ML- Cranbury
(Morris v. Cranbury)

3-Apr-84

- Brief on Transfer of Development Credits

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JOSEPH MORRIS and ROBERT MORRIS, **Plaintiffs,** **vs.** **TOWNSHIP OF CRANBURY IN THE COUNTY OF MIDDLESEX, a municipal corporation of the State of New Jersey,** **Defendant.**	**SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION** **MIDDLESEX COUNTY** **Docket No. L-54117-83 P.W.**

BRIEF ON TRANSFER OF DEVELOPMENT CREDITS

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STATEMENT OF FACTS

Plaintiffs Joseph Morris and Robert Morris have sought for the past few years to develop a housing complex known as Cranbury Meadows in the Township of Cranbury in Middlesex County. Plaintiffs are the contract optionees of contiguous premises containing about 101 acres of land in Cranbury Township, known as Lots 36 and 23 of Block 18 on the Cranbury Tax and Assessment Map. Said option is in full force and effect and is attached hereto as Exhibit A.

The passage of a new Land Development Ordinance in Cranbury Township occurred on July 25, 1983. The act of the Township Committee placed the plaintiffs' land in the PD-MD, Planned Development, Medium Density Zone established in Article vm of the Ordinance. In this zone multi-family dwellings are termed a "conditional use." However, Article VIE, Section 150-27 requires that before this conditional use can be utilized the developer must receive "Transferable Development Credits" (hereinafter referred to as TDC[f]s) from the A-100 Agricultural Zone created in Article IV of the Ordinance. Article Vm, Section 150-27 B.(3) limits density to one-half dwelling unit per acre in the PD-MD zone unless the owner-developer of the property acquires TDC's from the Agricultural Zone. Each TDC transferred to the PD-MD zone permits one added dwelling unit per acre up to a maximum gross density for the development of three dwelling units per acre.

Owners of land in the A-100 zone are permitted under Article IV, Section 150-16 to apply for TDC's. Having obtained these TDC's, they can then transfer them to owners of land in the PD-MD Zone and PD-HD, Planned Development, High Density Zone, established in Article IX of the Ordinance.

The owners of the land in the PD-MD and PD-HD zones are then permitted to develop to a higher density, as previously described; however, the owners

of the land in the A-100 zone who have transferred away their TDC[T]s can never develop their land. They must file a deed of restriction which runs with that land from which the TDC's were transferred and restricts the land to agricultural use and farm buildings into perpetuity.

Therefore, in order for a developer to develop land in the PD-MD or PD-HD zones, and to construct dwelling units at a higher density than that permitted under the existing zoning ordinance, he must go to owners of land in the A-100 zone and purchase their TDC[T]s.

Plaintiffs filed a complaint in lieu of prerogative writs based on the contention that the TDC scheme is ultra vires of the "Municipal Land Use Law" of New Jersey, N.J.S.A. 40:55D-l et seg. Defendant, in its answer, denied only the allegation that the TDC scheme is ultra vires of the "Municipal Land Use Law" (hereinafter referred to as MLUL).

As stated beforehand, Plaintiffs Morris are optionees of this land in the PD-MD Zone and thus have standing to sum

There being no questions of fact to be resolved, this matter is one for summary judgment on the legal issue of whether the Cranbury Township TDC scheme is ultra vires of the MLUL of New Jersey, N.J.S.A. 40:55D-l, et seg., i.e. not authorized by N.J.S.A. 40:55D-62 and 40:55D-65.

ARGUMENT

THE CRANBURY TOWNSHIP TDC SCHEME IS ULTRA VIRES OF THE MLUL OF NEW JERSEY, N.J.S.A. 40:55D-l, ET SEQ., AND NOT AUTHORIZED BY N.J.S.A. 40:55D-62 AND 40:55D-65.

A. A Municipality Has No Zoning Power Other Than That Given It By The Constitution And Legislature.

A municipality in the State of New Jersey has only those powers given to it by the New Jersey Constitution and legislative enactment. A municipality possesses no inherent power of its own. All its powers, including the power to zone, come from the State. The New Jersey Supreme Court, in interpreting N.J.S.A. 40:55-30, et se<j., the precursor of the MLUL, stated:

> Zoning is inherently an exercise of the State's police power. Rockhill v. Chesterfield Tp., 23 N^J. 117, 124-125 (1957); Schmidt v. Newark Bd. of Adjustment, 9 N.J. 405, 413-14 (1952); cf., Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). Consequently, municipalities have no power to zone except as delegated to them by the Legislature. J. D. Construction Corp. v. Freehold Tp. Bd. of Adjustment, 119 N.J. Super. 140, 144 (Law Div. 1972); Kirsch Holding Co. v. Manasquan, 111 N.J. Super. 359, 365 (Law Div. 1970), rev'd on other grounds, 59 N.J. 241 (1971); Piscitelli v. Scotch Plains Tp. Comm., 103 N.J. Super. 589, 594-95 (Law Div. 1968); see N.J. Const. (1947), Art. IV, Section VI, par. 2. In this regard, zoning powers are granted to municipalities by the zoning enabling act, N.J.S.A. 40:55-30 et seq.
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> Taxpayers Association of Weymouth Township v. Weymouth Township, 71 N.J. 249, 263 (1976), cert, denied, sub nom. Feldman v. Weymouth Township, 430 U.S. 977, 97 S. Ct. 1672, 52 L. Ed. 2d 373 (1977).

A municipality has the power to enact zoning and land use ordinances. This power is strictly defined by the MLUL, N.J.S.A. 40:55D-l et se<|., and derives from the New Jersey Constitution of 1947, which reads in part:

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature.
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> N.J. Const. (1947), Art. IV, Section VI, Para. 2.

The New Jersey Constitution authorizes the Legislature to enact statutes giving power to municipalities to enact zoning ordinances. The Legislature has done so in the MLUL, N.J.S.A. 44:55D-1 et secj., which is the enabling act authorizing municipal enactment of zoning and land use regulation ordinances. The power conferred upon the municipalities is not unlimited. The MLUL is carefully structured to give the municipality limited powers.

B. The MLUL Does Not Explicitly Enable Municipalities To Enact A Transfer Development Credit or Transfer Development Right Seheme.

Nowhere in the MLUL is there mention of TDC!s, Transfer Development Rights (hereinafter referred to as TDR's), or any similar concept, as a tool for municipal zoning and land use regulation.

The municipality's power to zone is authorized by N.J.S.A. 40:55D-62, "Power to zone." The limitations on what matters are regulated by local zoning ordinances are set forth in N.J.S.A. 40:55D-65, "Contents of zoning ordinance."

N.J.S.A. 40;55D-62 authorizes the governing body of a municipality to adopt or amend a zoning ordinance "relating to the nature and extent of the uses of land and of buildings and structures thereon."

In brief, N.J.S.A. 40:55D-65 permits a zoning ordinance enacted by a municipality to do the following:

(a) Limit buildings to certain types, and regulate the use of land;

(b) Limit the size of buildings;

(c) Provide districts for planned developments, including standards for density, intensity of land use, etc.;

(d) Provide for improvements;

(e) Regulate flood areas;

(f) Provide for conditional uses;

(g) Provide for senior citizen housing; and

(h) Require payment of taxes.

Nowhere does the MLUL authorize, or even mention, the use of TDC's or TDR[T]s as a tool to achieve these ends.

C. The TDC Scheme of Cranbury Township Affects An Ownership Interest In Land. The MLUL Does Not Explicitly Or Implicitly Enable Municipalities To Enact Zoning And Land Use Ordinances Affecting Ownership Interests In Land.

The TDC scheme of Cranbury Township goes beyond the boundaries of the municipal zoning power set by the MLUL in that it affects ownership interests in its attempt to preserve agricultural land. Its TDC scheme does not merely regulate the sizes or types of building in a given zone, or the intensity and density of land use. The scheme requires that an owner of land in the Agricultural Zone who wishes to forego developing his land may apply to the municipality for TDC[f]s. He sells those TDC[T]s to an owner of land in the Planned Development, Medium Density Zone or Planned Development, High Density Zone, and records a deed of restriction on his

land in the Agricultural Zone. This deed prohibits any development of that land into perpetuity. In essence, the scheme provides a method for separating the right to develop the land from the other rights of ownership.

"Property" is defined as: "In a strict legal sense, an aggregate of rights which are guaranteed and protected by the government." Black's Law Dictionary, 1095 (5th Ed. 1981). The owner of land in Cranbury's Agricultural Zone, once he has sold his TDC's, owns the same number of acres as prior to the sale. However, his property is diminished. The owner of land in the Agricultural Zone possesses less rights appurtenant to that land. He has sold a portion of his ownership interest. That interest, the right to develop the land, is gone forever.

It is not contended here that there is anything wrong with the selling of development rights ger se. But municipal regulation of the sale of ownership rights has never been a permissible form of land use regulation. There are numerous cases which discuss the lack of power of a municipality to affect ownership rights to property by zoning ordinance.

In Bridge Park Co. v. Borough of Highland Park, 113 N.J. Super. 219 (App. Div. 1971), the borough zoning ordinance defined a "garden apartment" as "'a building or series of buildings under single ownership ***."' 113 N.J. Super, at 221. The affect of the ordinance was to prevent the conversion of an apartment building to the condominium form of ownership. The Appellate Division, interpreting N.J.S.A. 40:55-30, precursor to N.J.S.A. 40:55D-65, said:

> A quick reading discloses no power granted to a municipality to regulate the ownership or buildings or the types of tenancies permitted. It is obvious that each phrase in the statute refers either to the type of construction or the use permitted on real property within the confines of a municipality.

> **Defendant attempts to characterize condominium ownership as a "use" of land — i.e., since the property in question is to be "used" as a condominium, the municipality may regulate or prohibit such "use." It is apparent, however, that after change of ownership as planned, the same buildings will be on the premises in question and the use to which they are put will also remain the same. We conclude that the word "use," as contained in the statute above, does not refer to ownership but to physical use of lands and buildings. A building is not "used" as a condominium for purposes of zoning.**
>
> **In view of our conclusion that the attempted regulation of ownership of property under the guise of the zoning power is beyond the power of defendant borough, we find it unnecessary to meet plaintiff's arguments as to preemption and restraint on alienation.**
>
> **113 N.J. Super, at 221-222.**

The situation in Cranbury Township involves the same principle. The Township seeks to regulate the use of land by permitting development in the PD-MD and PD-HD zones at a higher density only after ownership rights in the Agricultural Zone are surrendered. This is "attempted regulation of ownership of property under the guise of the zoning power." Id. at 222.

In Metzdorf v. Borough of Rumson, 67 N.J. Super. 121 (App. Div. 1961), the deceased testator devised the northerly half of a tract of land to defendants, the Ericsons, and the southern portion to plaintiff, Metzdorf. A metes and bounds description of each portion was contained in the will.

Defendant Rumson Borough argued that the testator's division of the tract created two parcels of land, both of which violated the municipal zoning ordinance. At issue was whether this violation made the devises null and void. In upholding the validity of the devise, the Appellate Division stated:

> **The zoning power, in its proper exercise, is not operative upon the alienability of land, whatever the size of the parcel**

transferred, but is concerned solely with the manner in which its owner seeks to utilize it.

It is thus evident that the Rumson zoning ordinance can in no way interfere with the effectuation of the testator's intentions in transferring title to his property.

67 N.J. Super, at 128.

In Maplewood Village Tenants Association v. Maplewood Village, 116 N.J. Super. 372 (Ch. Div. 1971), the court considered whether a proposed conversion of an apartment building into a condominium required subdivision approval by the municipality.

The court held that no municipal approval was required, stating:

The presently existing apartments conform to the township zoning ordinance, and the proposed conversion represents nothing more than a change in the form of ownership. The use of the land will not be affected. Planning controls, including subdivision approval, cannot be employed by a municipality to exclude condominiums or discriminate against the condominium form of ownership, for it is use rather than form of ownership that is the proper concern and focus of zoning and planning regulation.

116 N.J. Super, at 377.

In Township of Washington v. Central Bergen Community Health Center, Inc., 156 N.J. Super. 388 (Law Div. 1978), the municipality sought to oust defendant from its use and occupancy of a facility that it was leasing. The facility was in a residential zone. The municipality argued that while the defendant was the tenant under the lease, the actual users of the half-way house facility were the resident patients, and that this difference between tenant and users was a violation of the zoning ordinance. The court stated:

> N.J.S.A. 40:55-30^ does not empower a municipality through zoning to regulate the ownership of buildings or the types of tenancies permitted. It is obvious that the statute aforesaid utilizes the word "use" solely as a reference to the actual or physical purposes to which land or buildings are devoted and does not apply to the legal form by which ownership or possession is derived.
>
> 156 N.J. Super, at 417.

Local zoning ordinances under the MLUL must adhere to the traditional standards of N.J.S.A. 40:55D-65, and not adopt unauthorized means to achieve aims. The MLUL permits the municipality to establish districts for various uses and determine what sort of use may occur within a district. It does not authorize the municipality to regulate land use by creating ordinances allowing landowners to sell rights for money or other consideration.

Countless rights attach to any given piece of land. Doubtless a municipality, influenced by any number of good or bad objectives for the use of land within its boundaries, could encourage land to be dedicated to such objectives into perpetuity by authorizing sale of TDC's in return for the restrictive deed. Within time, each of New Jersey's 567 municipalities' zoning ordinances would contain an intricate lattice work of transferable rights, credits, and restrictive uses. The result would be chaos.

The Legislature of New Jersey had simpler methods for municipal control of local zoning in mind when it passed the MLUL. A municipality has the power

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* See the parallel provision contained in the Municipal Land Use Law, N.J.S.A. 40:55D-62.

to create zones where no development is permitted, and to create zones where dense development is permitted. It may only do so directly, by establishing the rules for use and development in each given zone, and considering variances thereafter. That is the system which the Legislature has authorized, and the only system permitted. The creation of a TDC or TDR scheme is beyond the power of a municipality.

D. The Legislature Has Considered TDC's And TDR[T]s As A Municipal Zoning Device And Failed To Enact Enabling Legislation.

The Legislature is not unaware of the concept of TDC's and TDR's. In fact, several bills have been proposed before it which, if passed, would have authorized municipalities to enact TDR ordinances.

While the MLUL was pending enactment, a bill known as the "Municipal Development Rights Act," A-3192 (1975), was introduced in the Assembly on February 27, 1975, for the express purpose of authorizing municipalities to enact TDR ordinances. Said Bill is attached hereto as Exhibit B. The sponsor's statement to A-3192 (1975) says:

> This bill would supplement the present laws concerning planning and zoning to permit municipalities to recognize the existence of development rights on certain properties within their boundaries and to establish a system by which such right may be determined, allocated and transferred for use in another segment of the municipality.
>
> Exhibit B, 32A.

Although the concept is termed "TDR's" in A-3192 (1975), the concept is essentially the same as the TDC scheme of Cranbury Township. A-3192 (1975)

authorizes the municipality to set up a commission to study the feasibility of a TDR scheme for the municipality. If the scheme is thought feasible, a report is prepared, a plan implementing the concept submitted for public hearings, recommendations formulated, and a vote taken by the governing body. If approved, the municipality establishes agricultural or historic preservation zones, assigns TDR's after public hearing on the matter, and establishes transfer zones, all according to the mandatory guidelines of A-3192 (1975). This bill was not enacted.

A second bill authorizing TDR[T]s was introduced before the Legislature after the MLUL had gone into effect. This bill, known as the "Municipal Transfer of Development Rights Act," A-1509 (1978), introduced on June 19, 1978, contains detailed provisions respecting the creation, transfer, and use of TDR's. Said Bill is attached hereto as Exhibit C. It authorizes municipalities to adopt appropriate ordinances implementing TDR's. The sponsor's statement accompanying the bill describes its purpose as follows:

> This bill would permit, and establishes the procedure by which, municipalities may adopt transferable development rights (TDR) provisions within their zoning ordinances for the preservation of properties of historic, aesthetic, environmental and economic significance.
>
> Exhibit C, 52A.

A-1509 (1978), like its predecessor, A-3192 (1975), sets forth in detail what form a TDR scheme should take. It requires the municipality to conduct a feasibility study, analyze existing land uses, identify anticipated growth and development, consider tax factors, and consider numerous other factors. A-1509 (1978), Art. HI, Seetion 8. It also establishes a Legislative Oversight Committee. This body reviews the progress of TDR ordinances throughout the State. This bill was not enacted.

Yet another bill was introduced before the Assembly on June 23, 1983 which would have authorized municipalities to institute transfer development schemes. This bill, A-3664 (1983), attached hereto as Exhibit D, would amend N.J.S.A. 40:55D-l. It authorizes municipal bodies to allow owners of land to transfer the permitted development of their land under the zoning laws to other lots "...by means of appropriate deed restriction, covenant, dedications, or other legal devices designed to retain the sending lot at the intensity of development established at the time of transfer." Exhibit D, 55A. This bill was not enacted.

In the "Pinelands Protection Act," N.J.S.A. 13:18A-1, et seg., the Legislature authorized the Pinelands Commission to adopt a management plan for the Pinelands area. N.J.S.A. 13:18A-8. In this plan, the Commission was specifically authorized to utilize, among other methods, a TDR scheme to preserve the Pinelands area. N.J.S.A. 13:18A-8 d.(l). The Commission subsequently adopted a system of Pinelands Development Credits, and developers purchasing these credits are permitted to build in greater density. The Legislature realized that such TDR schemes require precise authorization.

The executive branch of state government is of the opinion that an enabling act is necessary before municipalities can enact TDC schemes. In Governor Kean's Annual Message to the New Jersey State Legislature of January 10, 1984, in the section on Housing and Community Development, attached hereto as Exhibit E, he discusses the need for new approaches to the Mt. Laurel problem. He states:

> Another aspect of the Mt. Laurel decision that may require legislative intervention is the fact that the decision appears to apply to each developer in each municipality that falls within the growth area designated by the Guide Plan. Conceptually, it would appear to make much more sense for

> the Legislature to provide a system of transfer development credits so that a builder skilled in constructing low and moderate income housing could sell excess credits for such housing to builders without this type of construction experience. The price of the credit would constitute part of the subsidy which in many counties will be required to encourage the construction of low and moderate income housing. I am advised that a system of transfer development credits is presently operating in at least one other state and I would encourage you to consider the enactment of legislation which would afford to municipalities, on an optional basis, the right to adopt ordinances allowing for the transfer of low and moderate income housing credits. Such legislation would avoid the mandate that low and moderate income housing be located in each development constructed in every municipality subject to the decision, and would allow greater flexibility among municipalities and developers in determining where such housing could most appropriately be constructed.
>
> Exhibit E, 59A.

The Legislature has yet to authorize municipalities to adopt a system of TDR's as a land use regulation mechanism. It has authorized only a government created agency, The Pinelands Commission, to enact a development credit system. Until the Legislature enables any other governmental body to enact a development credit or right scheme, only the Pinelands Commission may utilize this technique.

E. The Holding Of Centex Is That The TDR Concept Is Ultra Vires Of The MLUL.

The question of whether municipalities are authorized to enact TDR schemes has been considered by at least one New Jersey Court.

The recently decided case of Centex Homes of New Jersey, Inc. v. The Mayor and Council of the Township of East Windsor, The Planning Board of the Township of East Windsor and The East Windsor Municipal Utilities Authority, an unreported decision in the Superior Court of New Jersey, Law Division, Mercer

County, Docket No. L-5117-80, decided by the Honorable Paul G. Lew, J.S.C., on May 13, 1983, is on point.2 Said decision is attached hereto as Exhibit F.

In that case, plaintiffs challenged the validity of defendant's TDR scheme under the MLUL. On summary judgment Judge Levy declared the East Windsor ordinance invalid on its face.

In Centex, defendant East Windsor created an Agricultural Preservation Zone. It allotted the owner of lands in that zone TDR's which could be sold if seller gave the municipality a recordable covenant against non-agricultural use of the lands. Judge Levy held that East Windsor exceeded its power to zone in adopting the ordinance. Exhibit F, 64A.

Judge Levy reasoned that the New Jersey Constitution of 1947, Article IV, Section VI, Paragraph 6, authorizes the Legislature to delegate the zoning powers to municipalities. The Legislature delegated this zoning authority to municipalities in the MLUL, N.J.S.A. 40:55D-62, which repeated the constitutional language:

> The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon.

Any zoning ordinance failing to conform to these strictures is void. Exhibit F, 65A-66A.

Even though the "intent and purpose" of the MLUL as stated in N.J.S.A. 40:55D-2 demonstrates legislative concern with preservation of agricultural land, all

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2 The case is before the Appellate Division on appeal. Oral arguments were heard, but no decision as of this date has been rendered.

power to create zones and to restrict land use comes from Sections 62 and 65. The East Windsor ordinance departed radically from the traditional concepts of zoning and planning as permitted by the MLUL. It is only within the power of the Legislature to change these traditional concepts of zoning. Exhibit F, 66A-69A.

There is need for State-wide uniform regulation in determining what zones should be preservation zones and what zones should receive TDR's. Pertinent questions for the Legislature to address would be how to assess, tax, sell and exchange these rights. Exhibit F, 69A-70A.

Since the sale of these TDR[T]s requires the seller to give up a portion of his fee ownership of the property, uniform regulation is necessary. The fact that East Windsor had enacted an ordinance regulating ownership rights rather than physical use of land and structures made the ordinance ultra vires of the MLUL. Important questions of title and taxation raised by the TDR ordinances need to be addressed on a State-wide basis. Exhibit F, 71A-72A.

F. Summary

It is clear that the TDC scheme of Cranbury Township, and any TDC or TDR scheme, is beyond the province of a municipality to enact as a provision of its zoning and land use ordinances. Neither the New Jersey Constitution of 1947 nor the MLUL authorize a municipality to use a technique whereby it creates a new right of land ownership, the right of development, and permits that right to be sold, alienating from the land for all time any right to develop the land. The Legislature has considered authorizing the technique in proposed statutes other than the MLUL. The Legislature has declined to enact enabling legislation authorizing municipalities to use the TDC or TDR scheme. Any attempt to use the scheme should be ruled ultra vires of the MLUL, in accord with the holding in Centex.

CONCLUSION

For all the foregoing reasons, judgment should be granted to Plaintiffs Joseph Morris and Robert Morris, declaring the Ordinance invalid on its face, ultra vires of the Municipal Land Use Law, N.J.S.A. 40:55D-l et seg., and that all sections of the Land Development Ordinance of Cranbury Township approved by the Township Committee on June 25, 1983 referring to Transferable Development Credits are severed from the Ordinance pursuant to the Severance Clause in Article XXI of said Ordinance, including, but not limited to, Articles IV, VIII and IX of same.

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By: W. Scott Stbner

Dated: April 3, 1984