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Ztrinsky v. Cranbury
Morris v. Cranbury
Barfield v. Cranbury

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1984

Defendants

Trial Brief on Transfer of Development Credits

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LAWRENCE ZIRINSKY,

Plaintiff,

v.

THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation and THE PLANNING BOARD of THE TOWNSHIP OF CRANBURY,

Defendants.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION:
MIDDLESEX COUNTY

Docket No. L 079309-83 P.W.

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JOSEPH MORRIS and ROBERT MORRIS,

Plaintiffs,

v.

TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A Municipal Corporation of the State of New Jersey

Defendant.

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GARFIELD & COMPANY,

Plaintiff,

v.

MAYOR AND THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY, A Municipal Corporation and the Members thereof; PLANNING BOARD OF THE TOWNSHIP OF CRANBURY, and the members thereof,

Defendants.

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# TRIAL BRIEF ON TRANSFER OF DEVELOPMENT CREDITS

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CRANBURY DEVELOPMENT CORPORATION, A Corporation of the State of New Jersey,

Plaintiff,

v.

CRANBURY TOWNSHIP PLANNING BOARD and the TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

Defendants.

Docket No. L59643-83

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BROWNING-FERRIS INDUSTRIES OF SOUTH JERSEY, INC., A Corporation of the State of New Jersey, RICHCRETE CONCRETE COMPANY, a Corporation of the State of New Jersey, and MID-STATE FILLIGREE SYSTEMS, INC., A Corporation of the State of New Jersey,

Plaintiffs,

v.

CRANBURY TOWNSHIP PLANNING BOARD and THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY,

Defendants.

Docket No. L 058046-83 P.W.

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URBAN LEAGUE OF GREATER NEW BRUNSWICK,

Plaintiff,

v.

THE MAYOR and COUNCIL OF THE BOROUGH OF CARTERET, et al.,

Defendants.

CHANCERY DIVISION: MIDDLESEX COUNTY

Docket No. C 4122-73

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CRANBURY LAND COMPANY, a New Jersey Limited Partnership,

Plaintiff,

v.

CRANBURY TOWNSHIP, A Municipal Corporation of the State of New Jersey located in Middlesex County, New Jersey,

Defendant.

Docket No. L 070841-83

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TOLL BROTHERS, INC., A Pennsylvania Corporation,

Plaintiff,

Docket No. L 005652-84

v.

THE TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, A Municipal Corporation of the State of New Jersey, THE TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY and THE PLANNING BOARD OF THE TOWNSHIP OF CRANBURY,

Defendants.

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## STATEMENT OF THE CASE

After the New Jersey Supreme Court's reversal and remand of Urban League of Greater New Brunswick v. Borough of Carteret in Mount Laurel II, see Southern Burlington County N.A.A.C.P. v. Mount Laurel Township (Mount Laurel II), 92 N.J. 158 (1983), rev'g, 170 N.J. Super. 461 (App. Div. 1979), the defendant Cranbury Township adopted a revised zoning ordinance on July 25, 1983. Thereafter various landowners and developers brought a series of actions against Cranbury Township, seeking to invalidate the provisions of the zoning ordinance dealing with transfer of development of credits as unauthorized by law and invalid under the Mount Laurel doctrine. Morris v. Cranbury Township, Dkt. No. L-054117-83 PW (Complaint filed Aug. 23, 1983); Garfield & Co. v. Mayor & Township Committee of Cranbury Township, No. L-055956-83 PW (Complaint filed Sept. 7, 1983); Browning-Ferris Industries of South Jersey, Inc. v. Cranbury Township Planning Board, No. L-58046-83 PW (Complaint filed Sept. 14, 1983); Cranbury Township Development Corp. v. Cranbury Township Planning Board, No. L-59643-83 PW (Complaint filed Sept. 16, 1983); Cranbury Land Co. v. Cranbury Township, No. L-070841-83 PW (Complaint filed Nov. 9, 1983). These actions have been consolidated for trial with the remand in Urban League of Greater New Brunswick v. Borough of Carteret, in which the trial court will determine the extent of Cranbury Township's fair share obligation and whether the revised ordinance adopted by the Township on July 25, 1983, fulfills that obligation.

The trial is scheduled for March 19, 1984. This trial brief addresses the issues surrounding the validity of the revised ordinance's provisions permitting the transfer of development credits.

## STATEMENT OF FACTS

On July 24 1983, the Township Committee of the Township of Cranbury adopted a new comprehensive zoning ordinance known as "The Land Development Ordinance of Cranbury Township" (hereinafter the "ordinance" or "Zoning Ordinance"). As part of its provisions, the ordinance adopted the zoning technique known as transfer of development credits. The ordinance created an A-100, Agricultural Zone. In the A-100 zone, the only permitted uses of note are agriculture and single-family dwellings with a minimum lot size of six (6) acres. See Zoning Ordinance §§150-13, 150-15(A)(1). However, the ordinance permits an owner of land in the A-100 zone, in lieu of developing his or her land, to "transfer its development potential or credit to the owner of any land in the PD-MD and PD-HD Zones, for development in accordance with the regulations applicable in such zones." Id. § 150-16.

In order to take advantage of his option, an owner of land in the Agricultural Zone must meet certain requirements. First, the owner must submit a hypothetical subdivision plat containing specified information to enable the township zoning authorities to determine the number of development credits to which the owner is entitled. Id. § 150-16(A). After the number of development credits which the owner may transfer has been determined and the transfer approved, the owner must

file a "deed restriction, in a form acceptable to the Planning Board attorney, running with the land from which the development credits are proposed to be transferred and restricting such land to agricultural use and farm buildings in perpetuity." Id. § 150-16(B). The deed restrictions so filed are to be enforceable by specific performance at the instance of either the township or any individual and are to be recorded with the Clerk of Middlesex County. Id.

In the PD-MD, Planned Development-Medium Density Zone, the permitted uses include single-family dwellings on a minimum of two (2) acre lots. Id^ §§ 150-26(A), 150-28(A)(1). Planned developments, including a mix of single-family dwellings, duplexes, townhouses and apartments, are also permitted as a conditional use subject to certain requirements. Id. § 150-27(B). One of these requirements provides for a permitted gross density of one (1) dwelling unit per two (2) acres. See id. § 150-27(B)(3). However, this gross density can be increased up to three (3) dwelling units per acre with the purchase or transfer of transferable development credits from the A-100, Agricultural Zone. Id. Additional density increases are allowed at a rate of one (1) dwelling per unit per acre for each development credit transferred. Id.

In the PD-HD, Planned Development-High Density Zone, the ordinance again provides for single-family dwellings on

a minimum of two (2) acre lots as a permitted use. Id. §§ 150-29(A), 150-31(A)(1). Planned developments, similar to those permitted in the PD-MD Zone, are permitted as a conditional use in the PD-HD Zone, with a permitted gross density of one (1) dwelling unit per two (2) acres. Id. § 150-30(B)(3). The permitted gross density of a planned development can be increased up to four (4) dwelling units per acre through the purchase or transfer of development credits from the Agricultural Zone. Id. Again, additional density increases are permitted at the rate of one (1) dwelling unit per acre for each development credit purchased or transferred. Id.

The regulations for the PD-HD Zone also include density bonuses to encourage developers of planned developments to provide low and moderate income housing. By providing lower income housing, a developer may receive a density bonus increase equal to one (1) additional dwelling unit per acre "above the maximum otherwise permitted in the PD-HD district." Id. § 150-30(B)(11). Moreover, where the density bonus raises the gross density from four (4) dwelling units per acre to five (5) dwelling units per acre, at least fifteen (15) percent of all the units in the planned development must consist of low and moderate income housing. Id.

## ARGUMENT

### POINT I

LIBERALLY CONSTRUING THE POWERS GRANTED MUNICIPALITIES BY THE MUNICIPAL LAND USE LAW, CRANBURY TOWNSHIP ENJOYS IMPLIED AUTHORITY TO USE TRANSFER OF DEVELOPMENT CREDITS (TOC(S)) TO ACCOMPLISH THE STATUTORY PURPOSE OF CONSERVING AGRICULTURAL LANDS FOR THE BENEFIT OF ALL NEW JERSEY CITIZENS.

#### A. Importance Of Farmland Preservation And Use Of TDCs To Further Such Preservation.

Between 1960 and the year 2000, an estimated forty-seven million acres of farmland will be developed. Rose, "The Mount Laurel II Decision: Is It Based on Wishful Thinking?" 12 Real Estate L.J. 115, 121 (1983). Much of this land will be prime agricultural land, which is attractive to developers due to its good drainage, slight slopes and resistance to erosion. Id. However, this decrase in the amount of farmland may well have adverse impacts on the nation's capacity to produce food and fibre, and to provide exports for a healthy international trade balance. Id. at 120-21.

These national concerns are reflected in New Jersey's state policy favoring the preservation of agricultural lands. The New Jersey legislature has found and declared that "the preservation of agricultural open space and the retention of agricultural activities would serve the best interests of all citizens of this State by insuring the numerous social, economic and environmental benefits which accrue from the continuation

of agriculture in the Garden State." N.J. Stat. Ann. § 4:lB-2a) (West Cum. Supp. 1983) (New Jersey Agricultural Preserve Demonstration Act). The legislature further found that agriculture constitutes "a vital and benevolent use of the land which is . . . rapidly disappearing in this, the most densely populated and highly urbanized State in the nation." Id. § 4:lB-2(b). In line with these findings, the legislature has concluded that "it is both necessary and desirable to implement additional policies, including the creation of an agricultural preserve, designed to provide for . . . preservation and retention" of agricultural lands. Id. § 4:lB-2(c).

A federal study recently recommended that if a community wants to protect its farmland, it must find a way to deflect development away from productive agricultural land to areas where urban growth is more appropriate. National Agricultural Land Study, The Protection of Farmland; A Reference Guidebook for State and Local Governments 31 (Washington, D.C., U.S. Government Printing Office (1981), cited in Rose, supra, 12 Real Estate L.J. at 120-21 rin.18 & 19). The transfer of development credits technique serves as an innovative means of achieving this deflection. Transfer of development rights (TDR) and transfer of development credits (TDC) programs are designed primarily to prevent development of specified areas, e.g./historical landmarks, open space and agricultural lands,

by directing development elsewhere. Rose, "The Transfer of Development Rights: A Preview of an Evolving Concept.," 3 Real Estate L.J. 330, 350 (1975). Both the TDR and TDC techniques are based on the concept that development rights attributable to a particular piece of .land may be severed and transferred to another parcel. See City of Hollywood v. Hollywood, Inc., 432 So. 2d 1332, 1337 (Fla. 4th DCA 1983). The municipality implements a TDR or TDC plan by first designating (1) the area to be preserved (the "donor" or '"preservation" zone) and (2) the area or areas where the transferable development rights (TOR's) or transferable development credits (TDC's) granted to owners of land in the preservation zone may be received and put to use (the "receiving"::zones) . Preserva-- tion zone owners may either retain the TDR's or TDC's for use on land they own in the receiving zones, or they may sell TDR's or TDC's to developers of land in the receving zone. See Rohan, Zoning & Land Use Controls § 6.02[2][c] at 6-25 (1983). In this case, the A-100, Agricultural Zone, covering primarily those agricultural lands of Cranbury Township designated for "limited growth" by the State Development Guide Plan, constitutes the preservation zone. The PD-MD, Planned Development-Medium Density Zone, and PD-HD, Planned Development-High Density Zone, are the "receiving" zones.

In a "mandatory" TDR plan, zoning restrictions are

imposed mandating preservation of the "donor" zone in exchange for the automatic grant of TDR's. An example of a "mandatory" TDR program can be found in Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381. 385 N.Y.S.2d 5, appeal dismissed, 429 U.S. 990 (1976). A 1972 amendment to the New York City Zoning Resolution rezoned two private parks in an apartment complex as public parks and granted the owners; of the private parks transferable development rights useable in -other areas of midtown Manhattan designated as "receiving lots." The New York Court of Appeals invalidated the zoning amendment as an unreasonable exercise of the police power because it "destroyed the economic value of the property." 385 N.Y.S.2d at 12. The court emphasized that the transfer of development rights was "mandatory under the amendment." Id. ("By compelling the owner to enter an unpredictable real estate market to find a suitable receiving lot for the rights, or a purchaser who would then share the same interest in using additional development rights, the amendment renders uncertain and thus severely impairs the value of development rights before they were severed") (emphasis added). Thus, a municipality must not couple a mandatory TDR plan with harsh restrictions within the preservation zone, as the resulting scheme may violate fourteenth amendment rights of property owners. Marcus, "A Comparative Look at TDR, Subdivision Extractions and Zoning

As Environmental Preservation Panaceas: The Search for Dx. Jekyll Without Mr. Hyde," 1980 Urban Law Annual 3 46 (1981).

Cranbury Township has avoided this pitfall by adopting a TEC or "voluntary" TDR plan. This plan allows landowners in the farm preservation zone a reasonable use of their land for either agricultural purposes or large lot residential development. In addition, the plan WPkei participation by farmland owners in the transfer of their development credits purely voluntary. If, and only if, an owner of land in the preservation zone chooses to transfer his or her development credits, the ordinanace extracts, as a quid pro quo, the recordation of a restrictive farm preservation easement. A similar voluntary TDR plan for agricultural land preservation has been adopted by Montgomery County, Maryland. Burch & Ryals* "Land Use Controls: Requiem for Zoning and Other Musings on the Year 1982," 15 The Urban Lawyer 879, 892-94 (1983) (summarizing provisions of ordinance). Moreover, a voluntary TDR scheme designed to conserve beach front property was recently upheld against constitutional attack by a Florida appeals court. City of Hollywood v. Hollywood, Inc., supra, 432 So. 2d at 1337-38.

The TDC technique vsnplqyea by Cranbury Township enjoys several important advantages over the traditional zoning methods for preserving agricultural lands, namely large-lot zoning and zoning areas exclusively for agricultural use. Both large

lot zoning and exclusive agricultural zoning are subject to subsequent zoning amendments that release agricultural lands for development. By contrast, the restrictive farm preservation easement extracted by the Cranbury Township zoning ordinance in exchange for a voluntary transfer of development credits run with the land in perpetuity. In addition, the TDC technique provides the township with a third alternative to either the risk that very restrictive, exclusive agricultural zoning will be struck down as an unconstitutional "taking"[1] or the expensive proposition of purchasing farmland preservation easements. See Foster, "The Transferability of Development Rights," 53 U. Colo. L. Rev. 165 166-67 (1981).

Finally, the TDC technique counteracts the "windfalls and wipeouts" phenomenon created by the use of more traditional zoning methods. Whenever local government regulation restricts the right to develop certain properties, an important element of value of these lands is "wiped out." On the other hand, the remaining properties in the community enjoy an increase in value in proportion to the loss of development potential in the regulated areas, receiving a "windfall" in the process. See Marcus, supra, 1980 Urban Law Annual at 14. The sale of development credits by the property owners in the preservation zone is designed to mitigate the windfalls and wipeouts created by agricultural preservation zoning by forcing developers in

other areas to pay for these credits in order to build at additional densities. Id.

In short, the preservation of agricultural lands undertaken by the township is in accord with both national interests and state policy. The innovative TDC technique adopted by the township for accomplishing this objective serves to deflect urban and suburban growth away from prime agricultural lands while assuring that owners of land in the farm preservation zone are fairly compensated for the loss of the right to develop their properties in the future.

B. Implied Authority For The Use Of TDC's

The New Jersey Constitution mandates the liberal construction of municipal powers in the following language:

> The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. The powers of counties and such municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or by law.

N.J. Const, art. IV, § 11., fl 11 (1947). In light of this constitutional provision, laws granting authority to municipalities

are to be construed broadly and liberally. E.g., Home Builders League of South Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 137 (1979); Union County Park Commission v. County of Union, 154 N.J. Super. 213 , 227 (Law. Div. 1976) ("The intention of this provision was to reverse earlier judicial decisions that grants of power to political subdivisions be construed narrowly"), aff'd per curiam o.b., 154 N.J. Super. 125 (App. Div.), cert, denied, 75 N.J. 531 (1977). Moreover, in the Municipal Land Use Law, N.J.S.A. § 40:55D-l et seq. (West Cum£ Supp. 1983), the Legislature has explicitly adopted this principle of liberal construction. Id. § 40:550-92? State v. C.I.B. International, 83 N.J. 262, 273 n.6 (1980).

One of the express purposes of the Municipal Land Use Law (MLUL) is "[t]o provide sufficient space in appropriate locations for a varity of agricultural, residential, recreational, commercial and industrial uses and open space . . . according to their respective environmental requirements in order to meet the needs of all New Jersey citizens." N.. J.S.A. § 40:55 D-2(g) (West Cum. Supp. 1983). Another purpose is "[t]o promote the conservation of open space and valuable natural resources and to' prevent urban sprawl and degradation of the^environment through improper use of land." Id. § 40:55D-2(j). The statute grants municipalities broad powers to adopt zoning ordinances containing provisions that "regulate the

nature and extent of the use of land for trade, industry, residence, open space or other purposes." Id. §§ 40:550-62, 40:55D-65(a) (emphasis added). See Fischer v. Bedminster, 11 N.J. 194, 201-02 (1952) (upholding municipality's zoning ordinance prescribing five-acre minimum lots for residential construction in rural areas as a lawful and constitutional exercise of the municipality's power under zoning enabling act to regulate "the nature and extent of the uses of land").

* The transfer of development credits technique (hereinafter the TDC technique) merely amounts to a more creative means of regulating the extent to which agricultural land., and the lands in the "receiving" zones, may be developed. Although no provision of the Municipal Land Use law expressly authorizes Cranbury Township to employ the TDC technique, the power to use this technique may be necessarily or fairly implied from its express power to regulate "the nature and extent of the uses of land" for the statutory purpose of conserving agricultural lands.

While the question presented here is one of first impression in New Jersey, implied powers to regulate land subdivision and land use have previously been recognized by the New Jersey courts. In Divan Builders, Inc. v. Planning Board of Township of Wayne, 66 N.J. 582 (1975), the question presented was whether the Municipal Planning Act N.J.S.A. § 40:55-1.1 et seq. (West repealed 1976), authorized a municipality

to enact an ordinance empowering a planning board to condition subdivision approval upon a developer's installation of off-site drainage improvements. While N.J.S.A. § 40:55-1.21 (West repealed 1976) authorized the conditioning of subdivision approval on the installation of those improvements which "the municipal governing body may find necessary in the public interest," the statute made no specific reference to off-site improvements.

Nevertheless, the New Jersey Supreme Court determined that !'this omission does not preclude a determination that the Planning Act authorizes municipalities to adopt both on-site and off-site improvement ordinances." 66 N.J. at 595. Pointing to N.J. Const, art. IV, § VII, $ 11 (1947), and a statutory provision similar to N.J.S.A. § 40:55D-12 (West Cum. Supp. 1983), see N.J.S.A. § 40:55-1.3 (West repealed 1976), the court reasoned as follows:

> In our judgment, the constitutional and legislative direction to resolve questions of municipal authority broadly in favor of the local unit, compels the conclusion that, by necessary implication, N.J.S.A. 40:55-1.21 empowers a planning agency to require both on-site and off-site improvements of the physical character and type referred to in N.J.S.A. 40:55-1.20 and N.J.S.A. 40:55-1.21, including off-site improvements made necessary by reason

> of the subdivision's effect on lands other than the subdivision property, provided that the agency acts pursuant to a valid local ordinance containing suitable standards governing construction and installation of improvements.

Id. at 596 (emphasis added and citation omitted).

The court found this conclusion to be further buttressed by considerations; of public policy underlying the Municipal Planning Act. The court said:

> The public interest is no less substantial in the . . . context of [of off-site improvements] since in either case the alternative to developer installation of the required improvements is municipal construction at public expense. We are satisfied that the inclusion of off-site improvements in the authority granted by N»J.S.A. 40:55-1.21 comports with the overall legislative purpose to require developers in the first instance to assume the legitimate expenses of subdivision.

Id. at 596-97 (footnote omitted). It was not until after the Divan decision had been handed down that the state legislature enacted, as part of the MLUL, enabling legislation expressly authorizing ;; the extraction of off-site improvements from subdivision developers. See N.J.S.A. §§ 40:55D-39(a) and -42 (West Cum. Supp. 1983).

A broad view of a municipality's powers under zoning enabling legislation was likewise taken in State v. C.I.B. International, supra. In C.I.B. International, a borough adopted an amendment to its zoning ordinance requiring a landlord to obtain a new certificate of occupancy every time an apartment became vacant. The zoning amendment empowered the borough's building inspector to issue certificates of occupancy indicating compliance with both zoning code provisions and "such other ordinances of the Borough of Little Ferry as may be applicable." The defendant landlord re-rented an apartment without obtaining a certificate of occupancy, after issuance of the certificate was refused because the apartment's defective toilet flush system had not been repaired. In a prosecution for violation of the ordinance, the landlord argued that the ordinance was invalid because, inter alia, a municipal zoning ordinance could not be used to enforce health regulations applicable to rental housing.

Although the MLUL nowhere expressly provided for the use of a zoning ordinance to enforce housing regulations, the New Jersey Supreme Court upheld the ordinance. It set forth the following three requirements for determining whether the ordinance was a valid enactment:

> To be valid, "ordinances adopted under the zoning enabling act must bear a real and substantial relationship to the regulation of land within the municipality. They must

> also advance one of the several purposes specified in the enabling statute." . . . Finally, the zoning provision must advance an authorized purpose in a manner permitted by the Legislature . . . .

83 N.J. at 271-72 (citations omitted). While essentially conceding that the first two requirements had been met, the landlord focused its challenge on the third requirement.

The court found "direct authorization" for enforcing housing regulations in the zoning enabling law. Id. at 273. It pointed to authority for the "[e]stablish[ment], for particular uses or class of uses, [of] reasonable standards of performance and standards for the provision of adequate physical improvements . . . ." N.J.S.A. § 40:55D-65(d) (West Cum. Supp. 1983). It found the definition of "standards of performance" to be broad enough to encompass municipal health regulations governing rental housing. See id. § 40:55D-7. Consequently, a municipality could enforce its housing code as part of its zoning scheme, provided the "standards of performance" were reasonable. 83 N.J. at 273.

Justice Schreiber dissented, construing the term "standards of performance" as used in § 40:55D-65(d) as relating solely to noise levels, glare, levels of vibration, and the like. Id. at 278. The majority opinion responded to Justice Schreiber's construction of the term "standards of performance" by saying:

> Our Brother Schreiber's narroe interpretation of "standards of performance," post at 278 (Schreiber,- J. , dissenting) , is inconsistent with the constitutional mandate that "any law concerning municipal corporations * * * shall be liberally construed in their favor." N.J. Const. (1947), Art. IV, § 7, par. 11; see Divan Builders. Inc. v. Planning Bd. of Wayne Tp., 66 N.J. 582, 595, 334 A.2d 30 (1975); . . . The Legislature has explicitly adopted this principle of liberal construction for the Municipal Land Use Law. N.J.S.A. 40:55D-92. Such a construction permits a zoning ordinance to enforce "standards of performance" found in other existing ordinances.

Id. at 273 n.6 (some citations omitted).

Most recently, in Matter of Egg Harbor Associates (Bayshore Centre), 94 N.J. 358 (1983), the New Jersey high court concluded that the Department of Environmental Protection had the power under the Coastal Area Facility Review Act (CAFRA), N.J.S.A. §§ 13:18-1 et seq., to condition approval of a proposed development within the coastal zone on the construction of a certain percentage of low and moderate income housing units. Although acknowledging that the primary purpose of CAFRA was "to protect the unique and fragile coastal zones of the State," 94 N.J. at 364, the court found that the authority to impose "fair share" housing conditions could be implied from the Act's mandate that the coastal zone be "dedicated to those

kinds of land uses which promote the public health, safety and welfare." N.J.S.A. § 13:19-2 9West 1979).

In reaching this conclusion, the court said:

> Enabling statutes delegating to municipalities the power to enact ordinances to promote the health, safety, and general welfare in the context of land use regulation should be given "an expansive interpretation." . . . With respect to the scope of municipal land use regulations, the general welfare includes zoning for planned housing development for the elderly, Shepard v. Woodland Tp. Committee and Planning Bd., 71 N.J. 230, [237-38] (1976), and a trailer park for the elderly. Taxpayers Ass'n of Weymouth Tp. [v. Weymouth Tp., 80 N.J. 6, 32 (1976)] . . . .
>
> The message is clear. State and municipal bodies that have the power to control land use for the health, safety, and general welfare may use that power to create housing opportunities for the poor.

94 N.J. at 366-67 (emphasis added); see also Southern Burlington County, N.A.A.C.P. v. Mount Laurel Township (Mount Laurel II), 92 N.J. 158, 271 (1983) (in fulfilling Mount Laurel obligation, " inclusionary devices such as density bonuses and mandatory set-asides keyed to. the construction of lower income housing, are constitutional and within the zoning power of municipality").

With respect to Shepard and Taxpayers Association of

Weymouth Township, cited in support of the court's reasoning in Egg Harbor Associates, it should be noted that express authority for senior citizen community housing did not become effective until August 1976, well after the ordinances involved in those two decisions were enacted in 1973 and 1971, respectively. See MLUL, N.J.S.A. § 40:55D-2(_l) and -65(g) (West Cum. Supp. 1983). The New Jersey Supreme Court relied solely on the general welfare provision of the prior zoning enabling act, N.J.S.A. §§ 40:55-30 ©t seq. (West repealed 1976), in upholding the ordinances, gee Shepard v. Woodland Township Committee & Planning Board, supra, 71 N.J. at 237 & n.5; Taxpayers Association of Weymouth Township, supra, 80 N.J. at 36 52-54.

Two lower court decisions also support an expansive reading of a municipality's implied powers in the land use context. In Chrinko v. South Brunswick Township Planning Board, 77 N.J. Super* 594 (Law Div. 1963), the plaintiff developer contested the validity of two zoning ordinances permitting cluster or open space zoning. Under the terms of the ordinance, a subdivision developer could, with planning board approval, reduce minimum lot sizes by 20% to 30% and minimum frontages by 10% to 20%.if he deeded 20% to 30% of the subdivided tract for parks, school sites and other public purposes.

The court held that the municipality had the power to engage in cluster or density zoning by virtue of N.J.S.A. § 40:55-30 (West repealed 1976), providing that a municipality may

> »* * * regulate and restrict the height number of stories, and sizes of buildings, and other structures, the percentage of lot that may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the location and use and extent of use of buildings and structures and land for trade, industry, residence, or other purposes."

The court reasonsed as follows:

> Although the state zoning law does not in so many words empower municipalities to provide an option to developers for cluster or density zoning, such an ordinance reasonably advances the legislative purposes of securing open spaces, preventing over-crowding and undue concentration of population, and promoting the general welfare.

77 N.J. Super, at 601.

In support of this conclusion, the court emphasized the inadequacy of traditional zoning techniques to effectively deal with the problems of providing for adequate open space and sites for public facilities:

Zoning ordinances in rapidly growing municipalities may be founded on an out-moded concept that houses will be built one at a time for individual owners in accordance with zoning regulations, with latitude for variances in hardship or other exceptional cases, and that the municipality can take steps whenever warranted to acquire school, park and other public sites. Such a gradual and controlled development is not practicable in many municipalities today. Confronted with a subdivision plan for several hundred homes in a tract meeting all water drainage, sanitation and other conditions, a municipality must anticipate school needs but without lands set aside for that purpose; it must anticipate a large population concentration without recreation areas, parks or green spaces, or lands for firehouses or other public purposes. Cluster or density zoning is an attempted solution, dependent, as set up in the South Brunswick zoning ordinance, upon the agreement of the large-scale developer whose specific monetary benefit may be only that he saves on street installation costs.

Id. at 601-02. The court further found support for its decision in the "presumption of validity attaching to zoning as well as other legislation . . . and the liberal construction to be accorded to the powers of municipal corporations, including those granted by necessary or fair implication or incident to those expressly conferred/ under N.J. Const. Art. IV, § VII, par. 11." Id. at 602 (emphasis added).

It was not until some years after Chrinko was decided that the New Jersey legislature passed the Municipal Planned Unit Development Act of 1967, N.J.S.A. §§ 40:55-54 et seq. (West repealed 1976), expressly authorizing PUD cluster-type zoning. See also N.J.S.A. § 40:55D-65(c) (West Cum. Supp. 1983) (present authorization of PUD and cluster zoning). The Chrinko holding was expressly followed by the Maryland Court of Appeals in upholding a county resolution providing for cluster development under enabling legislation "almost identical in its relevant provisions" to that relied on in Chrinko. Prince George'^s County v. M & B Construction Corp., 267 Md. 338, 297 A.2d 683, 693T94 (1972) (resolution provided for the exercise by the county governing body of subdivision powers "well within such powers alreadyconferred upon it by the relevant enabling legislation)."

Finally, in Matlack v. Board of Chosen Freeholders of County of Burlington, 191 N.J. Super. 236 (Law Div. 1982), the court determined that the defendant county board of freeholders did not act beyond the powers conferred upon it by

the Pinelands Protection Act, N.J.S.A. §§ 13:18A-1 et seq., in deciding to purchase and sell Pineland Development Credits (PDC's) created by the state Pinelands Commission. Pursuant to N.J.S.A. § 13:18A-8 (West Cum. Supp. 1983), the Pinelands Commission drafted a comprehensive management plan (CMP) for land use in the Pinlands. The CMP adopted by the Pinelands Commission created a development credit program whereby landowners in restricted areas would be allocated credits that could be purchased by landowners in growth areas in order to gain bonus residential densities. The CMP envisioned that local governmental units would be the principal management entities for implementing the plan in line with the legislative directive that the CMP "[i]include a policy for the use of State and local police power responsibilities to the greatest extent possible." Id. § 13.-18A-8(d)(2).

After the CMP was approved, the Burlington County Board of Freeholders adopted a resolution creating the Pinelands Development Credit Exchange. The resolution authorized the Exchange to use the proceeds of a $2,000,000 bond issue to purchase PDC's in exchange for recorded conservation easements to run in perpetuity. The resolution further authorized the board of freeholders to sell PDC's in a public manner as provided by applicable statutes and to use the proceeds from these sales to buy additional PDC's or direct conservation easements.

In holding that the board of freeholders' purchase and sale of PDC's was not ultra vires, the court pointed to N.J. Const.

art. IV, § VII, 5 11 (1947), and N.J.S.A. § 13:18A-29 (West Cum. Supp 1983) , mandating a liberal construction of the Pinelands Protection Act. The court held that the power to buy and sell PDC's could be implied from the statutory directive encouraging the participation of local governments in the implementation of the CMP. 191 N.J. Super at 253 ("A 'fair implication[1] of the directive to implement the CMP is the power to buy and sell PDC's)."

In view of the above case authority,, the power to employ the transfer of development credits technique may be fairly or necessarily implied from, or may be considered incident to the township's express power to '^regulate the nature and extent of the use of land for trade, industry, residence, open space or other purposes." N.J.S.A. § 40:55D-65(a) (West Cum. Supp. 1983). Although the MLUL does not in so many words authorize employment of the TDC Technique, the use of the technique to deflect suburban growth away from the township's agricultural preservation zone reasonably advances the legislative purposes of conserving farmland, creating open, space, preventing urban sprawl and promoting the general welfare. Id. § 40:55D-2(a), (g) & (j). Because more traditional zoning techniques are inadequate to deal with the problem of effectively preserving agricultural lands in the face of burgeoning suburban growth, an expansive interpretation of the township's zoning powers is necessary to accomplish this objective, an objective in furtherance of express

state policy. See N.J.S.A. § 4A:lB-2 (West Supp. 1983).

That the TDC technique is a novel solution to the problem of farmland preservation should not preclude its use by municipalities. As the decisions in Divan, Shepard, Taxpayers Association of Weymouth Township and Chrinko demonstrate, New Jersey municipalities often have experimented with novel techniques of land use and. subdivision control long before state legislation expressly authorizing those techniques is finally enacted. Yet, these experiments have been upheld as valid exercises of the municipalities' zoning powers. As the New Jersey Supreme Court explained in upholding a local rent control ordinance as not ultra vires, the liberal rule of construction applied to municipal powers "reflects a need . . . that local government be equipped to deal with matters of local concern which, if left to state action, might not be met expeditiously or at all." Inganamort v. Borough of Fort Lee, 62 N.J. 521, 533 (1973).

Aside from the New Jersey authorities discussed above, at least one out of state court has held that municipal zoning authorities have implied power to utilize transferable development rights. In Dupont Circle Citizens Association v. District of Columbia Zoning Commission, 355 A.2d 550 (D.C. 1976), ;. , . the D.C. Zoning Commission approved a final application for a planned unit development calling for the sale and transfer of development rights from the Columbia Historical Society to the PUD developer in order to meet the floor area ratio:. (FAR)

requirements of the D.C. Zoning Regulations. As a result of the transfer of development rights, the total density of the PUD would be less than the maximum permitted in the applicable zoning. Moreover, the Columbia Historical Society, owner of the Christian Heurich Memorial Mansion located within the PUD, would be made more financially secure, thereby assuring its continued operation and the preservation of the historical mansion with its garden and open spaces. On appeal, the petitioner citizens[1] association argued that permitting the transfer of development rights to promote historical preservation constituted an "abuse or stretching of the Commission's authority."

In rejecting the association's contention that the D.C. Zoning Act did not permit the Commission to approve a transfer of development rights within a PUD, the D.C. Court of Appeals, after, noting that "petitioner provides us with, no legal support for its position," 355 A.2d at 556, pointed to the following two sections of the Act*, as authorizing the Commission's action:

> To promote the health, safety, morals, convenience, order, prosperity, or general welfare of the District of Columbia and its planning and orderly development as the national capital, the Zoning Commission created by section 5-412, is hereby empowered, in accordance with the conditions and procedures, specified in: sections 5-413 to 5-428, to regulate the location, height, bulk,, number of stories and size of buildings and other structures, the percentage of lot which may be occupied, the sizes of yards, courts, and other open spaces, the density of population, and the uses of buildings, structures,

> and land for trade, industry, residence, recreation, public activities, or other purposes . . . . [ § 5-413. ]
>
> . . . Such regulations shall be . . . designed to lessen congestion in the street, to secure safety from fire, panic, and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the undue concentration of population and the overcrowding of land, and to promote such distribution of population and of the uses of land as would tend to create conditions favorable to health, safety, transportation, prosperity, protection of property, civic activity, and recreational, educational, and cultural opportunities . . [§ 5-414.]

Id. The court then explained its holding as follows:

> [T]he Act . . . grants the Commission a broad general authority . . .
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> • • • •
>
> This grant of authority is not materially unlike the first three sections of the Standard State Zoning Enabling Act, drafted and distributed by the United States Department of Commerce in the 1920's. It represents a broad grant of authority with an itemization of the main purposes of zoning.

Id. (emphasis added & footnote omitted).

The New Jersey MLUL similarly grants Cranbury Township broad authority to "regulate the nature and extent of the use of

land for trade, industry, residence, open space or other purposes," N.J.S.A. § 40:55D-65(a), authority that can be used for any one or more of the purposes itemized in N.J.S.A. § 40:55D-2. The transfer of development credits provided for in the township's zoning ordinance represents a valid exercise of its broad grant of authority for the authorized purpose of agricultural preservation.

Out-of-state courts have also upheld the use of numerous other zoning techniques and growth controls as impliedly authorized by zoning enabling acts and other statutes. Examples include "slow growth" ordinances, Sturges v. Town of Chilinark, 380 Mass^ 246, 402 N.E.2d 1346, 1350-51 (1980) (ordinance limiting rate of issuance of building permits for residential construction over ten-year period upheld despite absence of express statutory language authorizing time controls); Beck v. Town of Raymond, 118 N.H. 793, 394 A.2d 847, 849 (1978) ("The power to restrict and regulate population density necessarily implies the authority to direct and control population growth"); Golden v. Planning Board of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, 146, appeal dismissed, 409 U.S. 1003 (1972) ("The power to restrict and regulate . . . includes within its grant, by way of necessary implication, the authority to direct the growth of population for the purposes indicated [in the statute], within the confines of the township"); special permits, Zykla v. City of Crystal, 283 Minn. 192, 167

N.W.2d 45, 49 (1969), "floating zones" (special detailed use districts of undetermined location in which the proposed kind, size and form of structures must be preapproved before being established at a particular location), Sheridan v. Planning Board of City of Stamford, 159 Conn. 1, 266 A.2d 396, 405 (1969) (langauge of city's zoning enabling act is sufficiently broad to create floating zones); Bellemeade Co. v. Priddle, 503 S.W.2d 734, 738 (Ky. 1973) (langage of Kentucky zoning enabling act is sufficiently broad to provide for floating zones in form of neighborhood development units); Costello v. Sieling, 223 Md. 24, 161 A.2d 824, 826 (1960), the imposition of parkland dedication requirements and in lieu fees on=subdividers, Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442, 446-47 (1965); Coulter v. City of Rawlins, 662 P.2d 888, 901 (Wyo. 1983) (power to adopt parkland dedication ordinance could be fairly implied from city's express powers to hold and acquire property for parks and to plan, zone and regulate development), and the levying of connection fees on. new development to offset the cost of projected water and sewer improvements. City of Arvada v. City & County of Denver, _____ Colo. _____, 663 P.2d 611, 614-15 (1983); Coulter v. City of Rawlins, supra, 662 P.2d at 900. Along with Dupont Circle, these out-of.-state authorities strongly indicate that Cranbury Township has implied authority to use the TDC technique to preserve its agricultural lands from the pressures of suburban growth.

Nor does Cranbury Township lack the authority to acquire and hold restritive farm preservation easements. The New Jersey Constitution expressly authorizes municipalities to acquire all easements upon private property as may be needed for any public use. , N.J. Const, art. IV, § VI, $ 3 (1947). In Matlack v. Burlington County Board of Chosen Freeholders, supra, the court impliedly held that the county had the power under this constitutional provision to acquire pinelands, conservation easement. 191 N.J. Super, at 258.

To summarize Cranbury Township enjoys the power to use the TDC technique for the purpose of agricultural land preservation by necessary or fair implication from its broad authority under the MLUL to "regulate the nature and extent of the use of land." This conclusion finds, support in the liberal rule of construction mandated by N.J. Const, art. IV, VII, 5 11 (1947) and N.J.S.A. § 40:55D-92 (West Cum. Supp. 1983), state policy favoring agricultural land preservation, and the failure of more traditional zoning techniques to effectively conserve farmland.

POINT 2

THE TDC PROVISIONS OF THE TOWNSHIP'S ZONING ORDINANCE ARE CONSISTENT WITH THE TOWNSHIP'S MT. LAUREL OBLIGATION, WHICH PERMITS ZONING FOR AGRICULTURAL AND OPEN SPACE PRESERVATION SO LONG AS A MUNICIPALITY ADEQUATELY PROVIDES FOR ITS FAIR SHARE OF LOW AND MODERATE INCOME HOUSING IN THE TOWNSHIP'S "GROWTH" AREA

In the landmark decision of Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I), 67 N.J. 151 (1975), the New Jersey Supreme Court held that "developing municipalities" must provide realistic opportunities for the construction of low and moderate income housing by eliminating exclusionary provisions in their zoning ordinances. In Southern Burlington County N.A.A.C.P. v. Mount Laurel Township (Mount Laurel II), 92 N.J. 158 (1983), the court, expanded and strengthened the Mount Laurel doctrine. In addition to eliminating exclusionary barriers,, every community designated on the State Development Guide Plan (SDGP) as containing "growth areas" must take affirmative measures, such as the use of inclusionary zoning techniques, to provide its fair: share of low and moderate income housing. Nevertheless, the court in Mount Laurel II did not entirely preclude "growth" municipalities from zoning to preserve agricultural lands or open spaces so long as they otherwise met their fair share obligation. Moreover, the court specifically directed municipalities, containing both growth and nongrowth areas, such as Cranbury Township, to attempt to meet their fair

share obligation without stimulating high density residential development in their nongrowth areas. The transfer of development credits technique furthers rather than impedes the operation of the ordinance's inclusionary zoning technique, which is designed to meet the township's fair share obligation wholly within its growth area consistent with sensible planning. Consequently, the use of the TDC technique does not conflict with the township's Mount Laurel obligation.

In defining how a "growth" municipality may meet its Mount &aurel obligation, the New Jersey high court in Mount Laurel II stated as follows:

> Once a municipality has revised its land use regulations and taken other steps affirmatively to provide a realistic opportunity for the construction of its fair share of lower income housing, the Mount Laurel doctrine requires it to do no more. For instance, a municipality having thus complied, the fact that its land use regulations contain restrictive provisions incompatible with lower income housing, such as bedroom restrictions, large lot zoning, prohibition against mobile homes, and the like, does, not render those provisions invalid under Mount Laurel.

92 N.J. at 259-60. Of course, if these restrictions are otherwise invalid, e.g., they bear, no rational relationship to any

legitimate governmental goal, they may be declared void on those grounds. Id. at 260. However, they are "not void because of Mount Laurel under those circumstances." Id. In explaining the limitation of the Mount Laurel doctrine, the court said:

> Mount Laurel is not an indiscriminate broom designed to sweep away all distinctions in the use of land. Municipalities may continue to reserve areas for upper income housing, may continue to require certain community amenities in certain areas", may continue to zone with some regard for their fiscal obligations: they may do all of this, provided that they have otherwise complied- with their Mount Laurel obligations.

Id. In other words, just as Mount Laurel II does not require "wall-to-wall development in the state, Rose, "The Mount Laurel II Decision: Is It Based on Wishful Thinking?" 12 Real Estate L.J. 115, 128 (1983), neither does it require wall-to-wall development in each "growth" municipality.

The court elaborated further on this aspect of the Mount Laurel doctrine in disposing of the consolidated appeal in Caputo v. Chester. In that case the plaintiff developers brought suit to have Chester Township's zoning ordinance declared invalid under Mount Laurel. The trial court held that the ordinance was unconstitutional and specifically determined that the minimum five^acre lot requirements imposed by the ordin-- ance were illegal per se. The township did not appeal from the

court's determination that the ordinance violated Mount Laurel, but did appeal the invalidation of the five acre restiction.

In reversing the invalidation of the five-acre restriction the court reasoned as follows:

> We hold . . . that low density limitations like five acre lot minimums are not necessarily in violation of the Mount Laurel fair share obligation so long as municipalities are able to satisfy that obligation in spite of apparently "exclusionary" devices. Therefore such devices are subject to the same level of scrutiny as other municipal regulations, once compliance with fair share requirements has been demonstrated.

Id. at 314-15. The court further approved of zoning to preserve open space, saying:

> Moreover, we hold that the preservation of open space itself may, under proper circumstances, be sufficient justification for large lot zoning, including five acre zoning. Where a municipality's zoning provides for its fair share of low and moderate income housing, as well as for other uses it deems appropriate, it is not obliged, in its other zones, to allow for the maximum density of construction that environmental factors will permit. In an area like Chester, it may decide that the value of preserving open space is sufficent to warrant such zoning.

Id. at 315. Thus, because Mount Laurel II does not necessarily prevent a municipality from using large lot zoning to preserve" open space, a municipality may logically use large lot zoning and similar

devices to preserve agricultural lands consistent with its Mount Laurel obligation.

Moreover, Mount Laurel II requires a municipality like Cranbury Township, which contains both "growth" and "limited growth" areas, to attempt to meet its fair share obligation wholly within its "growth" area. Thus, in deciding the consolidated appeal in Round Valley v. Township of Clinton, the Mount Laurel II decision addressed the application of the Mount Laurel doctrine "to what is essentially a rural but nonetheless 'developing' community . . . that is partially comprised of a 'growth area' as determined by the SDGP." Id. at 321. The SDGP placed approximately 40% of Clinton Township in a "growth" area, the balance being "limited growth" and "agriculture areas." After determining, in accordance with the SDGP designation, that Clinton had a fair share obligation, the court laid down the following guidelines concerning how to meet that obligation:

> On remand the trial court should determine whether the fair share can be accommodated completely in the growth area consistent with sensible planning. If it can, then the fair share determination below shall stand; if not it shall be revised appropriately. The trial court need, not be concerned with the general growth pressure that any development in a "growth" area may exert on the neighboring "limited growth" or "agriculture" area, since those pressures are implicit in and presumably acceptable to the State Plan. They are, obviously, inevit-

> plan, growth is to be "discouraged." [Citing pertinent discussion of this issue in Round Valley v. Township of Clinton]. We believe that Plainsboro, Cranbury, South Brunswick, North Brunswick, East Brunswick and Monroe all contain some non-growth as well as growth areas.

92 N.J. at 351 (emphasis added).

Thus, insofar as the use of the TDC technique by Cranbury Township in its revised zoning ordinance deflects high density residential growth away from the agricultural lands in its "limited growth" area and into its "growth" area, the TDC technique is perfectly consistent with the township's Mount Laurel obligation. The New Jersey Supreme Court has made it clear that the purpose of the Mount Laurel doctrine is not to make each municipality "a demographic mirror image of another," id. at 350, and has directed Cranbury Township and. similar municipalities containing both growth and nongrowth areas to draft their revised ordinances so as "to encourage lower income housing only in the 'growth' area." Id. at 329.

Indeed, most of the parties challenging the TDC provisions of the township.' s ordinance do not appear to dispute that the township's agricultural lands slioulcl be preserved. See id. at 312 ("Chester [Township] has within its borders a. substantial portion of prime agricultural land, which no one disputes should remain free of development"). Nor, of course, do they dispute the use of incentive zoning or density bonuses to encourage the construction of low and moderate income housing in the township's

> able. Such general pressures, however, are to be distinguished from the site specific pressure of locating a large-scale development in such a fashion in a growth area as to make it highly likely that growth will occur where it is intended not to, namely, in the "limited growth" area. These matters are best left to the municipality and planners in redesigning the zoning ordinance. In that connection, the revised ordinance should obviously be tailored to encourage lower income housing only in the "growth" area.

92 N.J. at 329 (emphasis added); see also id. at 331 (Urban League of Essex County v. Township of Mahwah; "[b]ecause a substantial portion of Mahwah is characterized as 'conservation" [by the SDGP], fair share allocations must be calculated with due regard for that fact").

This concern that development not be stimulated in the nongrowth areas of "growth" municipalities was reiterated in the Mount Laurel II court's disposition of the appeal in the instant case, Urban League of Greater New Brunswick v. Borough of Carteret. The court laid down the following parameters to guide the trial court in determing the fair share obligation of Cranbury Township and other municipalities containing nongrowth as well as growth areas:

> ID]etermination of fair share must take into consideration, where it is a fact, the inclusion within particular municipalities of non-growth areas where, according to the

PH-HD (Planned Development-High Density) district. See id. at 271 ("[w]here the Mount Laurel obligation cannot be satisfied by removal of restrictive barriers, inclusionary devices such as density bonuses and mandatory set-asides keyed to the construction of lower income housing, are constitutional and within the zoning power of a municipality"). Essentially, the plaintiff landowners and developers dispute the township's conditioning of the availability of significant density increases upon a developer's purchase of transferable development credits. The plaintiffs argue that the resulting cost of land will be inflated, thereby making it economically impracticable to build lower income housing as part of an overall development project.

However, the TDC technique does not inflate the cost of land in the receiving zones, but merely redistributes some of the gain in value experienced by land in the receiving zones to those owners of land in the agricultural preservation zone who give up all rights to develop their agricultural lands in the future. If the land located in the PD-HD district could be developed as a matter of right for higher densities, the developer would have to pay a higher price for that land, and landowners in the PD-HD district would reap a "windfall" at the expense of preservation zone farmland owners. See Marcus, "A Comparative Look at TDR, Subdivision Extractions, and Zoning as Environmental Preservation Panaceas: The Search for Dr. Jekyll Without Mr. Hyde," 1980 Urban Law Annual 3, 14 (1981). By allowing

development as a matter of right only at lower densities, the value of the land in the receiving zones decreases, thereby reducing the price that developers must pay for that land. In requiring these developers to purchase transferable development credits from preservation zone farmland owners in order to develop their land at higher densities, the township's zoning ordinance merely transfers all or some of the cost savings to the preservation landowners. Landowners in the receiving zone are denied an unjustified windfall, preservation zone landowners receive fair compensation for the loss of their development rights, and developers pay roughly the same net price for land suitable for high density residential development,^ including lower income housing. Because the transfer of development credits technique does not generate significant additional development costs, it does not constitute the type of exclusionary regulation or policy that thwarts or precludes the development of lower income housing, condemned in both Mount Laurel I and Mount Laurel II. See Mount Laurel I, supra/ 67 N.J. at 179-80; Mount Laurel II, supra, 92 N.J. at 258-59.

Thus, the use of TDC's to preserve agricultural lands in the "limited growth" area of Cranbury Township will not impede the construction of low and moderate income housing in the "township's" growth area. Rather, the TDC technique insures that the township will be able to meet its fair share obligation without stimulating development in the nongrowth area of the

township, an aim consistent with the Mount Laurel doctrine as redefined in Mount Laurel II. Consequently, the TDC provisions of the ordinance do not violate Mount Laurel.

## CONCLUSION

In view of the arguments and authorities cited above, the defendant Cranbury Township respectfully requests that this court issue a declaratory judgment that the transfer of development credits technique as employed in the revised zoning ordinance adopted by Cranbury Township on July 25, 1983, is authorized by the Municipal Land Use Law, §§ 40:55D-l et seq., and does not violate the Mount Laurel doctrine. The township further requests that the complaints of the plaintiff landowners and developers, insofar as they attack the validity of the transfer of development credits technique, be dismissed, and that the court grant such further relief as may be appropraite in the circumstances.

Respectfully submitted,

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