - Class 15D
	Permanently Preserved Farmland		Cemetery or Graveyard - Class 15E



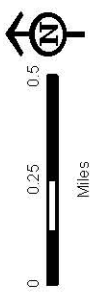
**Delaware Valley**  
**Regional Planning Commission**  
**March 2007**

Source: Mercer Co. NJDEP, NJDOT, DAVPPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state-authorized.

# East Windsor Township Map 5 Agricultural District Soils



Soil Types	
	EIkBa Elkon silt loam, 0 to 2 percent slopes
	EveB Evesboro sand, 0 to 5 percent slopes
	EvgB Evesboro loamy sand, 0 to 5 percent slopes
	FamA Fallington sandy loam, 0 to 2 percent slopes
	FmHAt Fallington loam, 0 to 2 percent slopes, frequently flooded
	FmHAv Fallington loam, 0 to 3 percent slopes, very frequently flooded
	FodB Fort Mill loamy sand, 0 to 5 percent slopes
	FodC Fort Mill loamy sand, 5 to 10 percent slopes
	GaaB Galloway variant soils, 0 to 5 percent slopes
	GaaB2 Galloway variant soils, 0 to 5 percent slopes
	GaaB3 Galloway variant soils, 0 to 5 percent slopes
	GaaB4 Galloway variant soils, 0 to 5 percent slopes
	GaaB5 Galloway variant soils, 0 to 5 percent slopes
	GaaB6 Galloway variant soils, 0 to 5 percent slopes
	GaaB7 Galloway variant soils, 0 to 5 percent slopes
	GaaB8 Galloway variant soils, 0 to 5 percent slopes
	GaaB9 Galloway variant soils, 0 to 5 percent slopes
	GaaB10 Galloway variant soils, 0 to 5 percent slopes
	GaaB11 Galloway variant soils, 0 to 5 percent slopes
	GaaB12 Galloway variant soils, 0 to 5 percent slopes
	GaaB13 Galloway variant soils, 0 to 5 percent slopes
	GaaB14 Galloway variant soils, 0 to 5 percent slopes
	GaaB15 Galloway variant soils, 0 to 5 percent slopes
	GaaB16 Galloway variant soils, 0 to 5 percent slopes
	GaaB17 Galloway variant soils, 0 to 5 percent slopes
	GaaB18 Galloway variant soils, 0 to 5 percent slopes
	GaaB19 Galloway variant soils, 0 to 5 percent slopes
	GaaB20 Galloway variant soils, 0 to 5 percent slopes
	GaaB21 Galloway variant soils, 0 to 5 percent slopes
	GaaB22 Galloway variant soils, 0 to 5 percent slopes
	GaaB23 Galloway variant soils, 0 to 5 percent slopes
	GaaB24 Galloway variant soils, 0 to 5 percent slopes
	GaaB25 Galloway variant soils, 0 to 5 percent slopes
	GaaB26 Galloway variant soils, 0 to 5 percent slopes
	GaaB27 Galloway variant soils, 0 to 5 percent slopes
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	GaaB29 Galloway variant soils, 0 to 5 percent slopes
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	GaaB75 Galloway variant soils, 0 to 5 percent slopes
	GaaB76 Galloway variant soils, 0 to 5 percent slopes
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	GaaB78 Galloway variant soils, 0 to 5 percent slopes
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	GaaB84 Galloway variant soils, 0 to 5 percent slopes
	GaaB85 Galloway variant soils, 0 to 5 percent slopes
	GaaB86 Galloway variant soils, 0 to 5 percent slopes
	GaaB87 Galloway variant soils, 0 to 5 percent slopes
	GaaB88 Galloway variant soils, 0 to 5 percent slopes
	GaaB89 Galloway variant soils, 0 to 5 percent slopes
	GaaB90 Galloway variant soils, 0 to 5 percent slopes
	GaaB91 Galloway variant soils, 0 to 5 percent slopes
	GaaB92 Galloway variant soils, 0 to 5 percent slopes
	GaaB93 Galloway variant soils, 0 to 5 percent slopes
	GaaB94 Galloway variant soils, 0 to 5 percent slopes
	GaaB95 Galloway variant soils, 0 to 5 percent slopes
	GaaB96 Galloway variant soils, 0 to 5 percent slopes
	GaaB97 Galloway variant soils, 0 to 5 percent slopes
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	GaaB99 Galloway variant soils, 0 to 5 percent slopes
	GaaB100 Galloway variant soils, 0 to 5 percent slopes



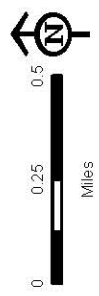
Delaware Valley  
Regional Planning Commission  
March 2007

Source: NJDEP, NJDOT, DVRPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state-authorized.

**East Windsor Township**  
**Map 6**  
**Agricultural District**  
**Soil Quality**

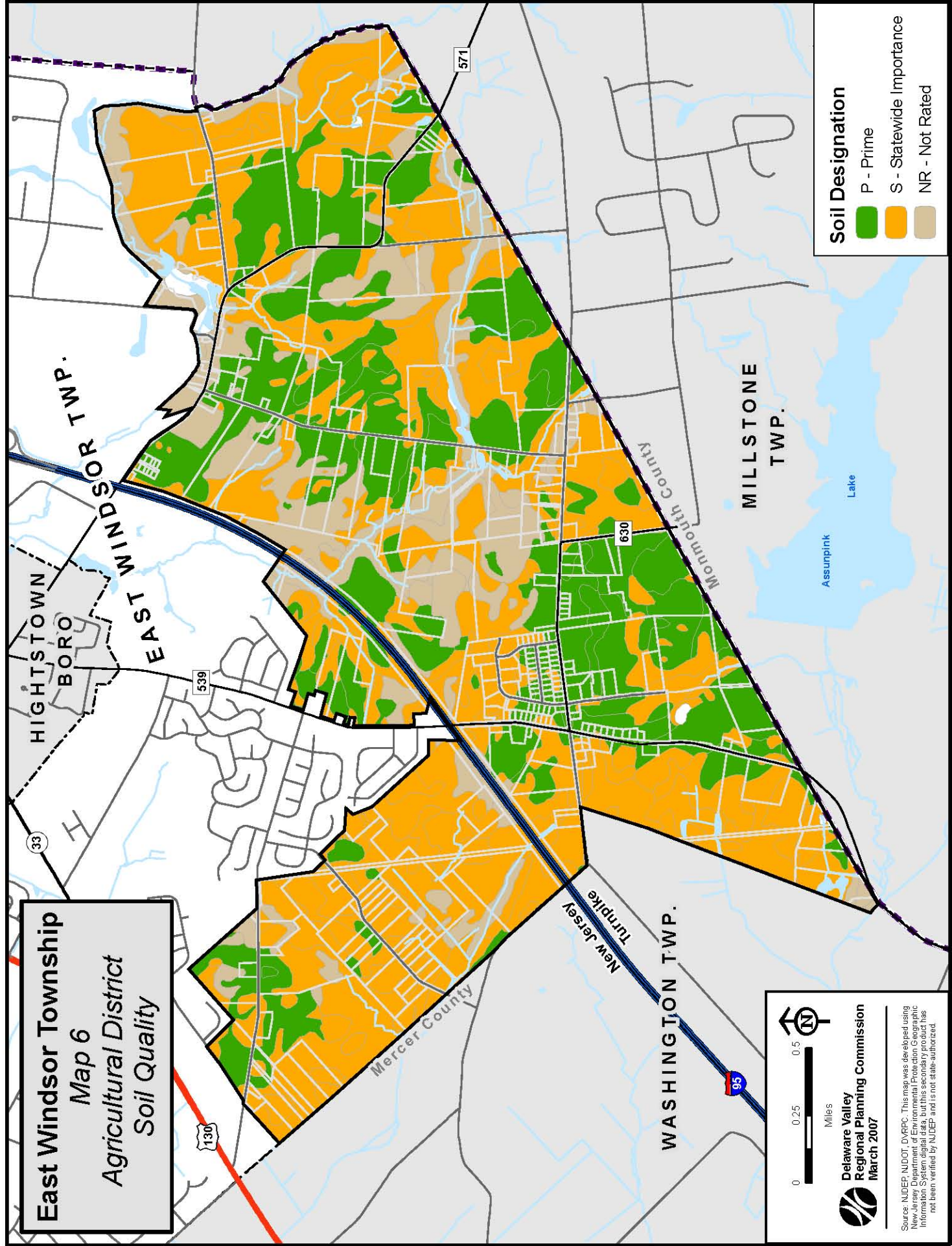
**Soil Designation**

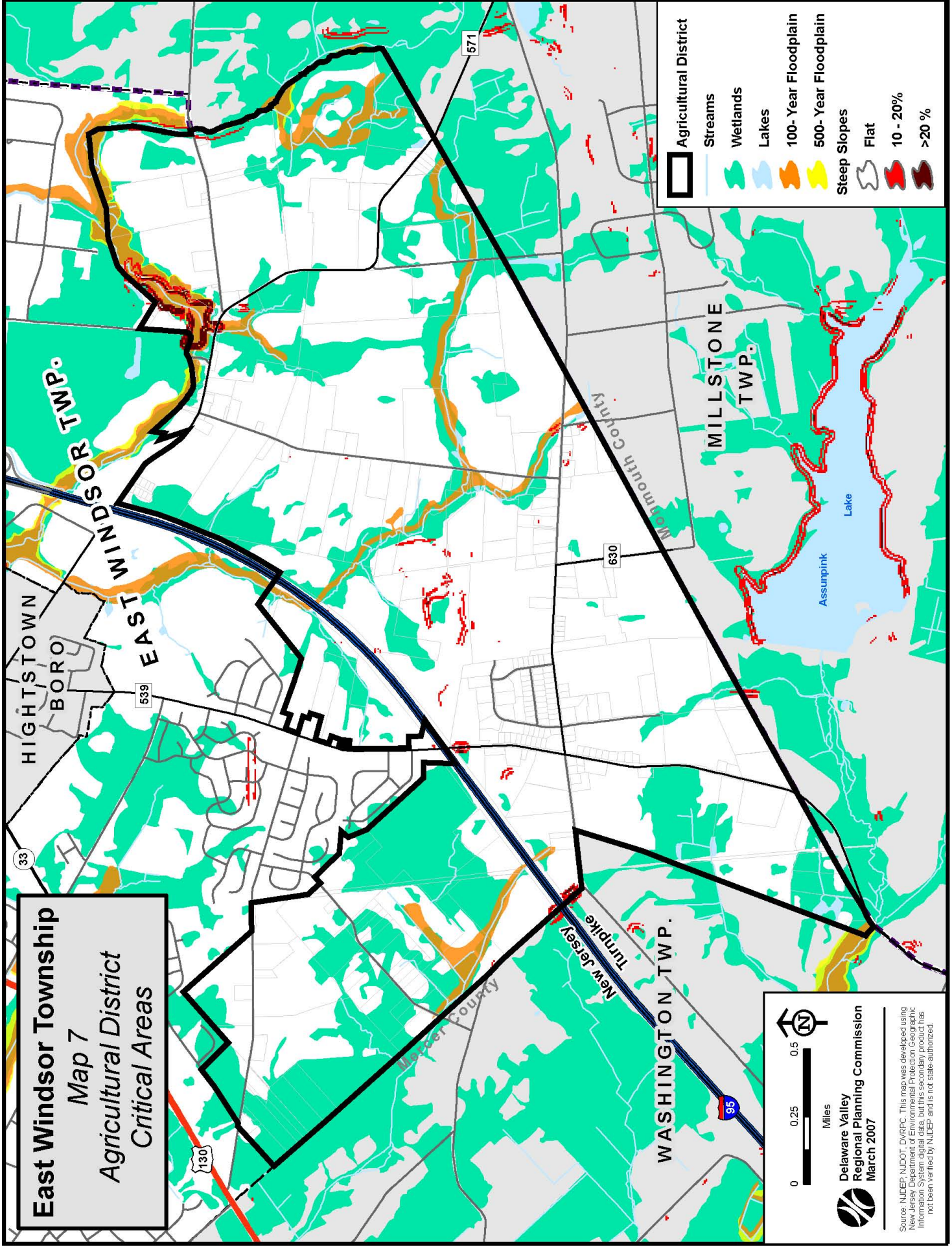
- P - Prime
- S - Statewide Importance
- NR - Not Rated



 Delaware Valley  
Regional Planning Commission  
March 2007

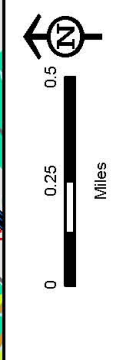
Source: NJDEP, NJDOT, DVRPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state-authorized.





**East Windsor Township**  
**Map 7**  
**Agricultural District**  
**Critical Areas**

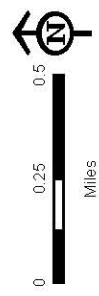
- Agricultural District
- Streams
- Wetlands
- Lakes
- 100-Year Floodplain
- 500-Year Floodplain
- Steep Slopes
- Flat
- 10 - 20%
- >20%



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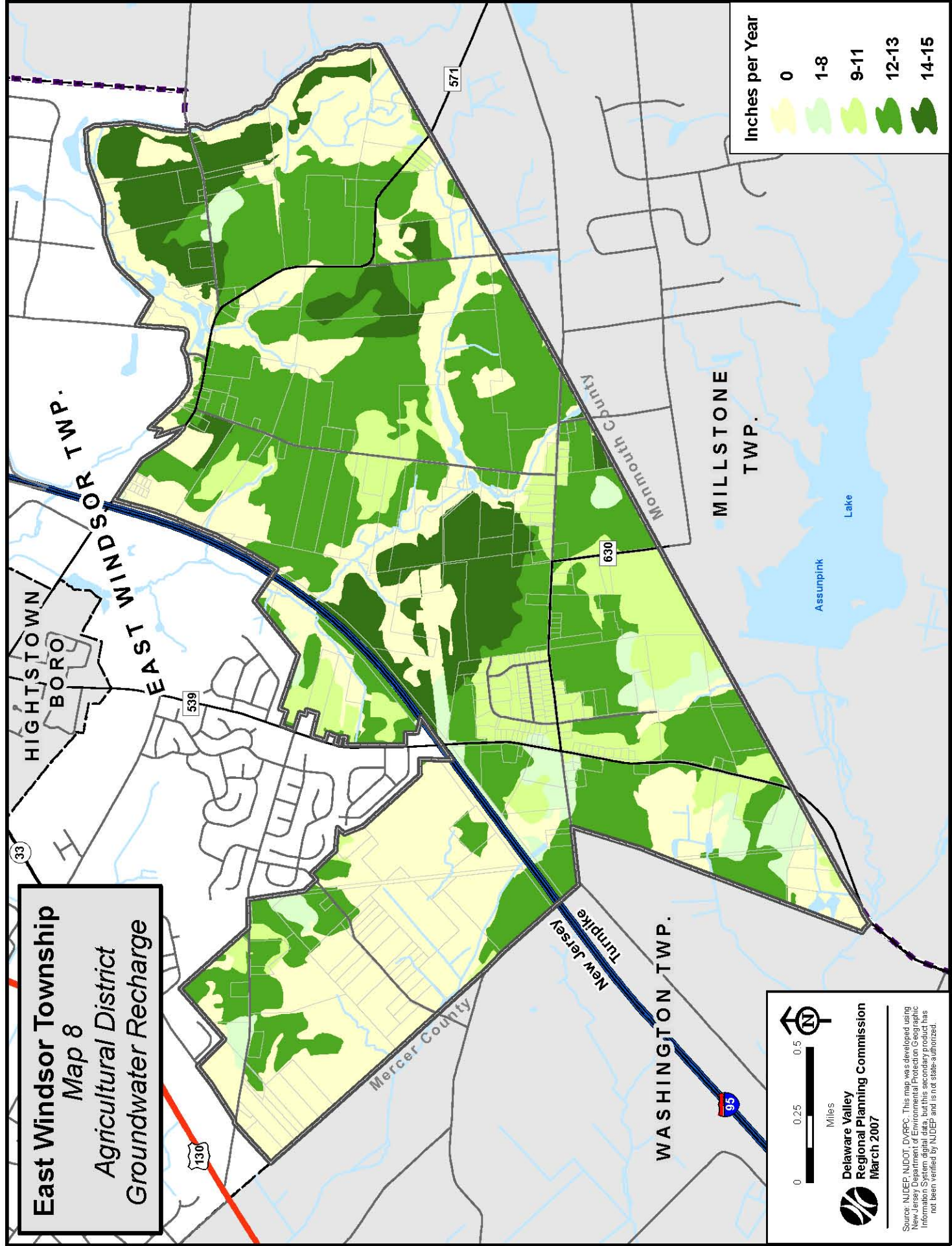
Source: NJDEP, NJDOT, DVRPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state-authorized.

**East Windsor Township**  
**Map 8**  
**Agricultural District**  
**Groundwater Recharge**

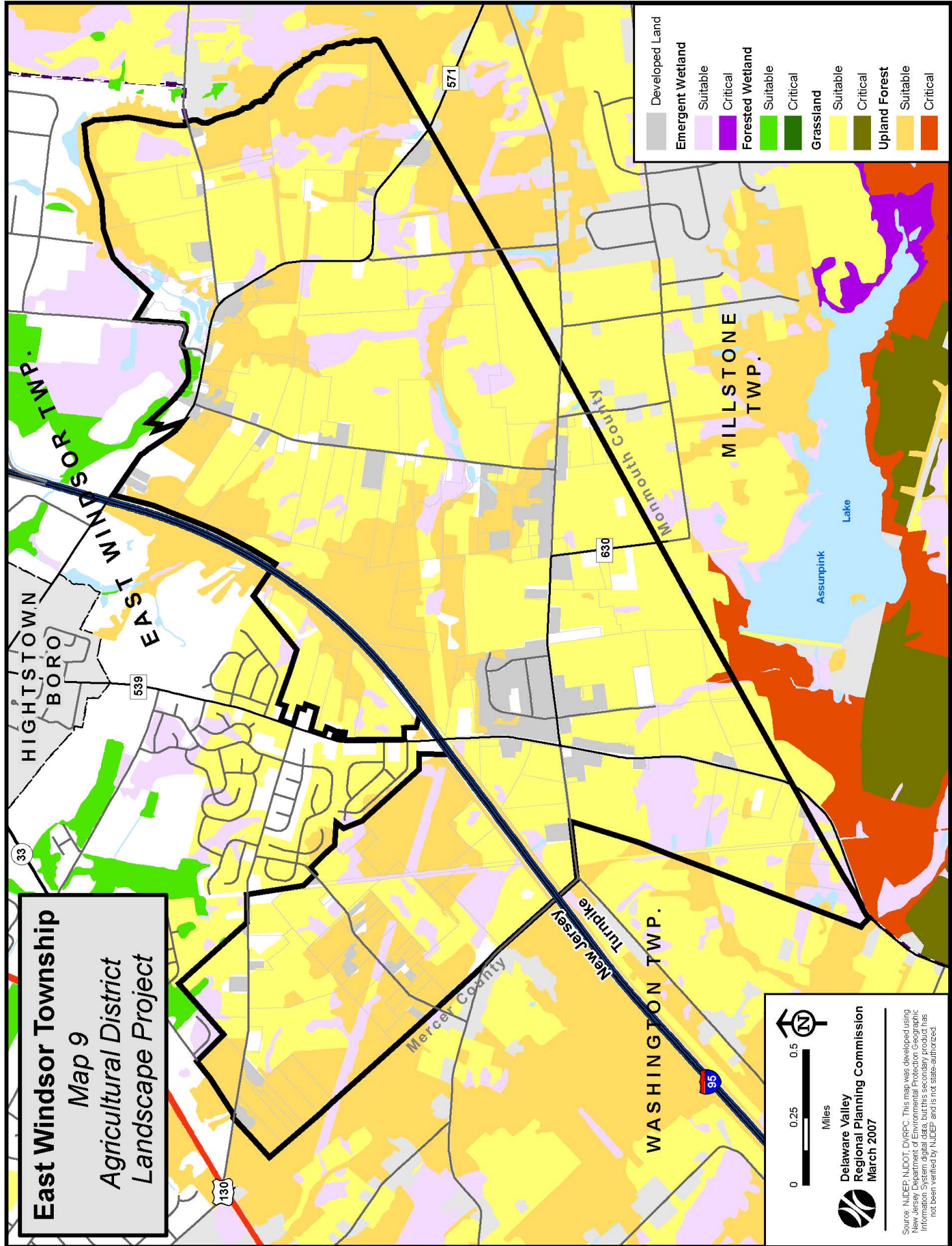


**Delaware Valley**  
**Regional Planning Commission**  
**March 2007**

Sources: NUDAP, NJDOT, DWRPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NUDAP and is not state-authorized.



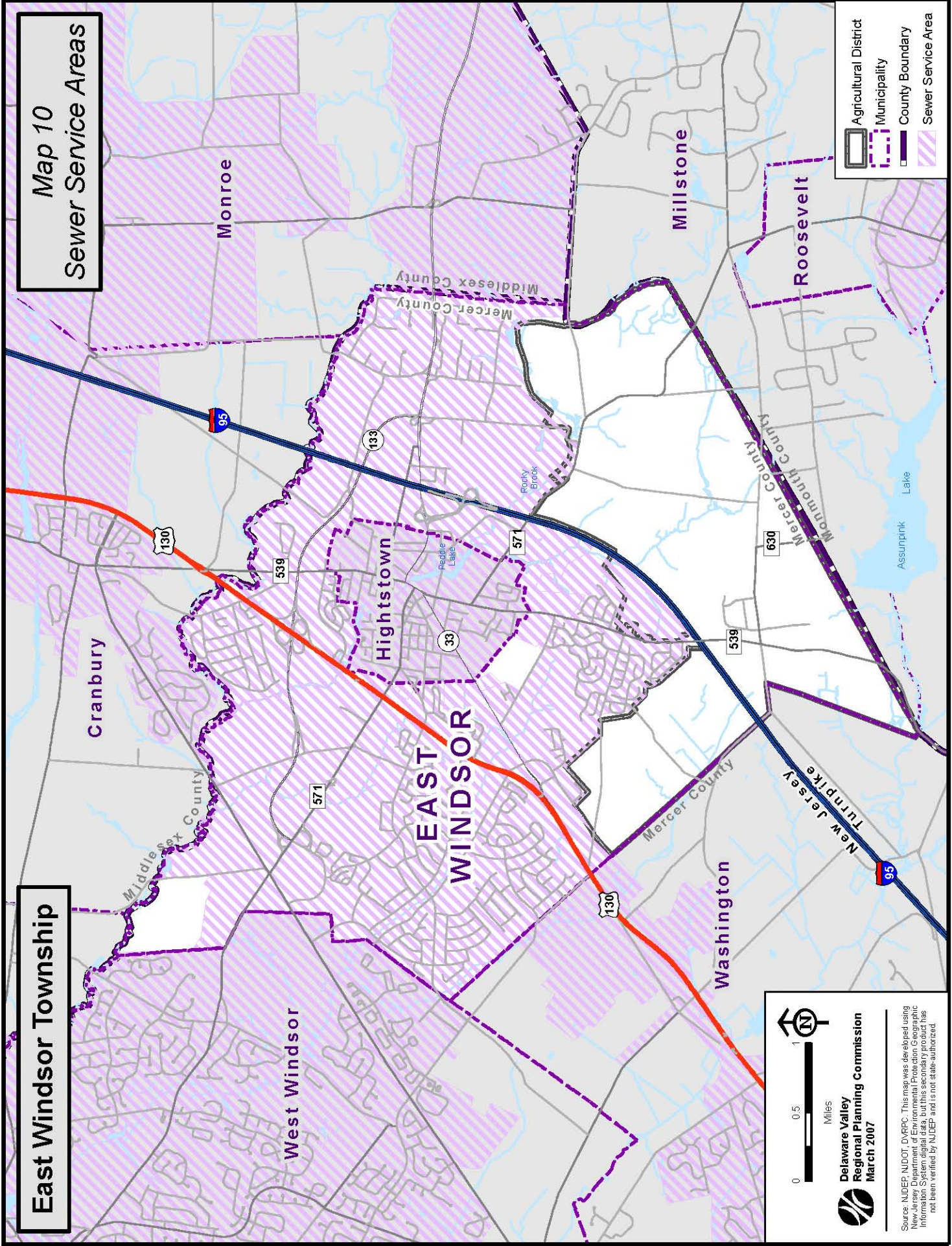
**East Windsor Township**  
 Map 9  
 Agricultural District  
 Landscape Project





**Map 10**  
**Sewer Service Areas**

**East Windsor Township**



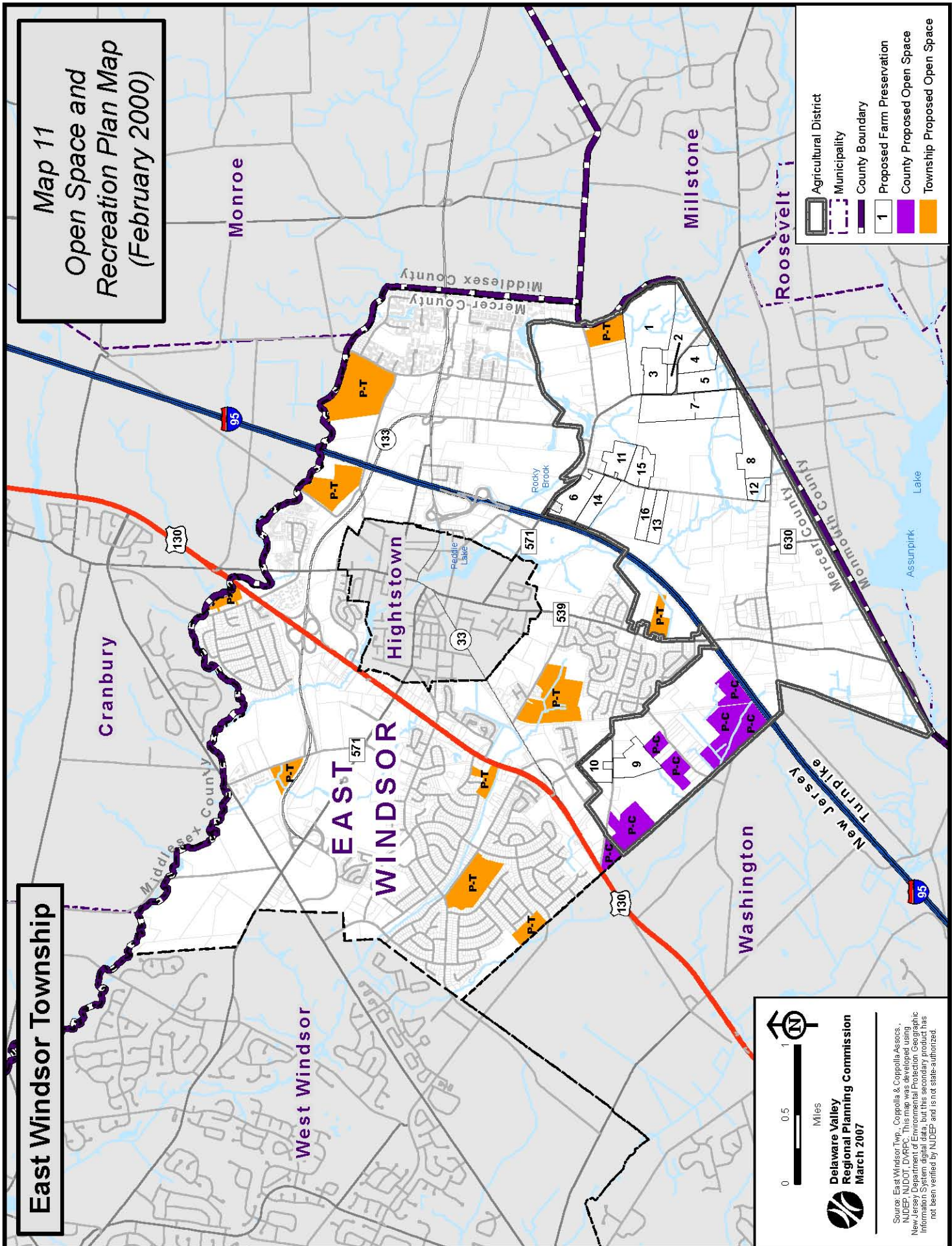
0 0.5 1 Miles

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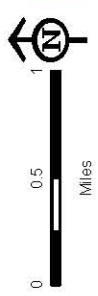
Source: NJDEP NJDOT, DVRPC. This map was developed using New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NJDEP and is not state-authorized.

# East Windsor Township

# Map 11 Open Space and Recreation Plan Map (February 2000)



	Agricultural District
	Municipality
	County Boundary
	Proposed Farm Preservation
	County Proposed Open Space
	Township Proposed Open Space



Delaware Valley Regional Planning Commission  
March 2007

Source: East Windsor Twp., Coppola & Coppola Assoc., NIDEP NJDOT, DVRPC. This map uses geospatial information from the New Jersey Department of Environmental Protection Geographic Information System digital data, but this secondary product has not been verified by NIDEP and is not state-authorized.

# DELAWARE VALLEY REGIONAL PLANNING COMMISSION

## Publication Abstract

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**Title:** **Agricultural Zoning Analysis  
for East Windsor Township,  
Mercer County, New Jersey**

**Date Published:** **March 2011**  
**Publication No.** **11048**

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**Geographic Area Covered:** East Windsor Township, Mercer County, New Jersey

**Key Words:** Agriculture, agricultural zoning, *Bailes v. Township of East Brunswick*, conservation, downzoning, East Windsor Township, environment, farming industry, farmland, farmland preservation, land preservation, master planning, Mercer County, municipal planning, *New Jersey Farm Bureau v. Township of East Amwell*.

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### ABSTRACT

This publication assesses the planning and legal circumstances of adopting agricultural zoning to protect a municipality's agricultural industry and its preserved farms. An overview of farmland preservation efforts made by East Windsor Township in Mercer County, New Jersey, is presented. The degree of the township's vulnerability to legal challenge, if East Windsor decides to rezone its agricultural preservation area, is examined fully, with the evaluation including discussion of key issues in downzoning controversies and necessary planning requirements as a basis for downzoning. Two New Jersey court cases – *New Jersey Farm Bureau v. Township of East Amwell* and *Bailes v. Township of East Brunswick* are summarized and analyzed in detail and lessons are drawn from their differing outcomes upon appeal. Specific recommendations are made that will reduce the threat of legal challenge or the cost of defending such a challenge in East Windsor Township, drawing upon the guidance of the lead attorney for the East Amwell case. Other recommendations are made about strengthening the understanding of farm value for the community and involving farmers in economic planning for the township.

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