ML-East Windsor 2/10/83

Brief for π in support of motion for summary judgment

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MERCER COUNTY
DOCKET NO. L-06433-83 P.W.

CENTEX HOMES OF NEW JERSEY, INC., a Corporation of the State of Nevada,	)	
Plaintiffs,	)	
v.	)	Civil Action
THE MAYOR AND COUNCIL OF THE TOWNSHIP OF EAST WINDSOR, a Municipal Corporation, and THE PLANNING BOARD OF THE TOWNSHIP OF EAST WINDSOR,	)	
Defendants.	)	

BRIEF FOR PLAINTIFF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF THE COMPLAINT

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PRELIMINARY STATEMENT

Plaintiff, Centex Homes of New Jersey, Inc., (Centex-New Jersey) filed a Complaint In Lieu of Prerogative Writ in this matter on January 28, 1983. The Complaint, which contains ten counts, essentially seeks a judicial declaration that Ordinance 1982-16 of the Township of East Windsor (the East Windsor TDR ordinance) is null, void, and of no force or effect at law or equity. Defendants in this action are the Mayor and Council of the Township of East Windsor, and the Planning Board of the Township of East Windsor. Centex-New Jersey has moved for summary judgment as to Count I of the Complaint, and seeks a declaration that the TDR ordinance is invalid and ultra vires because East Windsor Township lacks any authority under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq., to enact such an ordinance. Moreover, Centex-New Jersey seeks an injunction prohibiting defendants from in any way enforcing the TDR ordinance, and other relief as set forth in Point III, infra.

The facts underlying Centex-New Jersey's Motion for Summary Judgment as to Count I are undisputed. Centex-New Jersey is the owner of 600± acres of land located south of the Borough of Hightstown in the Township of East Windsor, Mercer County, New Jersey. (See Complaint, ¶1 and Exhibit A attached thereto). On November 24, 1981, a draft of what became the East Windsor TDR ordinance was first discussed at a public meeting conducted by the defendants Mayor and Council of East Windsor and the East Windsor Planning Board. Designated as Ordinance 1982-16, the

East Windsor TDR ordinance was introduced and passed on first reading at a regular meeting of the Township Council of East Windsor held on July 13, 1982. On November 11, 1982, the Township Council conducted a public hearing on the proposed ordinance.

On November 23, 1982, the proposed Ordinance 1982-16 was amended by the Township Council. On that same evening, the public hearing previously commenced was continued. The hearing was thereafter continued to December 14, 1982, and was ultimately concluded on that date.

Because Centex-New Jersey's property in East Windsor Township was the subject of Ordinance 1982-16, Centex-New Jersey, through legal counsel, filed numerous written objections to the ordinance and testified against it at the public hearings. On December 14, 1982, a petition directed to the Township Council, signed by the owners of approximately 40 percent of the land area affected by the proposed ordinance and "protesting" the adoption of the TDR ordinance, was filed with the Township Clerk. Pursuant to N.J.S.A. 40:55D-63, therefore, the ordinance could only be adopted by at least a two-thirds vote of the Township Council.

On December 14, 1982, the East Windsor Township Council adopted Ordinance 1982-16 by a vote of 6-1. A true copy of the TDR ordinance as adopted by the Township Council is annexed to the Complaint in this matter as Exhibit B. Pursuant to section 7 of the TDR ordinance, the ordinance was to be effective 20 days after its final passage and publication, or after January 3, 1983.

The ostensible purpose of the TDR ordinance is to preserve agricultural land within East Windsor Township. (See East Windsor TDR Ordinance, §20-17.2000A). To that end, the TDR ordinance places approximately 3,000 acres of land in the south and southeastern portion of the Township in an agricultural preservation (AP) zone. The only permitted uses in the AP zone are agricultural, roadside produce stands, and farm dwellings. (Id. §20-17.3000A). All the land in the AP zone west of the New Jersey Turnpike is designated in the State Development Guide Plan as a "growth area." The entire Centex-New Jersey tract is located west of the Turnpike and wholly within the AP zone.

As a conditional use in the AP zone, single family dwellings are permitted, under limited circumstances, on farms at a ratio of one dwelling per 20 acres of land. (Id. §20-17.5000A). No such single family dwellings are permitted on farms of less than 20 acres unless the owner of the property demonstrates that the land is not suitable for agricultural preservation. No other residential uses are permitted in the AP zone.

Under the terms of the TDR ordinance, landowners in the AP zone may be granted a certain number of "development rights." (Id. §20-19.1000; -19.2000). A "development right" is defined by the ordinance as

> an interest in land which represents a certain right to use the land for residential or non-residential purposes. A development right may be transferred from one person to another and may be used in any location where use is authorized in accordance with the provisions of this ordinance. [Id. §20-17.1000A(c)]

Such development rights may be granted to AP zone landowners in lieu of being permitted to develop their property and in return for deed restricting development of the land. [Id. §20-19.5000]. The number of development rights awarded to each landowner is not determined or set forth in the TDR ordinance; the amount will ostensibly be determined at a subsequent time. (Id. §20-19.2000).

The TDR ordinance further provides that development rights awarded by the Township to landowners in the AP zone may be transferred by these landowners to developers of land located in another portion of the Township referred to in the ordinance as the Residential Expansion for Agricultural Preservation Zone (REAP zone). [Id. §20-18.1000). The portion of the Township designated as the REAP zone was, until 1976 zoned for agricultural use and most if not all of this land is still actually farmed. The area was rezoned in 1976 for planned development. Approximately one-half of the land in the REAP zone is located in an area designated in the State Development Guide Plan as an "agricultural area."

The TDR ordinance concedes that "development rights" are being granted in recognition of the fact that prohibiting development within the AP zone will drastically reduce the value of land and cause economic hardship. §20-17.2000A. The granting of "development rights" is the admittedly experimental form of "compensation" the Township has deemed constitutionally sufficient to enable it to compel land owners in the AP zone to retain their land in "agricultural uses."

The East Windsor TDR ordinance provides for the following uses in the REAP zone: agricultural, low density residential dwellings on lots with a minimum of two acres, and "planned development." (Id. §20-18.2000) In addition, higher density residential development is permitted in the REAP zone provided that development rights are "transferred" for each residential unit according to the following table:

USE	NUMBER OF DEVELOPMENT RIGHTS TO BE TRANSFERRED PER UNIT
single family dwelling (1/2 acre lot or larger)	2.0 development rights
single family dwelling (lot not less than 1/3 acre)	1.6 development rights
single family dwelling (lot not less than 1/5 acre)	1.2 development rights
townhouse at a density of not more than 6 dwelling units per acre	0.9 development rights
garden apartments at a density of not less than 10 dwelling units per acre	0.7 development rights

[Id. §20-18.2000(c)].

The ordinance defines "transfer of a development right" as "the act of using a development right, where the ordinance mandates such use, in order for permission for development to be granted." [Id. §20-17.1000A(e)]. Thus, the ordinance contemplates that individuals who wish to develop residential units in the REAP zone at a density higher than one unit per two acres must first purchase development rights from landowners in the AP zone, and then turn them over to municipal officials in exchange for the appropriate development approvals in the REAP zone.

ARGUMENT

POINT I

SUMMARY JUDGMENT IS APPROPRIATE WHEN A MUNICIPAL ORDINANCE IS ATTACKED ON THE GROUNDS THAT AS A MATTER OF LAW THE MUNICIPALITY HAS NOT BEEN DELEGATED ANY AUTHORITY BY THE STATE LEGISLATURE TO ENACT SUCH AN ORDINANCE.

Centex-New Jersey's instant Motion for Partial Summary Judgment on Count I of its Complaint is appropriate for disposition by summary judgment because it presents a narrow, purely legal issue: whether the Legislature, by enactment of the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq., has authorized municipalities to adopt zoning regulations which establish a "preservation zone", provide for separation of development rights from land in that zone, and require that such development rights be purchased and transferred to a parcel located in a "receiving zone" as a condition of more intense development of the receiving zone parcel. Because the East Windsor TDR ordinance is being challenged here as per se illegal and ultra vires under the MLUL, and because no relevant facts are in dispute, summary judgment is appropriate pursuant to R. 4:46-1.

The rule providing for summary judgment in New Jersey is designed to provide a prompt, businesslike, and inexpensive method of disposing of any cause which a discriminating search of the merits demonstrates not to present any genuine issue of material fact requiring disposition on trial. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1955). Summary judgment is especially appropriate when the facial validity of a municipal ordinance is at issue. Such cases typically present

solely a question of law, and do not involve issues respecting the reasonableness of the exercise of municipal discretion, the motivation underlying municipal action, or the credibility of various witnesses. Rather, cases such as the instant case involve only legal issues which can be determined by examining the terms of the ordinance being challenged (i.e., the East Windsor TDR ordinance) in light of the purported source of the power to enact the ordinance (i.e., the MLUL).

In instances where ordinances have been challenged as facially invalid, the Supreme Court has sanctioned the use of summary judgment because "no real issues of fact," but merely legal issues, are presented. See, e.g., Brunetti v. Borough of New Milford, 68 N.J. 576 (1975). The case of Town of Morristown v. Tp. of Hanover, 168 N.J. Super. 295 (App. Div. 1979) is analogous to the present case. There, Morristown filed suit to set aside and enjoin the enforcement of a Hanover zoning ordinance designed to regulate Morristown's airport. Morristown moved for summary judgment on the basis that the ordinance was facially invalid as violative of a statutory immunity enjoyed by the airport from such regulations. The court found that the case presented purely legal issues and was appropriate for summary judgment, notwithstanding the defendant's contention that genuine issues of fact existed.

> Since the invalidity of these provisions is apparent on the face of the ordinance, further factual exploration was not essential, and plaintiff was entitled to a summary judgment in its favor. [168 N.J. Super. at 300].

In numerous other cases where municipal zoning ordinances were challenged as beyond the scope of the zoning

power delegated to municipalities by the Legislature, courts have found that no facts were in issue and determined the legal issues upon a motion for summary judgment. E.g.; Bridge Park Co. v. Borough of Highland Park, 113 N.J. Super. 219 (App. Div. 1971); Levitt and Sons, Inc. v. Tp. of Freehold, 120 N.J. Super. 595 (Law Div. 1972); Sussex Woodlands, Inc. v. Tp. of West Milford, 109 N.J. Super. 432 (Law Div. 1970). Accordingly, it is apparent that summary judgment is the appropriate manner in which to adjudicate Count I of Centex-New Jersey's Complaint.

It is true that where the constitutionality of zoning ordinances is challenged as a matter of substantive Due Process, summary judgment may at times be inappropriate. Odabash v. Mayor and Council of Dumont, 65 N.J. 115, 121 n. 4 (1974). The reason for this conclusion is that the finding that an ordinance is arbitrary, capricious, or unreasonable needed to show a violation of Due Process often necessitates expert or factual testimony. This is especially true where an ordinance is attacked as applied, as opposed to a facial attack. But see Brunetti v. Bor. of New Milford, supra.

In the case of Count I of the present Complaint, however, whether or not East Windsor acted arbitrarily or unreasonably is irrelevant. The only issue is whether N.J.S.A. 40:55D-1 et seq. authorizes the East Windsor TDR ordinance. Determination of this legal issue involves only comparing the ordinance to the laws of the enabling statute. No factual issues are presented under Count I. Accordingly, summary judgment is the proper means of determining this aspect of plaintiff's Complaint.

POINT II

THE TOWNSHIP LACKS AUTHORITY UNDER THE MUNICIPAL LAND USE LAW TO ENACT A TDR ORDINANCE

As a general principle, it is established beyond question that New Jersey municipalities, being created by the State, have no inherent authority. Wagner v. Newark, 24 N.J. 467, 474 (1957). Rather, they have only those powers delegated to them by the State Constitution and the Legislature. Dome Realty, Inc. v. Paterson, 83 N.J. 212, 225 (1980); Ringlieb v. Parsippany-Troy Hills Tp., 59 N.J. 348, 351 (1971). This is particularly true respecting municipal authority to enact zoning ordinances and regulate the use of land. "[M]unicipalities have no power to zone except as delegated to them by the Legislature." Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., 71 N.J. 249, 263 (1976), cert. denied, sub nom. Feldman v. Weymouth Tp., 430 U.S. 977, 97 S. Ct. 1672, 52 L. Ed. 2d 373 (1977); Pop Realty Corp. v. Springfield Bd. of Adj., 176 N.J. Super. 441, 453 (Law Div. 1980); J.D. Const. v. Bd. of Adjust. of Freehold, 119 N.J. Super. 140, 144 (Law Div. 1972).

Since 1927, the limits of zoning authority which may properly be delegated to municipalities has been governed by the State Constitution. In that year, the New Jersey Constitution of 1844 was amended to authorize the Legislature to 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 . . . . [N.J. Const. (1844), Art. IV, §VI, ¶5].

This grant of authority was thus limited only to regulating the "construction," "nature," and "extent of . . . use" of "buildings and structures" within "specified districts" in accordance with the then-prevailing Euclidean concept of zoning. See Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926).

The Constitution of 1947, however, "went further and expressly extended the zoning power" to also encompass "the nature and extent of the uses of land." Fischer v. Tp. of Bedminster, 11 N.J. 194, 201 (1952). The current constitutional provision thus provides that:

> 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. [N.J. Const. (1947), Art. IV, §VI, ¶2 (emphasis added)].

This provision delimits the scope of power which the Legislature is now authorized to delegate to municipalities. Clearly, the Legislature may constitutionally delegate to municipalities only that zoning authority necessary (1) to limit and restrict buildings/structures to specified districts, and regulate them according to their construction and the nature and extent of their use, and (2) to regulate the nature and extent of the uses of land itself according to specified districts.

Under the present constitution, there is no requirement that the Legislature delegate the sum total of delegable zoning authority to municipalities. In fact, the Legislature has withheld some zoning authority from municipalities by delegating it to other agencies of the State. See, e.g., Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1 et seq.; Meadowlands Regional Development Agency v. State, 63 N.J. 35 (1973), app. dism., 414 U.S. 991, 94 S.Ct. 343, 38 L. Ed. 2d 230 (1973); Coastal Area Facility Review Act, N.J.S.A. 13:19-1 et seq.; Toms River Affiliates v. DEP, 140 N.J. Super. 135 (App. Div. 1976), certif. denied, 71 N.J. 345 (1976). Moreover, the Legislature is expressly empowered to repeal or alter any delegation of zoning power at any time. N.J. Const. (1947), Art. IV, §VI, ¶2.

At any given moment, therefore, a municipality's authority to zone is governed by the extent to which that authority has been legislatively delegated in accordance with Art. IV, §VI, 2.

> Municipalities must look to legislation to determine the scope of their zoning powers. These are as comprehensive or as restrictive as the relevant statutes determine. [Berger v. State, 71 N.J. 206, 220 (1976)] (emphasis added).

Municipalities which exercise zoning power "must observe the limitations of the [legislative] grant and the standards which accompany it." Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., supra, 71 N.J. at 264. All provisions of a municipal zoning ordinance must be within the confines of the relevant enabling statute. Sussex Woodlands, Inc. v. Mayor and Council of West

Milford Tp., 109 N.J. Super 432, 437 (Law Div. 1970). Municipal zoning power "must always be exercised within statutory limits, and for legitimate zoning purposes." Morris v. Postma, 41 N.J. 354, 359 (1964). In exercising zoning powers,

> A municipality...must act within such delegated powers and cannot go beyond them, and where a statute sets forth the procedure to be followed, no governing body or subdivision thereof can adopt any other method of procedure. [Pop Realty Corp. v. Springfield Tp. Bd. of Adj., 176 N.J. Super. 441, 453 (Law Div. 1980)]

Thus, Article IV, §VII, ¶2 of the State Constitution, which provides that

> The powers of...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 bylaw ...

adds nothing to a municipality's zoning power as delineated in enabling legislation adopted pursuant to Art. IV, §VI, ¶2. It would make little sense, on the one hand, for the latter provision to specifically spell out the express scope of zoning authority which may be delegated to municipalities if, on the other hand, the former provision could then be applied to expand such powers to include those "of necessary or fair implication" or those powers "incident" or "essential" to the express powers. Clearly, such a construction would be "inconsistent with . . . [the] Constitution," i.e. the clear terms of Article IV, §VI, ¶2, and therefore inappropriate.

In the zoning area the powers of municipalities, while liberally construed under Article IV, §VII, ¶2, are "not

absolute." Rather, such "[m]unicipal powers are still derived from the Legislature." Sussex Woodlands, Inc. v. Tp. of West Milford, 109 N.J. Super. 432, 435 (Law Div. 1970). As the Supreme Court declared in Rockhill v. Chesterfield Tp., 23 N.J. 117, 125 (1957):

> However broad the police power inherent in sovereignty to invoke measures conducive to the general good and welfare, the exercise of the zoning process must perforce conform to the constitutional regulation [i.e., Art. IV, §VI, ¶2] and the enabling statute. (emphasis added).

In the final analysis, then, it is the specific terms of enabling legislation which define the limits of municipal zoning power, and against which the exercise of such power is measured. Without express statutory authority for the enactment of a municipal zoning ordinance, the ordinance is void. The Supreme Court plainly announced this principle in Dresner v. Carrera, 69 N.J. 237, 241 (1976):

> The absence of an enabling act is fatal to the argument that such power exists, for a municipality has no inherent power to adopt zoning or other land use ordinances; it may act only by virtue of a statutory grant of authority from the Legislature. N.J. Const., Art. 4, §6, ¶2; Fischer v. Bedminister Township, 11 N.J. 194, 201 (1953); J.D. Construction Corp. v. Board of Adjustment of Freehold Township, 119 N.J. Super. 140, 144 (Law Div. 1972); Piscitelli v. Township Committee of Scotch Plains Township, 103 N.J. Super 589, 594 (Law Div. 1968). See generally, 6 McQuillan, Municipal Corporations (3d ed. 1969), 24.35 et seq.

The current enabling legislation which delegates zoning authority to municipalities is the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq. Lusardi v. Curtis Point Prop. Owners

Assn., 86 N.J. 217, 226 (1981); see Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., supra, 71 N.J. at 263 n. 4. Therefore, unless the East Windsor TDR ordinance is authorized by the terms of the MLUL, it must be ultra vires and void.

It is recognized, as noted in the Weymouth case, that municipal zoning ordinances "enacted under this grant of power" are "accorded a presumption of validity which can only be overcome by an affirmative showing that the ordinance is arbitrary or unreasonable." 71 N.J. at 264. In this case, however, East Windsor so clearly acted under no grant of delegated power that the presumption of validity never attached to its action. See Pop Realty v. Springfield Tp. Bd. of Adj., 176 N.J. Super. 441, 453 (Law Div. 1980). And, in any event, the East Windsor TDR ordinance is inconsistent with the "limitations" of power granted by the MLUL and the "standards which accompany it" because it does not "bear a real and substantive relationship to the regulation of land within the municipality." Taxpayers Assn. of Weymouth, supra, 71 N.J. at 264.

At the outset, the best indication that the East Windsor TDR ordinance is nowhere authorized by any State enabling legislation is gleaned from an examination of the MLUL and subsequent legislative activity in the land use area. It cannot be disputed that no provision of the MLUL, or the Planning Act of 1953 which it replaced, expressly or impliedly recognizes the existence of "development rights" or authorizes the enactment of TDR ordinances.

In analyzing the intent of the Legislature respecting TDR under the MLUL, the chronology of the MLUL's passage is one factor to be considered. Muccio v. Cronin, 135 N.J. Super. 315, 323 (Law Div. 1975). Statements accompanying bills are relevant evidence of legislative intent [Bor. of Highlands v. Davis, 124 N.J. Super. 217, 226 (Law Div. 1973); Thomas v. Kinney, 85 N.J. Super. 357 (Law Div. 1964), aff'd, 43 N.J. 524 (1964)], as are the circumstances of passage. N.J. Ins. Underwriting Assn. v. Clifford, 112 N.J. Super. 195 (App. Div. 1970).

The MLUL was signed into law by the Governor on January 14, 1976, as L. 1975, Ch. 291, and became effective on August 1, 1976. Significantly, while the MLUL was pending enactment, a bill, A-3192, was introduced in the Assembly on February 27, 1975, for the express purpose of authorizing municipalities to enact TDR ordinances. (Pal).* Thus, the sponsor's statement to A-3192 specified:

> 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 rights may be determined, allocated and transferred for use in another segment of the municipality. (emphasis added). (Pal4).

The fact that this bill was considered, and rejected, during the same legislative term as the bill which ultimately became the MLUL is a plain indication that the latter does not, and was never intended to, authorize municipalities to adopt TDR ordinances.

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* "Pal" refers to page 1 of the Appendix to this Brief.

Even after the MLUL became effective, bills were introduced in the Legislature for the purpose of authorizing municipal TDR ordinances. For example, on June 19, 1978, A-1509, "an act concerning municipalities in relation to planning and zoning, and supplementing the 'Municipal Land Use Law' . . . " was introduced.* (Pa15). This bill, known as the "Municipal Transfer of Development Rights Act" contained detailed provisions respecting the creation, transfer, and use of development rights and authorized municipalities to adopt appropriate ordinances implementing TDR. The statement accompanying the bill described 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. (Pa34).

Clearly, the sponsors of A-1509, who wished to implement TDR in New Jersey, believed that no prior legislation (including the MLUL) had delegated TDR authority to municipalities, hence the need for a separate bill to spell out how TDR may be utilized in supplementation of the MLUL. A-1509, of course, was ultimately not enacted, and no TDR bills have since been introduced in the Legislature. Since the MLUL obviously provides no express authorization for municipal TDR ordinances, and since

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* An earlier version of this bill was introduced as A-657 on February 16, 1978.

no bill providing such authorization has yet been enacted, New Jersey's municipalities quite simply lack any authority to adopt such ordinances.

A review of A-1509 indicates the self-evident need for statewide enabling legislation before municipalities may enact TDR ordinances. The bill first provides uniform procedures for undertaking preliminary TDR feasibility studies, with specific provisions for public input, before the municipal governing body considers whether to adopt a TDR ordinance. (§5-10). Moreover, the bill provides specific guidance as to the procedure for adoption of a TDR ordinance (§11), the mandatory minimum contents of such an ordinance (§12), and the criteria for delineating the preservation (§13) and transfer (§14) zones. Most importantly, the bill provides uniform provisions governing the issuance and apportionment of development rights certificates (§17-18), the manner in which they may be transferred (§19), and the method by which such rights are to be taxed, assessed for purposes of valuation, and sold or exchanged (§21). Uniform treatment of such rights for purposes of taxation, assessment, and sale or exchange is necessary as a matter of essential fairness, if not as a matter of constitutional mandate.* Absent such statewide

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* See N.J. Const. (1947), Art. VIII, §I, ¶1(a) which requires that

> Property shall be assessed for taxation under general laws and by uniform rules. All real property assessed and taxed locally or by the State for allotment and payment to taxing districts shall be assessed according to the same standard of value . . . [emphasis added].

Thus, development rights (which are clearly an interest in "real estate") must be taxed under uniform rules according to the same standard of value statewide. This is impossible to do absent State enabling legislation which set such rules and standards.

enabling legislation, the East Windsor TDR ordinance fails to address such aspects of TDR, especially assessment and taxation, let alone provide a fair, uniform Statewide approach.

As one can easily see from a comparison of A-1509 and the East Windsor TDR ordinance, the entire TDR concept is neither simple nor easily understood; rather, it is a drastic departure from traditional notions of zoning and real property principles. As such, it does not lend itself to piecemeal treatment by each of New Jersey's 567 municipalities. One can easily imagine the chaotic situation that would result if each municipality were free to enact its own TDR system without any uniform, mandatory, State-imposed provisions. Surely, there is no indication that the Legislature intended to sanction such chaos. Like other aspects of land use and property law, TDR crys out for the enactment of mandatory guiding principles in the form of enabling legislation at the State level. Absent such legislation, there is clearly no authority for adoption of ordinances such as East Windsor's.

References to other analogous, innovative land use concepts abound, and each of these concepts is only viable because enabling legislation has been enacted. The use of air rights, for example, a precursor to TDR, is possible in New Jersey only because it is authorized by statute. N.J.S.A. 46:3-19. Similarly, solar easements have recently come into vogue as

part of the emerging trend toward full utilization of alternative energy sources. Specific legislation, N.J.S.A. 46:3-25 et seq., authorizes and defines the dimensions of such easements. Finally, the condominium form of ownership of real property, authorized and defined by N.J.S.A. 46:8B-1 et seq., is perhaps the clearest example of the need for uniform statewide legislation governing unique and novel interests in property. Ownership of a condominium would be unthinkable and subject to untold vagaries if it was regulated solely on a municipality-by-municipality basis.

In the case of TDR, legislation of statewide applicability is not only desirable if the concept is to succeed, but it is absolutely imperative. Without such enabling legislation, the TDR concept is void by virtue of the State Constitution, Art. IV, §VI, ¶2, since the power to adopt TDR ordinance may only be delegated by such legislation.

It has generally been acknowledged nationwide that specific enabling legislation is necessary in order for a municipality to enact a TDR ordinance. See Merriam, "Making TDR Work," 56 N.C. Law Rev. 77, 109-110 (1978) ("a statutory basis would permit recognition of TDR as a valid exercise of the police power, provide an opportunity to specify an institutional framework for regulating transfers and allow states to impose requirements for the effective land planning that is essential to designating preservation and tranfer zones."). The only two cases reported to date which discuss TDR ordinances [Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S.

2d 5, 350 N.E. 2d 381 (N.Y. Ct. App. 1976), app. dism., 429 U.S. 990, 97 S. Ct. 515, 50 L. Ed. 2d 602 (1976) and Penn Central Transp. Co. v. City of New York, 42 N.Y. 2d 324, 397 N.Y.S. 2d 914, 366 N.E. 2d 1271 (1977), aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)] both analyzed the concept on Fifth and Fourteenth Amendment "taking without just compensation" grounds, rather than from the perspective of whether the TDR ordinances were authorized by enabling legislation.* Both cases involved TDR ordinances adopted by the City of New York.

Significantly, however, Judge Breitel, the author of decisions in both cases by the Court of Appeals of New York (that State's highest court), later acknowledged the general need for TDR enabling legislation and indicated that the lack of enabling legislation was not an issue in French and Penn Central because

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* The only New Jersey case which even remotely touches upon TDR is Matlack v. Bd. of Chosen Freeholders of County of Burlington, Superior Court, Law Division, Dkt. No. L-67582-81 PW (decided December 6, 1982), which involved a challenge to the Development Credit Bank set up by Burlington County to create a market in "Pinelands Development Credits" (PDCs) by buying and selling such credits. The PDC system, which is similar to a TDR arrangement, was adopted by the Pinelands Commission as part of the Pinelands Comprehensive Management Plan. PDCs are allocated to landowners in the Preservation Area of the Pinelands, and may be sold to developers who may, in turn, use them in the growth area in order to obtain additional housing density. The PDC program is voluntary, not mandatory, in the sense that a developer is not required to use PDCs in order to build, but those who do so are awarded increased density.

No issue was raised in Matlack as to the adequacy of the enabling legislation supporting PDCs. Indeed, the Pinelands Protection Act, N.J.S.A. 13:18A-8, directed the Commission to "consider and detail the application of a variety of land and water protection and management techniques" in its planning, "including but not limited to ... transfer of development rights."

of the unique and extensive "home rule" powers enjoyed by the City of New York under the New York State Constitution. At a conference on transferable development rights sponsored by the National Conference of State Legislatures and the New Jersey Law Revision and Legislative Services Commission held on September 30, 1977, Judge Breitel was asked by a New Jersey attorney whether "there is the need for specific enabling authority for municipalities to adopt TDR ordinances." (Transcript of proceedings, p. 30). In response, Judge Breitel indicated that in New York:

> "We have strong home rule provisions in our state Constitution and, by statute, for the municipalities. Then, in the case of New York City, it has always had extremely broad home rule powers and in this area too. So nobody ever made any attack on the lack of power of the City to adopt legislation of that kind [i.e. a TDR ordinance]." (Transcript of proceedings at p. 33).

Judge Breitel indicated, however, "that had the same thing arisen outside New York City, I am sure the question would be raised and the outcome would be very dubious."

Also in attendance at the Transferable Development Rights Conference was Justice Frederick W. Hall of the New Jersey Supreme Court, a noted expert on land use law in New Jersey and the author of a number of judicial decisions in that area. In response to the same question respecting the need for enabling legislation for TDR ordinances, Justice Hall stated that:

> "I think legislation is not only desirable, but I would go further and I think probably it is necessary. You want to get some guidelines down, some ways of handling this. . . . and I think there ought to be enabling legislation, which is something more than just saying you

> can do it. I think it would help also in any attack on the concept--judicial attack--in that you have a legislative expression of policy by such a statute that it is a desirable thing from a social, economic and land use point of view. [Transcript of proceedings at p. 32].

Apart from the fact that TDR ordinances were never intended to be authorized by the MLUL or any other enabling legislation, it is clear that the East Windsor TDR ordinance is not consistent with the standards accompanying the grant of power contained in the MLUL and thus the ordinance is ultra vires and void. Lusardi v. Curtis Point Prop. Owners Assn., 86 N.J. 217, 226 (1981).

If the East Windsor TDR ordinance is to pass muster under the MLUL, it must satisfy N.J.S.A. 40:55D-62, which contains the specific delegation from the State to municipalities of the "power to zone." The statute indicates that a municipal governing body is empowered to "adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon." More specifically, such a zoning ordinance:

> ...shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate uses of land. The regulations in the zoning ordinances shall be uniform throughout each district for each class or kind of buildings or other structures or uses of land, including planned unit development, planned unit residential development and residential cluster, but the regulations in one district may differ from those in other districts. [N.J.S.A. 40:55D-62 (emphasis added)].

N.J.S.A. 40:55D-65 provides specific examples of the content of zoning ordinances, and the types of land uses which may be regulated. Nowhere of course, does the statute authorize the creation or regulation of "development rights," or the use of such rights as a condition to the use of land.

These provisions of the MLUL obviously give municipal officials wide discretion in determining what uses are suitable for delineated districts. Lusardi v. Curtis Point Prop. Owners Assn., supra, 86 N.J. at 227. East Windsor, however, has gone far beyond mere regulation of the use of land. East Windsor's TDR ordinance has created two districts, Agricultural Preservation (AP) and the Residential Expansion for Agricultural Preservation (REAP). The AP zone is to be preserved in substantially its present state: the only permitted uses are agricultural or agriculturally-related. The REAP zone permitted uses include agriculture, single family residential dwellings on large (two acre) lots and planned unit developments. In both the AP and REAP zones higher density residential housing is a conditional use, but the "condition" is unrelated to "land use" at all. Rather, the condition is that title to a portion of the fee interest in real property in the AP zone (i.e. "development rights") must be relinquished in order to develop at a higher density in the AP zone or must be purchased by the owner of land in the REAP zone to enable him to develop his REAP zone parcel at a higher density. In short, the municipality ultimately realizes its land use goals not through direct regulation of the use of land, but by compelling a developer to deed restrict the use of

AP land forever as a condition precedent to permission to construct residential dwellings on REAP land. Such a process goes far beyond the regulation of land uses authorized by N.J.S.A. 40:55D-62 and -65.

New Jersey courts have uniformly acknowledged that under the MLUL and its predecessor statutes, municipal zoning authority is limited to regulation of the physical use of land. For example, in Bridge Park Co. v. Bor. of Highland Park, 113 N.J. Super. 219 (App. Div. 1971), the borough zoning ordinance purported to define a "garden apartment" as "a building or series of buildings under single ownership." 113 N.J. Super. at 221. The borough attempted to use the ordinance to prevent the conversion of certain apartments to the condominium form of ownership. The Appellate Division declared that

> A quick reading of [former N.J.S.A. 40:55-30, the precursor of N.J.S.A. 40:55D-65] discloses no power granted to a municipality to regulate the ownership or buildings or the types of tenancies permitted . . . . [113 N.J. Super. at 221].

The court found that municipal authority to regulate the use of land "does not refer to ownership but to physical use of lands and buildings." Id. at 222. As such, the court concluded that "the attempted regulation of ownership of property under the guise of the zoning power is beyond the power of the defendant borough . . . ." Id.

Other courts have echoed the view that municipal zoning authority is limited to regulation only of physical use of land and structures and may not be extended to affect ownership or title to property. Plaza Joint Venture v. Atlantic City, 174

N.J. Super. 231, 242 (App. Div. 1980); Hampshire House Sponsor Corp. v. Fort Lee, 172 N.J. Super. 426, 431 (Law Div. 1979); Maplewood Village Tenants Assn. v. Maplewood, 116 N.J. Super. 372 (Ch. Div. 1971); Tp. of Washington v. Cent. Bergen Comm. Health, 156 N.J. Super. 388, 417 (Law Div. 1978). By contrast, the East Windsor TDR ordinance goes far beyond mere regulation of the physical use of land and structures: it requires, as a condition of obtaining approval for construction of single family residential dwellings on lots less than two acres, that ownership and title to AP land be radically altered. East Windsor thus is really attempting to regulate title to land (i.e., stripping the development potential of land from the owner's fee interest) as well as ownership (i.e. the development rights are eventually deeded to the municipality when a developer exchanges them for increased density). Under the above-cited cases, the MLUL may not be employed to affect title and ownership in this manner.

An analogous situation was presented by Metzdorf v. Rumson, 67 N.J. Super. 121 (App. Div. 1961), in which a testator's division of land through his will into two lots, each of which violated the size and usage requirements of the zoning ordinance, was claimed by the municipality to be void. The court distinguished between the law of testamentary disposition and the authority to zone:

> . . . while our laws relating to testamentary disposition are focused on devolution of title in accordance with the design of the decedent, our zoning and planning regulations relate predominantly to the use to which the realty may be subjected [67 N.J. Super. at 127].

Thus, the court declared that the zoning function is "directed in immediate fashion towards activities upon the property." Id. at 128. Zoning controls:

> the use to which land is subjected, . . . the size, shape, and placement of buildings, and size, shape, and usable percentage of lots -- in order to achieve the immediate ends of control over population density, adequate daylighting of buildings, and sufficient open space for rest and recreation [citations omitted] [Id.].

On the other hand, the court determined that

> 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. [Id., emphasis added].

The Metzdorf court thus held that a zoning ordinance may not block the effectuation of a testator's intent in transferring title to his land, and that the testamentary parcel division was valid even though it did not conform to the zoning ordinance. Id. The court's holding was premised upon the conclusion that a zoning ordinance may regulate use of land, but not the conveyance itself:

> ...the scope of municipal zoning authority must be measured in the light of both traditional conceptions of the zoning function and allied legislative enactments. The Planning Act, through its regulation of subdivisions, provides the sole governmental restraint on transferability in this area; testamentary dispositions are expressly excluded from its sweep, thus evincing a policy determination not to interfere with such transfers except as specified. [Id. at 129].

In sum, the court significantly stated that "the power to regulate land use does not embrace the authority to impinge upon the transfer of title thereto." Id.*

Whereas in Metzdorf the municipality attempted, by zoning ordinance, to prohibit a transfer of title to land, in the instant case East Windsor seeks to require such transfer of title as a condition precedent to permission to construct single family housing. In both situations, the municipality clearly is attempting to affect the alienability of land and transfer of title thereto under the guise of zoning authority. Since, under Metzdorf, a municipality clearly lacks power to block a transfer of title which may be inconsistent with its zoning ordinance, it should be obvious here that municipalities also lack the power to affirmatively compel the transfer of title to interests in land as the price for development approvals. The East Windsor ordinance plainly goes beyond mere regulation of land use to the extent that it compels the transfer of development rights. As Metzdorf makes clear, a municipality may in no way affect alienability of land since zoning authority "is concerned solely with the manner in which its owner seeks to utilize [his land]." 67 N.J. Super. at 128.

The East Windsor TDR ordinance recites among its objectives the preservation of agricultural land. Although this

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* Subsequent to the Metzdorf decision, the zoning enabling legislation was supplemented to exempt testamentary dispositions from a municipality power regulating subdivisions. See, N.J.S.A. 40:55D-7.

objective is consistent with the goals of the MLUL, N.J.S.A. 40:55D-2(g), a legitimate objective cannot validate the TDR provisions absent specific enabling legislation. The New Jersey cases are legion in which zoning ordinances have been invalidated as unauthorized by enabling legislation notwithstanding an undisputed beneficial objective.

For example, in Dressner v. Carrara, 69 N.J. 237 (1976), the municipality argued that it could, by ordinance, impose off-street parking requirements upon a commercial establishment as a condition of obtaining a certificate of occupancy. The Supreme Court rejected this argument, inter alia, because it was not authorized by then-existing enabling legislation: "Although the present statute authorizes 'such other subdivision improvements as the municipal governing body may find necessary in the public interest,' off-street parking is not specifically enumerated." 69 N.J. at 241. Accordingly, the court held that:

> There is, however, no statutory source for the power defendants seek to exercise. No enactment authorizes a municipality to impose requirements of this kind where no subdivision approval is sought and where there is no change of use. The absence of an enabling act is fatal to the argument that such power exists, for a municipality has no inherent power to adopt zoning or other land use ordinances; it may act only by virtue of a statutory grant of authority from the Legislature. [Id.].

The court reached this holding notwithstanding its observation that the MLUL, which had been enacted but which was not yet effective, "includes off-street parking facilities among improvements that may be required by a zoning ordinance. N.J.S.A. 40:55D-65d." 69 N.J. at 241.

In Sussex Woodlands, Inc. v. Tp. of West Milford, 109 N.J. Super. 432 (Law Div. 1970) the court considered whether the municipality was empowered to condition the grant of subdivision approval upon proof by the landowner that all taxes on the land have been paid. While payment of taxes is obviously in the public interest and is conduct that should be encouraged, the court nonetheless opined that

> What the Township of West Milford has attempted to do in passing ordinances which condition both major and minor subdivision approval on the payment of real property taxes is to try and collect back taxes in a manner not prescribed by statute. [109 N.J. Super. at 439].

The court adopted the view that "to permit municipalities the right to impose payment of taxes as a prerequisite to subdivision approval would be to give a strained interpretation to the Municipal Planning Act . . . ." Id. at 437. The court found that "regulatory ordinances are intended for the purpose of reasonably controlling the physical development of subdivision property" and that "planning conditions are limited to control over physical improvements to subdivisions . . . ." Id. at 437-438. Since no specific statute authorized the municipality to compel the payment of taxes as a condition of subdivision approval, the court invalidated the ordinance, notwithstanding its obvious beneficial objective, on the basis that municipalities lack "power to impose a tax payment condition under the guise of an act [i.e., zoning enabling legislation]

which does not authorize this condition." 109 N.J. Super. at 441.*

In a similar vein is Levitt and Sons, Inc. v. Tp. of Freehold, 120 N.J. Super. 595 (Law Div. 1972), in which a municipality withheld subdivision approval on the basis that the developer had demonstrated incompetence in an adjacent municipality. No statute authorized the municipality to take such action. Citing with approval the statement in 3 Anderson, American Law of Zoning, (1968), §19.24 at 443-444 that "a condition for approval may be imposed only if it is authorized by statute," the court held that:

> A municipality may not withhold approval for a subdivision plot even though it may have evidence that the builder has in the past done an inadequate job in the construction of homes. Subdivision control is not be used for that purpose. The municipality has available to it other means of protecting its citizens. [120 N.J. Super. at 598].

Just as in Dressner, Sussex Woodlands and Levitt, the goals which East Windsor is attempting to further are arguably worthy and in the public interest. But those cases make clear that worthy goals alone cannot validate a zoning ordinance; unless enabling legislation specifically authorizes a zoning ordinance to address such goals, they may not be addressed as

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* It should be noted that, no doubt in response to the Sussex Woodlands decision, the Legislature subsequently adopted N.J.S.A. 40:55D-65(h) which authorizes a municipal zoning ordinance to condition development approvals upon payment of taxes as assessments for local improvements.

part of such an ordinance.* Unless and until the Legislature acts, however, the East Windsor TDR ordinance is unauthorized by the MLUL.

In sum, municipalities lack any inherent authority and all municipal zoning authority flows from the MLUL in accordance with N.J. Const. (1947), Art. IV, §VI, ¶2. Zoning ordinances which are not authorized by the MLUL or are inconsistent with the terms and standards contained in that enabling legislation are ultra vires and void. The legislative history of the MLUL, and subsequent legislative activity respecting proposed TDR enabling legislation, demonstrate that the MLUL does not, and was never intended to, authorize TDR ordinances. The East Windsor TDR ordinance is therefore ultra vires and void; it plainly goes beyond regulation of land uses, and its TDR provisions are at best only tenuously related to the use of land. Although the stated goal of the ordinance may be worthy, worthy goals cannot validate an ordinance absent basic enabling legislation. Accordingly, the court should grant summary judgment in favor of Centex-New Jersey declaring Ordinance 1982-16 void and enjoining its enforcement.

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* It is interesting to note that the Legislature subsequently acted in response to Dresner and Sussex Woodlands to permit municipalities to condition approvals upon provision of off-street parking and payment of taxes, respectively. Perhaps the Legislature will ultimately agree that development approvals may be conditioned upon transfer of development rights, although to date it has failed to approve each TDR bill which has been introduced.

POINT III

IF THE COURT GRANTS SUMMARY JUDGMENT ON COUNT I IN PLAINTIFF'S FAVOR, IT SHOULD DIRECT THE TOWNSHIP TO REZONE THE AFFECTED LAND TO A VALID AND APPROPRIATE USE.

Assuming that the court agrees that the MLUL does not authorize municipalities to adopt TDR ordinances, it is evident that summary judgment must be granted in favor of Centex on Count I of its Complaint and that the Township of East Windsor must be enjoined from enforcing Ordinance 1982-16. In addition, Centex-New Jersey respectfully submits that the court must also address the question of appropriate remedies in order that Ordinance 1982-16 be replaced within a reasonable time with an ordinance that is valid under the MLUL.

It is apparent that the provisions of the East Windsor TDR ordinance are complex and interrelated. While the transferable development right portions of the ordinance are clearly invalid, the integrated nature of the ordinance makes it extremely difficult for the court to pick and choose as to which provisions pass muster under the MLUL and which do not. Indeed, it is far from clear which provisions, if any, the Township intended to survive in the event that the TDR mechanism were declared invalid. Accordingly, it is clear that the entire ordinance must be declared null and void.

This conclusion is grounded upon Morris County Land v. Parsippany-Troy Hills Tp., 40 N.J. 539 (1963), in which the Supreme Court found that the Meadow Development Zone Ordinance in that case was enacted to prevent private productive use of the

property and therefore constituted an illegal taking without just compensation. As in the present situation, the court in Morris County Land found that the ordinance in question was "enacted as a unified whole." 40 N.J. at 559. For that reason, the court found that:

> It is quite impossible or at least impracticable, even if a proper function or responsibility of a court, to attempt to sift any wheat from the chaff and pick out certain uses or certain land reclamation provisions which might individually be invalid. That which thereby could be saved would be so fractional and incomplete as not to amount to a comprehensive, reasonable regulation of the area. Therefore we must hold the provisions invalid in their entirety. [Id.].

Likewise in the present case, even assuming that it is a proper judicial function, any attempt by the court to analyze the minute provisions of Ordinance 1982-16 in an attempt to separate the wheat from the chaff would save only fractional provisions and at the same time deny the land in question a comprehensive, reasonable regulation. Since it is doubtful that the Township even intended that such isolated provisions survive in the event that TDR provisions are declared invalid, this court should adopt the Morris County Land approach and invalidate the entire ordinance.

Such a result, of course, "leaves the area unzoned." Morris County Land v. Parsippany-Troy Hills Tp., supra, 40 N.J. at 559. "The absence of all regulation would permit the establishment of any use by any means--a result which might well be damaging to the overall public interest entitled to be served by appropriate exercise of the police power in the light of the

special characteristics and particular problems of the district." Id. In such a situation, courts typically "rollback" to the zoning ordinance which was in effect immediately prior to the invalidated ordinance. In this case, however, as will be pointed out below, such a rollback would not serve the best interests of the parties because substantial legal issues, which are the subject of other litigation, are present respecting the validity of the previous zoning ordinance. Under the circumstances, the better course would be to provide the municipality reasonable opportunity to cure the invalidity of Ordinance 1982-16 by allowing it to adopt a new ordinance. See Deal Gardens, Inc. v. Board of Trustees of Loch Arbor, 48 N.J. 492, 498 (1967).

Precisely such a remedy was approved by the Supreme Court in Petlin Associates, Inc. v. The Township of Dover, 64 N.J. 327 (1974), in which the most recent zoning ordinance was invalidated and substantial legal problems existed respecting the previous ordinances which otherwise would have been reeffectuated by rollback. In Petlin, the Supreme Court concluded that:

> "An equitable resolution of the problem can be achieved by affording the Township a period of 90 days to rezone the area to a valid and appropriate use. Cf. Newark, etc. Cream Co. v. Parsippany-Troy Hills Tp., 47 N.J. Super. 306, 331 (Law Div. 1957). We do not mean to indicate what would or would not be the proper zone plan. This is the province of the governing body of the Township subject to the consideration set forth in [the enabling legislation]. The matter should be given careful study so that whatever zoning is selected, it will become an integral part of a rational and comprehensive plan. [64 N.J. at 333].

See also So. Burlington NAACP v. Tp. of Mt. Laurel, _____ N.J. _____ (1983), which, in an analogous context, indicated that municipalities should be ordered to revise ordinances declared to be invalid (Slip op. at 128).

At the public hearings on the East Windsor TDR Ordinance, a number of facts surfaced with (a) militate against a "rollback" to two-acre zoning for the lands located in the AP zone and (b) raise substantial questions as to whether the lands designated for preservation and for intense development are appropriately suited for such classification. Specifically, at the public hearings on the TDR Ordinance:

1. The Township admitted that (a) large-lot zoning is not an effective or reasonable technique for preserving farmland, (b) there is no market in the Township for the expensive housing that, by necessity, must be constructed on two-acres lots, and (c) that a planned development would not be built on the Etra Road site because of the difficulty involved in assembling the required 400 acres (See Exhibit A to Petrino Affidavit);

2. The Farm Bureau, on behalf of several farmers, in writing testified that (a) the best quality farmland in the Township was located in the REAP zone, not in the AP zone, and (b) approximately 50 percent of the land in the AP zone is currently not being farmed (Id. Exhibit B);

3. The Petitions submitted protesting the adoption of the TDR Ordinance as well as the testimony of certain REAP zone land owners established that more than 50 percent of the land located in the REAP zone is owned by individuals who have no intent to develop their land (Id. Exhibit C); and

4. The Farm Bureau (Id. Exhibit B), the Windsor-Hights Herald (Id. Exhibit D), and the individuals who signed the protest Petition all question whether the Township goal was the "preservation of farmland" or simply the "illegal desire to impose a moratorium on development within the AP zone and, in particular, to prevent Centex Homes of New Jersey, Inc. from developing its holdings. ..." (Id. Exhibit C).

Moreover, subsequent to the adoption of the TDR Ordinance, the New Jersey Department of Community Affairs, Division of Planning, in a letter confirmed that roughly 95 percent of the Township is within a Growth Area as described in the State Development Guide Plan, that the entire Centex-New Jersey site is in a designated Growth Area, and that approximately one-half of the Etra Road site is in a designated Agricultural Area.

These facts, separately or in combination, clearly support the need for the entry of an Order that does more than invalidate the TDR ordinance. Such an Order would be nothing more than a "pyrrhic victory" because it would allow the Township to continue to avoid satisfying its statutory obligation "to encourage the most appropriate use of land" in a manner which promotes the general welfare.

CONCLUSION

For the foregoing reasons, the Motion of plaintiff, Centex-New Jersey for summary judgment should be granted declaring that Ordinance 1982-16 of East Windsor Township is void and enjoining defendants from in any way acting to enforce the ordinance. Moreover, the court should order defendants to adopt a new ordinance for that land area covered by Ordinance 1982-16 in accordance with the provisions of the Municipal Land Use Law, and to submit such newly adopted ordinance to the court for review within 90 days.

Respectfully submitted,

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On The Brief

Dated: February 10, 1983

ASSEMBLY, No. 3192

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 27, 1975

By Assemblywoman TOTARO and Assemblyman WOODSON

Referred to Committee on Municipal Government

AN ACT concerning municipalities in relation to planning and zoning and supplementing chapter 55 of Title 40 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

ARTICLE I

1. This act shall be known and may be cited as the "Municipal Development Rights Act."

2. The Legislature hereby finds that the rate, extent, expense and results of the physical development of New Jersey in recent years have finally forced a recognition of the physical facts of New Jersey life and of the inherent relationship which exists between physical development and those physical facts; that among the most important such physical facts are those concerning New Jersey's size (forty-sixth in the Nation, in terms of land area), population (more than 8,000,000), population density (more than 950 per square mile; first in the Nation), population distribution (89% classified "urban"; 11% classified "rural"), geography (130 miles of coastline, most of which possesses physical beauty or economic value, or both), and land use (more than 1,000,000 acres of land actively devoted to agriculture in 1975, approximately 10,000 acres of which each year is being sold for development and for other than agricultural uses); that the period is long past when uncontrolled, unplanned, unregulated and unrelated physical development could be undertaken without regard for the aforesaid physical facts, and at no cost to the health, happiness, safety and general welfare of the citizens of this State; that while physical redevelopment is constantly necessary to renew and restore declining and deteriorating areas of New Jersey, great care must be exercised in undertaking new physical development which may

result in the destruction and permanent loss of natural assets, structural amenities and those special, distinctive, and often irreplaceable features which have contributed both to New Jersey's history and to its recognition as the Garden State; that the 567 local units of municipal government in New Jersey experience not only the greatest, most immediate and direct pressure for new physical development, but also all the most adverse effects of that development; that the State Government has an obligation to provide municipal governments with adequate and appropriate statutory tools whereby these local units, acting within the statutory framework and pursuant to guidelines provided by the State, may respond to the pressures for, and the burdens imposed by, physical development with sound, rational and comprehensive planning techniques; that these techniques must recognize that the right to own land is separate from the right to develop that land and that a development right may become, under the proper circumstances, a valuable negotiable instrument; that such techniques would permit municipalities to set aside portions of publicly and privately owned improved and unimproved land in permanent preservation zones where new physical development would be prohibited, and require such municipalities to establish other zones where the right to develop the land permanently preserved may be transferred in the marketplace through the sale and exercise of certificates of development rights; and that the exercise by municipalities of the authority to permanently preserve land and transfer the right to develop therefrom pursuant to such a State law, within a framework provided by statute and pursuant to guidelines provided by the State, is within the police power of the State and necessary to insure the public health, happiness, safety and general welfare of both present and future generations.

3. The Legislature declares as a matter of public policy that the preservation by municipalities of certain lands, both improved and unimproved, the prohibition of physical development of lands so preserved, and the transfer of the right to develop such preserved land to other land specifically designated to receive such development, is a public necessity and is required in the interests of the citizens of this State now and in the future.

4. As used in this act unless the context clearly indicates otherwise:

a. "Aesthetic and historic qualities" means those qualities possessed by any building, set of buildings, site, district or zone which, by virtue of its architectural significance, role in an historic event

or general appearance, represents a unique quality or feature in the municipality;

b. "Agricultural use" means substantially undeveloped land devoted to the production of plants and animals useful to man, including but not limited to: forages and sod crops; grains and feed crops; dairy animals and dairy products; poultry and poultry products; livestock, including the breeding and grazing of any or all of such animals; bees and apiary products; fur animals; trees and forest products; fruits of all kinds; vegetables; nursery, floral, ornamental and greenhouse products; and other similar uses and activities;

c. "Aquifer recharge area" means an area where rainfall infiltrates the ground to porous, waterbearing rock formations for retention in underground pools or acquifers;

d. "Assessed value" means the taxable value of property as established pursuant to the provisions of chapter 4 of Title 54 of the Revised Statutes for purposes of taxation;

e. "Board of adjustment" means the municipal zoning board of adjustment established pursuant to R. S. 40:55-30 et seq.;

f. "Capital facilities" means any substantial physical improvement built or constructed by the municipality to provide necessary services for an extended period, including, but not limited to: streets, roads, highways and other transportation facilities; schools; police, fire and rescue facilities; health facilities; sewer, water and solid waste systems;

g. "Certificate of development right" means the document indicating the existence of a development right;

h. "Compatible use" means two or more uses of land not in conflict with each other individually or as combined;

i. "Density" means the average number of persons, families or residential dwelling units per unit of area in the case of residential use; and the average number of square feet per unit of area, in the case of industrial, commercial, or any other use;

j. "Developability" means the capability of a parcel or parcels of land to accommodate the uses intended or proposed for it at the density intended or proposed for it, based on its topography, existing use, physical composition, desirability and availability;

k. "Development potential" means the possible development of a parcel or site based on its developability and the market in which it exists;

l. "Development right" means the right to develop land as set forth in sections 12 through 22 of this act;

m. "Economic feature" means an economic aspect of the use of a parcel of land which is significant to the economic viability of the municipality;

n. "Exercise of development right" means the submission of a development right to the designated municipal official in conjunction with an application for development approval in the transfer zone;

o. "Farmland" means land being used for agricultural purposes or substantially undeveloped land included in the categories of Class I, Class II and Class III soil classifications of the Soil Conservation Service of the United States Department of Agriculture;

p. "Flood plain" means land subject to regulation pursuant to P. L. 1962, c. 19 (C. 58:16A-50 et seq.), as amended and supplemented;

q. "Governing body" means the chief legislative body of the municipality;

r. "Improvement" means any building, structure or construction on the land, including, but not limited to: houses, stores, warehouses, factories, churches, schools, barns or other similar structures, recreational or amusement facilities, parking facilities, fences, gates, walls, outhouses, pumps, gravestones, works of art, improved or unimproved streets, alleys, roads, paths, or sidewalks, light fixtures or any other object constituting a physical betterment of real property or any part of such betterment;

s. "Land of steep slope" means land of a slope of not less than 25%;

t. "Market value" means the price property and improved property would command in the open market for such property and improvements;

u. "Marsh" means low, spongy land generally saturated with moisture and having persistent poor natural drainage. Marsh shall also include the term "swamp";

v. "Master plan" means the master plan of the municipality prepared and adopted pursuant to P. L. 1953, c. 433 (C. 40:55-1.1 et seq.);

w. "Municipality" means any city, borough, town, township or village of any size or class in the State of New Jersey;

x. "Planning board" means the municipal planning board established pursuant to P. L. 1953, c. 433 (C. 40:55-1.1 et seq.);

y. "Preservation zone" means the district or area in which development is discontinued and has such features as are provided in section 13 of this act;

z. "Recreation or park land" means land whose primary use or purpose is recreational;

aa. "Tax map" means the approved map prepared pursuant to P. L. 1956, c. 48 (C. 40:50–9 et seq.);

bb. "Transfer zone" means the district or area to which development rights generated by the preservation zone may be transferred and in which increased development is permitted to occur in connection with the possession of such development rights, and which has such features and characteristics as are provided in section 14 of this act;

cc. "Use" means the specific purpose for which land is zoned designed or occupied;

dd. "Woodland" means substantially undeveloped land consisting primarily of trees and capable of maintaining tree growth;

ee. "Zoning ordinance" means the zoning ordinace of the municipality adopted pursuant to R. S. 40:55–30 et seq.

ARTICLE II

5. The governing body of any municipality may, by resolution, establish a commission whose general purpose shall be to determine, within a time specified in the resolution, the feasibility of the municipality adopting a development rights ordinance, and upon such determination to make a recommendation to the governing body concerning the adoption of the provisions of this act, all as hereinafter provided.

6. In adopting a resolution pursuant to section 5 of this act, the governing body shall also designate the members of the commission and select its chairman; provided, however, that the commission shall have no more than 11 members, three of whom shall also be members of the municipality's board of adjustment, and three of whom shall also be members of the municipality's planning board; provided, further, however, that where the planning board also acts as the zoning commission pursuant to section 8 of P. L. 1953, c. 433 (C. 40:55–1.8) and R. S. 40:55–33, the members of the commission established herein shall also be members of the planning board except that no more than two members shall be of the same class on the planning board. The chief executive officer of the municipality, the municipal planner and the municipal zoning officer, if such positions exist; and the municipal attorney, unless any of the aforesaid are otherwise appointed to the commission as provided hereinabove, shall also be members of the commission, ex officio. Vacancies among the members shall be filled in the same manner as the original appointments were made. The term of the

members shall be the same as the life of the commission and shall terminate with the conclusion of the commission's work.

7. In the resolution adopted pursuant to section 5 of this act, the governing body may also appropriate to the commission such funds as it deems necessary and sufficient for its work. Within the limits of such appropriations, the commission may appoint and contract with such professional, clerical and stenographic assistants as it shall deem necessary and, where applicable, in the manner prescribed by the Local Public Contracts Law, P. L. 1971, c. 198 (C. 40A:11-1 et seq.). The members of the commission shall serve without compensation but may, within the limits of the appropriations therefor, be reimbursed for such expenses as are actually incurred in the performance of their official duties.

8. Every commission established pursuant to section 5 of this act shall, upon its organization, cause to be conducted a study to determine the feasibility of the municipality adopting a development rights ordinance which shall include, but not be limited to:

a. An analysis of the existing land uses in the municipality, and an identification of any land which might be included within a preservation and a transfer zone if such were to be established pursuant to the provisions of this act;

b. An evaluation of the zoning ordinance of the municipality adopted pursuant to the provisions of R. S. 40:55-30 et seq., if one so exists, on the basis of existing and anticipated land uses and development;

c. The identification of national, State and regional factors and trends which will have an influence on development in the municipality;

d. The identification of the anticipated growth and development the municipality may expect to experience in the next 10 years;

e. An assessment of the development potential of all areas of the municipality on the basis of the projected growth of the municipality, the demand for development imposed by the market and the suitability of the land for such development;

f. The identification and analysis of capital facilities currently existing in the municipality and those that will be required by virtue of the anticipated development.

9. Upon the completion of the study conducted pursuant to section 8 of this act, the commission shall formulate its recommendation and prepare a report to communicate its findings to the governing body of the municipality. If it is the recommendation of the commission that the municipality would not find it in its

best interest to adopt a development rights ordinance, the commission shall detail in its report such information as was available to it which led to such recommendation. If it is the recommendation of the commission to adopt a development rights ordinance, the commission shall prepare a report which shall include, but not necessarily be limited to:

a. The designation of a proposed preservation zone within the municipality in compliance with the provisions of section 13 of this act;

b. A plan indicating the existing and permitted uses of the proposed preservation zone accompanied by a statement detailing the nature and distinguishing features of the zone at present;

c. A tax map for the proposed preservation zone specifying the assessed value of the parcels contained therein;

d. An analysis of the development potential of the land in the proposed preservation zone estimating the market value of the parcels contained therein;

e. The designation of a proposed transfer zone in which the development rights generated by the preservation zone may be utilized;

f. A plan indicating the existing uses of the proposed transfer zone and a statement detailing the permitted uses under the existing zoning ordinance;

g. A tax map for the transfer zone indicating the assessed and market value of the parcels contained therein;

h. A plan projecting the land use scheme in the proposed transfer zone with the full transfer of development rights;

i. A proposal concerning the identification of the total number of development rights assigned the preservation zone and their distribution among the owners of property in said zone.

10. Upon the formulation of its recommendation and report, the commission shall hold public hearings in the manner provided in section 7 of P. L. 1953, c. 433 (C. 40:55–1.7), and within 10 days following the conclusion of the public hearings, shall transmit its recommendation, report and transcript of the public hearings to the governing body of the municipality for its consideration.

11. Within 60 days of the receipt of the documents specified in section 10 of this act, the governing body shall consider the commission's recommendation and report. If the commission recommends the adoption of a development rights ordinance, the governing body may adopt such ordinance by majority vote. If the commission recommends against the adoption of such an ordinance,

the governing body may adopt a development rights ordinance by a vote of two-thirds of the full membership of the governing body. The commission shall terminate upon the action of the governing body pursuant to this section unless otherwise provided for by the governing body. Any ordinance adopted pursuant to this section shall be subject to the provisions of article 1 of chapter 55 of Title 40 of the Revised Statutes (C. 40:55-1.1 et seq.) and shall be considered an amendment to the zoning ordinance, if any, then in effect.

ARTICLE III

12. Every development rights ordinance adopted pursuant to the provisions of this act shall include:

a. The specification that the planning board of the municipality shall have the responsibility for implementing the provisions of any ordinance adopted pursuant to this act; shall hear and review any applications or complaints that may result from the implementation of any such ordinance; and shall make such reports to the governing body as it may require and such recommendations as it shall deem necessary for the successful operation of the ordinance;

b. The establishment of a method for the review and hearing of applications and complaints in the manner provided by article 3 of chapter 55 of Title 40 of the Revised Statutes;

c. The designation and establishment of the preservation and transfer zones as the governing body shall deem necessary and as are consistent with the provisions of this act;

d. The provision that all construction, erection, demolition and development in the preservation zone not heretofore approved shall be prohibited except as provided in sections 15 and 23 of this act;

e. Provisions for the total number, allocation and distribution of development rights in the preservation zone; provided, however, that prior to the adoption of any such provisions in the ordinance all owners of property in the preservation zone shall be mailed a notice informing them of the number of development rights to which they will be entitled under the ordinance, the permitted use or uses on the basis of which such development rights are to be allocated in the preservation zone, the conversion schedule by which such development rights may be applied to another use or uses in the transfer zone, and the manner in which the development rights may be transferred, all as hereinafter provided. Such notices shall also contain the time and place the governing body or its

designate body shall hold a public hearing on the number, allocation and distribution of development rights. Public notice of the hearing required pursuant to this subsection may be given simultaneously with the public notice required pursuant to R. S. 40:49–2 concerning a hearing or hearings held for the purpose of considering any ordinance for final passage; provided, however, that a separate time shall be established for the hearing required pursuant to this subsection and the public hearing or hearings required pursuant to R. S. 40:49–2 shall not be finally adjourned until the completion of the hearing required pursuant to this subsection.

The governing body of any municipality which adopts a development rights ordinance pursuant to the provisions of this act shall appropriate such funds in such amounts and for such purposes as it shall deem necessary and sufficient for the purposes of implementing the ordinance.

13. In creating and establishing the preservation zone the governing body shall designate a tract in such numbers and of such sizes, shapes and areas as it may deem necessary to carry out the purposes of this act; provided, however, that

a. All land in the preservation zone contains one or a combination of the following characteristics:

(1) Substantially undeveloped or unimproved farmland, woodland, flood plain, swamp, acquifer recharge area, marsh, land of steep slope, recreational or park land;

(2) Substantially improved or developed in a manner so as to represent a unique and distinctive aesthetic or historic quality in the municipality;

(3) Substantially improved or developed in such a manner so as to represent an integral economic asset in and to the municipality;

b. The location of the zone is consistent with, and corresponds to, the master plan and zoning ordinance of the municipality if they so exist;

c. The aggregate size of the zone bears a reasonable relationship to the present and future patterns of population and physical growth and development as set forth in the study conducted by the commission pursuant to section 8 of this act, and are incorporated in the zoning ordinance and master plan of the municipality if they so exist;

d. Any nonconforming use or improvement existing in the preservation zone at the time of adoption thereof may be continued and in the event of partial destruction of such nonconforming use or improvement it may be restored or repaired; provided, however,

that such nonconforming use or improvement remains consistent with the nonconforming use or improvement in effect at the time of the adoption of the ordinance; and

e. Land within the preservation zone may be subdivided in the manner prescribed in section 14 of P. L. 1953, c. 433 (C. 40:55-1.14), only for the purpose of ascertaining the development potential and for determining the number and allocation of development rights of parcels contained therein, or, where a change, modification, or amendment to the development rights ordinance has been approved and issued pursuant to section 15 of this act, to provide for such change, modification or amendment.

14. In creating and establishing the transfer zone, the governing body may designate a tract or tracts, which may but need not be contiguous, in such numbers and of such sizes, shapes and areas as it may deem necessary to carry out the provisions of this act; provided, however, that

a. The density, topography, development and developability of each transfer zone is such that it can adequately accommodate the transfer of development rights from the preservation zone;

b. The density of each transfer zone is increased beyond the density otherwise permitted as a matter of right under the zoning ordinance of the municipality, if one so exists;

c. The result of the increase in the density shall be a zone wherein there is a greater incentive to develop at the higher density with certificates of development rights, than at a lower density without such certificates;

d. Development at higher densities in each transfer zone shall be permitted only with the utilization of certificates of development rights and that any development in any transfer zone at a density higher than that permitted by the zoning ordinance without such certificates shall be prohibited;

e. The present capital facilities and municipal services in and for each transfer zone are sufficient to accommodate the increased density of the transfer zone. As used herein "present capital facilities" means those facilities actually in existence and those for which construction contracts have been entered into or which are included in a capital facilities plan adopted by the municipality requiring the construction of such facilities within 5 years of the adopton of such plan; and

f. The overall developability of land in each transfer zone is such so as to offer the most lucrative site possible and available for the transfer of development rights.

Nothing contained herein shall be construed so as to prevent or prohibit a municipality from increasing the number of tracts in the transfer zone at any time upon or after the adoption of a development rights ordinance, using the same criteria as are contained herein, for the purpose of guaranteeing the greater incentive to develop with certificates of development rights as required pursuant to subsection c. hereof.

15. Any regulations, limitations, and restrictions contained in the development rights ordinance shall not be changed, amended, modified or repealed by the governing body or any other officer or agent of the municipality except where the owner of property can demonstrate that such regulations, limitations and restrictions prevent him from a reasonable use of his land; provided, however, that no such change, amendment, modification or repeal of the development rights ordinance shall be granted where such will destroy, change or otherwise alter the nature and characteristics of the preservation zone and the purposes for which it was established. Any application for a change, amendment, modification or repeal of any of the provisions of the development rights ordinance shall be made to the planning board of the municipality which shall hear and decide on the application within 60 days of its receipt. All actions taken by the planning board on any application submitted pursuant to this section shall be subject to review by the governing body of the municipality. No application for development or for the construction of any improvement shall be made where the development rights for the tract in question have been sold or otherwise transferred for use in the transfer zone.

16. Every development rights ordinance shall provide that the certificates of development rights issued in the preservation zone for one use may only be exercised in the transfer zone for that use unless otherwise converted and approved by the planning board as provided in section 20 of this act.

17. Certificates of development rights shall be allocated to the various portions of the preservation zone on the basis of the uses permitted in each such portion of said zone as a matter of right under the existing zoning ordinance, if any, at the time of the adoption of the development rights ordinance; or, in the event no zoning ordinance is in effect, on the basis of uses contained in the development potential determined by the study conducted by the commission pursuant to section 8 of this act and as approved or amended by the governing body. Each certificate of development rights so allocated shall contain on its face, a statement to the effect that it

is allocated on the basis of the specific use or uses cited in the statement, and that it shall be exercised in the transfer zone or zones in a development or developments of such specific use or uses unless converted to another use or uses pursuant to section 20 of this act. The total number of certificates of development rights so allocated shall be equal to and deemed to represent the full and total development potential of all land in the various portions of the preservation zone as a matter of right under the zoning ordinance, if any, existing at the time of the adoption of the development rights ordinance, or on the basis of the development potential of the preservation zone as determined by the study conducted by the commission pursuant to section 8 of this act and as approved or amended by the governing body of the municipality.

18. The total number of certificates of development rights determined pursuant to section 17 of this act shall be distributed to property owners in the various portions of the preservation zone in accordance with a formula whereby the number of certificates distributed to an individual property owner in each of the various portions of the preservation zone shall equal that percentage of the total number of such certificates allocated to the preservation zone that the assessed value of the property of any such owner is of the total assessed value of all property in the preservation zone.

19. Any owner of property in the preservation zone may appeal any determination concerning the number, allocation and distribution of development rights, pursuant to sections 17 and 18 of this act, to the Law Division of the Superior Court.

20. The conversion schedule which every development rights ordinance is required to contain pursuant to section 12 of this act shall provide a means by which development rights allocated pursuant to section 17 of this act on the basis of the uses permitted in each portion of the preservation zone may be exercised for another use or uses in the transfer zone.

Such schedule shall be based on the differing market values prevailing in the municipality for development rights for differing uses and shall be annually reviewed by the governing body and amended, modified and changed as necessary. Every application for the conversion of a development rights shall be received and reviewed by the planning board in the same manner prescribed by R. S. 40:55 35 for amending a zoning ordinance; and any such application shall be granted in the manner provided by the schedule if such application is found to be consistent with the provisions of this act and in the best interests of the municipality. Upon the

granting of any such application, the secretary of the planning board shall notify the county clerk of the converted use of the development right or rights involved in such application.

21. Certificates of development rights shall be taxed in the same manner as real property is taxed, and the assessed value of each uncanceled certificate of development right at the time of the adoption of the development rights ordinance shall be equal to the quotient obtained by dividing the aggregate assessed value of all property in that portion of the preservation zone which is zoned for the particular use or uses to which the particular certificate of development rights applies, by the total number of uncanceled certificates of development rights applying to such particular use or uses. Thereafter, such value shall be determined on the basis of current sales of certificates of development rights in the municipality.

22. Land within the preservation zone shall be eligible for assessment at its agricultural value pursuant to the "Farmland Assessment Act," P. L. 1964. c. 48 (C. 54:4–23.1 et seq.), on the same basis as all other land within this State, upon meeting the agricultural use requirements prescribed in said act; provided, however, that certificates of development rights allocated and distributed to such property shall be taxed pursuant to the provisions of section 21 of this act.

Article IV

23. Nothing in this act shall be construed to prohibit or prevent the ordinary maintenance or repair of property contained within the preservation zone nor to prevent any structural or environmental change to such property which the building inspector of the municipality shall certify is required by the public safety because of an unsafe or dangerous condition it imposes.

24. Any two or more municipalities may enter into an agreement pursuant to the "Interlocal Services Act," P. L. 1973, c. 208 (C. 40:8A–1 et seq.), to jointly implement the provisions of this act.

25. Nothing in this act shall be construed to prohibit or otherwise prevent a municipality from receiving development rights for municipal property contained within the preservation zone on the same basis as other property owners within said zone, or from buying and selling development rights of other parcels.

26. In implementing any development rights ordinance adopted pursuant to this act, and in fulfilling the requirements of this act, any municipality may establish a Development Rights Bank or other such facility in which development rights acquired by the municipality may be retained and traded in the best interests of the municipality.

27. If any clause, sentence, subdivision, paragraph, subsection or section of this act be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, subsection or section thereof directly involved in the controversy in which said judgment shall have been rendered.

28. This act shall take effect immediately.

STATEMENT

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 rights may be determined, allocated and transferred for use in another segment of the municipality. In essence, the bill provides the municipalities of this State with an additional tool or instrument through which they may control growth and its demands while preserving the dignity of natural areas, open spaces, farmlands and developed areas having a unique quality or characteristic.

ASSEMBLY, No. 1509

STATE OF NEW JERSEY

INTRODUCED JUNE 19, 1978

By Assemblyman DOYLE and Assemblywoman TOTARO

(Without Reference)

AN ACT concerning municipalities in relation to planning and zoning, supplementing the "Municipal Land Use Law," approved January 14, 1976 (P. L. 1975, c. 291; C. 40:55D-1 et seq.).

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

ARTICLE I

1. This act shall be known and may be cited as the "Municipal Transfer of Development Rights Act."

2. The Legislature hereby finds that the rate, extent, expense and results of the physical development of New Jersey in recent years have finally forced a recognition of the physical facts of New Jersey life and of the inherent relationship which exists between physical development and those physical facts; that among the most important such physical facts are those concerning New Jersey's size (forty-sixth in the Nation, in terms of land area), population (more than 7,000,000), population density (more than 950 per square mile; first in the Nation), population distribution (89% classified "urban"; 11% classified "rural"), geography (130 miles of coastline, most of which possesses physical beauty or economic value, or both), and land use (more than 1,000,000 acres of land actively devoted to agriculture in 1975, approximately 10,000 acres of which each year is being sold for development and for other than agricultural uses); that the period is long past when uncontrolled, unplanned, unregulated and unrelated physical development could be undertaken without regard for the aforesaid physical facts, and at no cost to the health, happiness, safety and general welfare of the citizens of this State; that while physical redevelopment is constantly necessary to renew and restore declining and deteriorating areas of New Jersey, great care must be exercised in undertaking new physical development which may result in the destruction and permanent loss of natural assets, structural amenities and those special, distinctive, and often irre-

placeable features which have contributed both to New Jersey's history and to its recognition as the Garden State; that the 567 local units of municipal government in New Jersey experience not only the greatest, most immediate and direct pressure for new physical development, but also all the most adverse effects of that development; that the State Government has an obligation to provide municipal governments with adequate and appropriate statutory tools whereby these local units, acting within the statutory framework and pursuant to guidelines provided by the State, may respond to the pressures for, and the burdens imposed by, physical development with sound, rational and comprehensive planning techniques; that these techniques must recognize that the right to own land is separate from the right to develop that land and that a development right may become, under the proper circumstances, a valuable negotiable instrument; that such techniques would permit municipalities to set aside portions of publicly and privately owned improved and unimproved land in permanent preservation zones where new physical development would be prohibited, and require such municipalities to establish other zones where the right to develop the land permanently preserved may be transferred in the marketplace through the sale and exercise of certificates of development rights; and that the exercise by municipalities of the authority to permanently preserve land and transfer the right to develop therefrom pursuant to such a State law, within a framework provided by statute and pursuant to guidelines provided by the State, is within the police power of the State and necessary to insure the public health, happiness, safety and general welfare of both present and future generations.

3. The Legislature declares as a matter of public policy that the preservation by municipalities of improved and unimproved lands and properties of historic, aesthetic, economic and environmental significance, particularly those lands and properties the development of which has been restricted or prohibited as a result of any State law or rule or regulation promulgated thereunder, the prohibition of physical development or redevelopment of lands and properties so preserved, and the accommodation of the physical development or redevelopment prevented as a result of such preservation through the transfer of the right to develop or redevelop such lands or properties so preserved to other lands and properties specifically designed to receive and accommodate the increased density as may result from such transfer or development, is a public necessity and is required in the interests of the citizens of this State now and in the future.

4. As used in this act unless the context clearly indicates otherwise:

a. "Aesthetic and historic qualities" means those qualities possessed by any building, set of buildings, site, district or zone which, by virtue of its architectural significance, role in an historic event or general appearance, represents a unique quality or feature in the municipality;

b. "Agricultural use" means substantially undeveloped land devoted to the production of plants and animals useful to man, including but not limited to: forages and sod crops; grains and feed crops; dairy animals and dairy products; poultry and poultry products; livestock, including beef cattle, sheep, swine, horses, ponies, mules or goats, including the breeding and grazing of any or all of such animals; bees and apiary products; fur animals; trees and forest products; fruits of all kinds, including grapes, nuts and berries; vegetables; nursery, floral, ornamental and greenhouse products; or when devoted to and meeting the requirements and qualifications for payments or other compensation pursuant to a soil conservation program under an agency of the Federal Government;

c. "Aquifer recharge area" means an area where rainfall infiltrates the ground to porous, waterbearing geologic formations for retention in underground pools or aquifers;

d. "Assessed value" means the taxable value of property as established pursuant to the provisions of chapter 4 of Title 54 of the Revised Statutes for purposes of taxation;

e. "Board of adjustment" means the municipal zoning board of adjustment established pursuant to section 56 of P. L. 1975, c. 291 (C. 40:55D-69);

f. "Capital facilities" means any substantial physical improvement built or constructed by the municipality or privately to provide necessary services for an extended period, including, but not limited to: streets, roads, highways and other transportation facilities; schools; police, fire and rescue facilities; health facilities; sewer, water and solid waste systems;

g. "Certificate of development right" means the document indicating the existence of a development right;

h. "Committee" or "Legislative Oversight Committee" means the Legislative Oversight Committee for the "Municipal Transfer of Development Rights Act" established by Article IV of this act;

i. "Compatible use" means two or more uses of land not in conflict with each other individually or as combined.

j. "Density" means the average number of persons, families or residential dwelling units per unit of area in the case of residential use; and the average number of square feet per unit of area, in the case of industrial, commercial, or any other use;

k. "Developability" means the capability of a parcel or parcels of land to accommodate the uses intended or proposed for it at the density intended or proposed for it, based on its topography, existing use, physical composition, desirability and availability;

l. "Development potential" means the possible development of a parcel or site based on its developability and the market in which it exists;

m. "Development right" means the right to develop land as set forth in sections 12 through 22 of this act;

n. "Economic asset" means an economic aspect of the use of a parcel of land which is significant to the economic viability of the municipality, region, State or nation;

o. "Exercise of development right" means the submission of a development right to the designated municipal official in conjunction with an application for development approval in the transfer zone;

p. "Farmland" means land being used for agricultural purposes or substantially undeveloped land included in the categories of Class I, Class II and Class III soil classifications of the Soil Conservation Service of the United States Department of Agriculture, and Class IV soil classification when it exists contiguous to or as a part of land in any one or more of the three aforesaid soil classifications;

q. "Flood plain" means land subject to regulation pursuant to P. L. 1962, c. 19 (C. 58:16A–50 et seq.), as amended and supplemented;

r. "Governing body" means the chief legislative body of the municipality;

s. "Improvement" means any building, structure or construction on the land, including, but not limited to: houses, stores, warehouses, factories, churches, schools, barns or other similar structures, recreational or amusement facilities, parking facilities, fences, gates, walls, outhouses, pumps, gravestones, works of art, improved or unimproved streets, alleys, roads, paths, or sidewalks, light fixtures or any other object constituting a physical betterment of real property or any part of such betterment;

t. "Land of steep slope" means land of a slope of not less than 25%;

u. "Market value" means the price property and improved property would command in the open market for such property and improvements;

v. "Marsh" means land seasonally saturated with moisture and having persistent poor natural drainage. Marsh shall also include the term "swamp";

w. "Master plan" means the master plan of the municipality prepared and adopted pursuant to section 19 of P. L. 1975, c. 291 (C. 40:55D–28);

x. "Municipality" means any city, borough, town, township or village of any size or class in the State of New Jersey;

y. "Planning board" means the municipal planning board established pursuant to Article 2 of P. L. 1975, c. 291 (C. 40:55D–23 et seq.);

z. "Preservation zone" means the district or area in which development is discontinued and has such features as are provided in section 13 of this act;

aa. "Recreation or park land" means land whose primary use or purpose is recreational;

bb. "Tax map" means the approved map prepared pursuant to P. L. 1956, c. 48 (C. 40:50–9 et seq.);

cc. "Transfer zone" means the district or area to which development rights generated by the preservation zone may be transferred and in which increased development is permitted to occur in connection with the possession of such development rights, and which has such features and characteristics as are provided in section 14 of this act;

dd. "Use" means the residential, commercial, industrial or other purpose for which land is zoned, designed or occupied, notwithstanding the density of such zoning, design or occupation;

ee. "Woodland" means substantially undeveloped land consisting primarily of trees and capable of maintaining tree growth;

ff. "Zoning ordinance" means the zoning ordinance of the municipality adopted pursuant to Article 8 of P. L. 1975, c. 291 (C. 40:55D–62 et seq.).

ARTICLE II

5. The governing body of any municipality may, by resolution, establish a commission whose general purpose shall be to determine, within a time specified in the resolution, the feasibility of the municipality adopting a development rights ordinance, providing for the preservation of lands and properties within the municipality of historic, aesthetic, economic or environmental signifi-

cance, and upon such determination to make a recommendation to the governing body concerning the adoption of the provisions of this act, all as hereinafter provided. A copy of every such resolution shall be filed with the Legislative Oversight Committee within 30 days of its adoption. Nothing contained in this act shall be construed as authorizing, empowering or otherwise permitting any municipal governing body, planning board or other municipal instrumentality to impose by ordinance, resolution or other decision, any moratorium on account of and during the conduct of the commission's study pursuant to this section, or the governing body's deliberations on such study as hereinafter provided. Any municipality which determines to establish a commission pursuant to this section shall continue to act upon all applications for construction, development, improvement or subdivision in conformity with the laws of this State, notwithstanding the establishment of such a commission, until such time as the municipality adopts a development rights ordinance pursuant to section 11 of this act, at which time such applications shall be subject to the provisions thereof.

6. Each commission established pursuant to section 5 of this act shall consist of either: a. the full membership of the planning board of the municipality establishing such commission, and four additional members appointed by the governing body of the municipality, one of whom shall be the municipal tax assessor, unless such official is already a member of the planning board; one of whom shall be a representative of the real estate industry in such municipality, if any; one of whom shall be a representative of the building or construction industry in such municipality, if any; and at least one of whom shall be a citizen of such municipality; in which case, the chairman of the planning board shall be the chairman of the commission; or, if the governing body so determines, b. no more than 13 members, three of whom shall also be members of the municipality's board of adjustment, and three of whom shall also be members of the municipality's planning board, the provisions of any other law to the contrary notwithstanding. The chief executive officer of the municipality, the municipal planner, the municipal tax assessor and the municipal zoning officer, if such positions exist; a member of the municipal environmental commission, if any; and the municipal attorney, unless any of the aforesaid are otherwise appointed to the commission as provided hereinabove, shall also be members of the commission, ex officio; in which case, the governing body shall designate the chairman of the commission. Vacancies

among the members shall be filled in the same manner as the original appointments were made. The term of the members shall be the same as the life of the commission and shall terminate with the conclusion of the commission's work as provided in section 11 of this act.

7. In the resolution adopted pursuant to section 5 of this act, the governing body may also appropriate to the commission such funds as it deems necessary and sufficient for its work. Within the limits of such appropriations, the commission may appoint and contract with such professional, clerical and stenographic assistants as it shall deem necessary and, where applicable, in the manner prescribed by the Local Public Contracts Law, P. L. 1971, c. 198 (C. 40A:11-1 et seq.). The members of the commission shall serve without compensation but may, within the limits of the appropriations therefor, be reimbursed for such expenses as are actually incurred in the performance of their official duties.

8. Every commission established pursuant to section 5 of this act shall, upon its organization, cause to be conducted a study to determine the feasibility of the municipality adopting a development rights ordinance. The study shall include, but not be limited to:

a. An analysis of the existing land uses in the municipality, and an identification of any land which might be included within a preservation and a transfer zone if such were to be established pursuant to the provisions of this act;

b. An evaluation of the zoning ordinance of the municipality adopted pursuant to the provisions of Article 8 of P. L. 1975, c. 291 (C. 40:55D-62 et seq.), if one so exists, on the basis of existing and anticipated land uses and development;

c. The identification of national, State and regional factors and trends which will have an influence on development in the municipality;

d. The identification of the anticipated growth and development the municipality may expect to experience in the next 10 years;

e. An assessment of the development potential of all areas of the municipality on the basis of the projected growth of the municipality, the demand for development imposed by the market and the suitability of the land for such development;

f. The identification and analysis of capital facilities currently existing in the municipality and those that will be required by virtue of the anticipated development;

g. An environmental inventory of any land which might be included within a preservation zone and a transfer zone if such were to be established pursuant to the provisions of this act;

h. A review of the adequacy of the assessment of property for the purposes of taxation in the municipality;

i. The identification of those lands and properties within the municipality the development of which has been restricted or prohibited as a result of any State law or rule or regulation promulgated thereunder.

9. Upon the completion of the study conducted pursuant to section 8 of this act, the commission shall formulate its recommendation and prepare a report to communicate its findings to the governing body of the municipality. If it is the recommendation of the commission that the municipality would not find it in its best interest to adopt a development rights ordinance, the commission shall detail in its report such information as was available to it which led to such recommendation. If it is the recommendation of the commission to adopt a development rights ordinance, the commission shall prepare a report which shall include, but not necessarily be limited to:

a. The designation of a proposed preservation zone within the municipality in compliance with the provisions of section 13 of this act;

b. A plan indicating the existing and permitted uses of the proposed preservation zone accompanied by a statement detailing the nature and distinguishing features of the zone at present;

c. A tax map for the proposed preservation zone specifying the full assessed value of the parcels contained therein;

d. An analysis of the development potential of the land in the proposed preservation zone;

e. The designation of a proposed transfer zone in compliance with the provisions of section 14 of this act in which the development rights generated by the preservation zone may be utilized;

f. A plan indicating the existing uses of the proposed transfer zone and a statement detailing the permitted uses under the existing zoning ordinance;

g. A tax map for the transfer zone indicating the full assessed value of the parcels contained therein;

h. A plan projecting the land use scheme in the proposed transfer zone with the full transfer of development rights;

i. A proposal concerning the identification of the total number of development rights assigned the preservation zone and their

distribution in compliance with the provisions of section 15 of this act among the owners of property in said zone;

j. A report on the adequacy of the assessment of property for the purposes of taxation in the municipality;

k. The identification and analysis of capital facilities currently existing in the municipality and those that will be required by virtue of anticipated development;

l. The identification and analysis of municipal services currently in existence and those that will be required by virtue of anticipated development;

m. An environmental inventory of any land which might be included within a preservation zone and transfer zone if such were to be established pursuant to the provisions of this act.

10. Upon the formulation of its recommendation and report, and after soliciting and considering comments thereon from the municipal planning board, zoning board and, if it so exists, environmental commission, the commission shall hold public hearings in the manner provided in section 6 of P. L. 1975, c. 291 (C. 40:55D-10), and within 30 days following the conclusion of the public hearings, shall transmit its recommendation, report and transcript of the public hearing to the governing body of the municipality for its consideration as well as filing an informational copy of same with the Legislative Oversight Committee.

11. Within 60 days of the receipt of the documents specified in section 10 of this act, the governing body shall consider the commission's recommendation and report; if the commission recommends the adoption of a development rights ordinance, the governing body may at any time thereafter adopt such ordinance by majority vote; if the commission recommends against the adoption of such an ordinance, the governing body may adopt a development rights ordinance by a vote of two-thirds of the full membership of the governing body; provided, however, that any ordinance adopted pursuant to this section shall be subject to the provisions of the "Municipal Land Use Law," P. L. 1975, c. 291 (C. 40:55D-1 et seq.) and shall be considered an amendment to the zoning ordinance, if any, then in effect. Any action taken by the governing body pursuant to this section shall, within 14 days of such action, be filed, together with any related documents, with the Legislative Oversight Committee. The commission shall terminate upon the action of the governing body pursuant to this section unless otherwise provided for by the governing body.

ARTICLE III

12. Every development rights ordinance adopted pursuant to the provisions of this act shall include:

a. The specification that the planning board of the municipality shall have the responsibility for implementing the provisions of any ordinance adopted pursuant to this act, and the responsibility for maintaining a reasonable balance between the number of uncanceled certificates of development rights and the capacity of the transfer zone to accommodate such uncanceled certificates; shall hear and review any applications or complaints that may result from the implementation of any such ordinance; and shall make such reports to the governing body as it may require and such recommendations as it shall deem necessary for the successful operation of the ordinance;

b. The establishment of a method for the review and hearing of applications and complaints in the manner provided by section 6 of P. L. 1975, c. 291 (C. 40:55D-10);

c. The designation and establishment of the preservation and transfer zones as the governing body shall deem necessary and as are consistent with the provisions of this act;

d. The provision that all construction, erection, demolition and development in the preservation zone not heretofore approved shall be prohibited except as provided in sections 13d, 15 and 28 of this act;

e. Provisions for the total number, allocation and distribution of development rights in the preservation zone; provided, however, that prior to the adoption of any such provisions in the ordinance all owners of property in the preservation zone shall be mailed a notice informing them of the number of development rights to which they will be entitled under the ordinance, the permitted use or uses on the basis of which such development rights are to be allocated in the preservation zone, the conversion schedule by which such development rights may be applied to another use or uses in the transfer zone, and the manner in which the development rights may be transferred, all as hereinafter provided. Such notices shall also contain the time and place the governing body or its designate body shall hold a public hearing on the number, allocation and distribution of development rights. Public notice of the hearing required pursuant to this subsection may be given simultaneously with the public notice required pursuant to R. S. 40:49-2 concerning a hearing or hearings held for the purpose of considering any ordinance for final passage; provided, however, that a

separate time shall be established for the hearing required pursuant to this subsection and the public hearing or hearings required pursuant to R. S. 40:49-2 shall not be finally adjourned until the completion of the hearing required pursuant to this subsection.

f. The provision that prior to the granting of any variance pursuant to section 57.d. of P. L. 1975, c. 291 (C. 40:55D-70.d.) for a parcel not contained within the transfer zone, a determination shall be made in writing by the planning board that any increase in density on such parcel as a result of the granting of the variance will not substantially impair the operation of the development rights ordinance or the viability of the development rights market, and that should it be the determination of the planning board that the granting of the variance will so substantially impair either the development rights ordinance or the viability of the development rights market, the application for said variance may be denied by the board of adjustment.

g. The provision that within 1 year after certificates of development rights have been allocated and distributed to owners of property in the preservation zone, the valuation placed on the affected properties for real property tax purposes shall be adjusted to reflect the loss of the right to develop such property.

The governing body of any municipality which adopts a development rights ordinance pursuant to the provisions of this act shall appropriate such funds in such amounts and for such purposes as it shall deem necessary and sufficient for the purposes of implementing the ordinance.

13. In creating and establishing the preservation zone the governing body shall designate a tract in such numbers and of such sizes, shapes and areas as it may deem necessary to carry out the purposes of this act; provided, however, that

a. All land in the preservation zone contains one or a combination of the following characteristics:

(1) Substantially undeveloped or unimproved farmland, woodland, flood plain, swamp, aquifer recharge area, marsh, land of steep slope, recreational or park land;

(2) Substantially improved or developed in a manner so as to represent a unique and distinctive aesthetic or historic quality in the municipality;

(3) Substantially improved or developed in such a manner so as to represent an integral economic asset in and to the municipality;

b. The location of the zone is consistent with the master plan, zoning ordinance and environmental inventory of the municipality if they so exist insofar as practicable;

c. The aggregate size of the zone bears a reasonable relationship to the present and future patterns of population and physical growth and development as set forth in the study conducted by the commission pursuant to section 8 of this act;

d. Any nonconforming use or improvement existing in the preservation zone at the time of adoption thereof may be continued and in the event of partial destruction of such nonconforming use or improvement it may be restored or repaired; provided, however, that such nonconforming use or improvement remains consistent with the nonconforming use or improvement in effect at the time of the adoption of the ordinance; and

e. Land within the preservation zone may be subdivided in the manner prescribed in Article 6 of P. L. 1975, c. 291 (C. 40:55D–37 et seq.) only for the purpose of ascertaining the development potential and for determining the number and allocation of development rights of parcels contained therein, or, where a change, modification, or amendment to the development rights ordinance has been approved and issued pursuant to section 15 of this act, to provide for such change, modification or amendment.

f. Wherever practicable, supportive of the public purpose of this act and in keeping with the integrity of the development rights ordinance, the governing body shall give first priority in the placing of property within the preservation zone to that property the development of which has been restricted or prohibited as a result of any State law or rule or regulation promulgated thereunder; provided, however, that the allocation of certificates of development rights pursuant to section 17 of this act to all such property the development of which has been so restricted or prohibited shall, any zoning ordinance in effect with respect to such property to the contrary notwithstanding, be on the basis of uses contained in the development potential determined by the study conducted by the commission pursuant to section 8 of this act, as approved or amended by the governing body.

14. In creating and establishing the transfer zone, the governing body may designate a tract or tracts, which may but need not be contiguous, in such numbers and of such sizes, shapes and areas as it may deem necessary to carry out the provisions of this act; provided, however, that

a. The density, topography, development and developability of the transfer zone is such that it can adequately accommodate the transfer of development rights from the preservation zone; provided, however, that wherever practicable, supportive of the

public purpose of this act and in keeping with the purpose and integrity of the development rights ordinance, land within the transfer zone shall be vacant; and, provided further, however, that land which is not vacant may be included within the transfer zone upon a finding by the planning board that such inclusion will provide at least as lucrative a site for the transfer of development rights from the preservation zone as any vacant land within the municipality;

b. The density of the transfer zone is increased beyond the density otherwise permitted as a matter of right under the zoning ordinance of the municipality, if one so exists;

c. The result of the increase in the density shall be a zone wherein there is a greater incentive to develop at a higher density with certificates of development rights, than at a lower density without such certificates;

d. Development at higher densities in the transfer zone shall be permitted only with the utilization of certificates of development rights and that any development in the transfer zone at a density higher than that permitted by the zoning ordinance without such certificates shall be prohibited;

e. The present capital facilities and municipal services in and for the transfer zone are sufficient to accommodate the increased density of the transfer zone. As used herein "present capital facilities" means those capital facilities actually in existence and those for which construction contracts have been entered into or which are included in a capital facilities plan adopted by the municipality requiring the construction of such facilities within 6 years of the adoption of such plan, or which have been proposed privately and agreed to by the municipality and will be constructed within 5 years; and

f. The overall developability of land in the transfer zone is such so as to offer the most lucrative site possible and available for the transfer of development rights.

Nothing contained herein shall be construed so as to prevent or prohibit a municipality from increasing the number of tracts in the transfer zone at any time upon or after the adoption of a development rights ordinance, using the same criteria as are contained herein, for the purpose of guaranteeing the greater incentive to develop with certificates of development rights as required pursuant to subsection c. hereof. Any such increase shall be considered an amendment to the development rights ordinance and shall be subject to the provisions of the "Municipal Land Use Law,"

P. L. 1975, c. 291 (C. 40:55D-1 et seq.). Any land included in the transfer zone shall not have been downzoned for a 1-year period preceding the adoption of a development rights ordinance pursuant to this act, unless such downzoning shall be directly related to a change in, or revision or amendment of, the municipality's master plan. For the purposes of this section, "downzoning" means a change in the zoning classification of land to a classification permitting development that is less intensive or dense.

15. Any regulations, limitations, and restrictions contained in the development rights ordinance shall not be changed, amended, modified or repealed by the governing body or any other officer or agent of the municipality except where the owner of property can demonstrate that such regulations, limitations and restrictions prevent him from a reasonable use of his land; provided, however, that no such change, amendment, modification or repeal of the development rights ordinance shall be granted where such will destroy, change or otherwise alter the nature and characteristics of the preservation zone and the purposes for which it was established, and that no change in the zone be permitted from the uses intended therein by way of special exception, variance or, except as provided in section 13e hereof, with respect to subdivision.

Any application for a change, amendment, modification or repeal of any of the provisions of the development rights ordinance shall be made to the planning board of the municipality which shall hear and decide on the application within 60 days of its receipt. All actions taken by the planning board on any application submitted pursuant to this section shall be subject to review by the governing body of the municipality. No application for development or for the construction of any improvement pursuant to this section shall be made unless the applicant therefor possesses, or has entered into an option contract to purchase, the sufficient number of development rights for the proposed development or improvement. Any such change, amendment, modification or repeal shall be filed, within 14 days of adoption thereof, with the Legislative Oversight Committee.

16. Every development rights ordinance shall provide that the certificates of development rights issued in the preservation zone for one use may only be exercised in the transfer zone for that use unless otherwise converted and approved by the planning board as provided in section 20 of this act.

17. Certificates of development rights shall be allocated to the various portions of the preservation zone on the basis of the uses permitted in each such portion of said zone as a matter of right

under the existing zoning ordinance, if any, at the time of the adoption of the development rights ordinance; or, in the event no zoning ordinance is in effect, or in the event such portions consist of property the development of which has been restricted or prohibited as a result of any State law or rule or regulation promulgated thereunder, on the basis of uses contained in the development potential determined by the study conducted by the commission pursuant to section 8 of this act and as approved or amended by the governing body. Each certificate of development rights so allocated shall contain on its face the name and address of the owner of the property with respect to which such certificate is allocated and a statement to the effect that it is allocated on the basis of the specific use or uses cited in the statement, and that it shall be exercised in the transfer zone or zones in a development or developments of such specific use or uses unless converted to another use or uses pursuant to section 20 of this act. The total number of certificates of development rights so allocated shall be equal to and deemed to represent the full and total development potential of all land in the various portions of the preservation zone as a matter of right under the zoning ordinance, if any, existing at the time of the adoption of the development rights ordinance, or on the basis of the development potential of the preservation zone as determined by the study conducted by the commission pursuant to section 8 of this act and as approved or amended by the governing body of the municipality.

18. The total number of certificates of development rights determined pursuant to section 17 of this act shall be distributed to property owners in the various portions of the preservation zone in accordance with a formula whereby the number of certificates distributed to an individual property owner in each of the various portions of the preservation zone shall equal that percentage of the total number of such certificates allocated to that portion of the preservation zone that the qualified assessed value of the property of any such owner is of the total qualified assessed value of all property in that portion of the preservation zone. As used in this section, "qualified assessed value" means the full assessed value of property less the assessed value of any improvements thereon and land appurtenant thereto; provided, however, that land assessed at its agricultural value pursuant to the "Farmland Assessment Act," P. L. 1964, c. 48 (C. 54:4-23.1 et seq.) shall be assessed at its full market value for the purposes of this section.

19. Any owner of property in the preservation zone may appeal any determination concerning the number, allocation and distribution of development rights, pursuant to sections 17 and 18 of this act, to the Law Division of the Superior Court.

20. The conversion schedule which every development rights ordinance is required to contain pursuant to section 12 of this act shall provide a means by which development rights allocated pursuant to section 17 of this act on the basis of the uses permitted in each portion of the preservation zone may be exercised for another use or uses in the transfer zone.

Such schedule shall be based on the differing market values prevailing in the municipality for development rights for differing uses and shall be annually reviewed by the governing body and amended, modified and changed as necessary. Every application for the conversion of a certificate of development right shall be received and reviewed by the planning board in the same manner prescribed by section 6 of P. L. 1975, c. 291 (C. 40:55D–10) for amending a zoning ordinance; and any such application shall be granted in the manner provided by the shedule if such application is found to be consistent with the provisions of this act and in the best interests of the municipality. Upon the granting of any such application, the secretary of the planning board shall notify the county clerk of the converted use of the development right or rights involved in such application.

21. Certificates of development rights, except as provided by section 22 of this act, shall be taxed in the same manner as real property is taxed, and the assessed value of each uncanceled certificate of development right at the time of the adoption of the development rights ordinance shall be determined by subtracting the aggregate assessed value of all property in that portion of the preservation zone which is zoned for the particular use or uses to which the particular certificate of development rights applies from the aggregate assessed value of all such property prior to the establishment of the preservation zone and dividing the difference, by the total number of uncanceled certificates of development rights applying to such particular use or uses. In determining the aggregate assessed value of such property prior to the establishment of the preservation zone, that land assessed at its agricultural value pursuant to the "Farmland Assessment Act," P. L. 1964, c. 48 (C. 54:4–23.1 et seq.) shall be assessed at its full market value. Thereafter, the assessed value of each uncanceled certificate shall be determined on the basis of current sales of certificates of development rights in the municipality.

Certificates of development rights shall, for purposes of sale or exchange, be deemed real estate and shall be subject to the provisions of chapter 15 of Title 45 of the Revised Statutes (C. 45:15-1 et seq.) and any other relevant provisions of law with respect to the sale of real estate. Such certificates shall be subject to foreclosure by a proceeding in rem in the same manner as other real property.

The address of an owner of any certificate of development right shall be presumed to be the address contained in such certificate.

The provisions for entering and recording with the relevant county and municipal officials the allocation, distribution, sale, conversion, and exercise of development rights, and for issuing new certificates upon the sale, conversion, loss or destruction of certificates allocated and distributed pursuant to this act, shall be identical to the relevant provisions of law applicable to entering and recording instruments evidencing ownership of, or interests in, real property.

22. Land within the preservation zone shall be eligible for assessment at its agricultural value pursuant to the "Farmland Assessment Act," P. L. 1964, c. 48 (C. 54:4-23.1 et seq.), on the same basis as all other land within this State, upon meeting the agricultural use requirements prescribed in said act and the certificates of development rights allocated and distributed to such property shall not be taxed upon allocation and distribution as long as such certificates of development rights and the land for which such certificates were allocated and distributed remain unsold. Upon the sale of either the land or the certificates, the certificates shall be taxed pursuant to the provisions of section 21 of this act and shall be subject to the tax rollback provisions of the "Farmland Assessment Act" on the basis of their taxable liability pursuant to section 21.

ARTICLE IV

23. There is hereby established upon the effective date of this act and upon the organization of each Legislature hereafter a permanent Legislative Oversight Committee on the Municipal Transfer of Development Rights Act. The committee shall consist of eight members, four to be appointed from the membership of the Senate by the President thereof, no more than two of whom shall be of the same political party, and four to be appointed from the membership of the General Assembly by the Speaker thereof, no more than two of whom shall be of the same political party. All members shall serve without compensation except that they may be

reimbursed for expenses incurred in the performance of their duties out of such funds as the Legislature may appropriate, or as are otherwise available to the committee.

24. The committee shall organize as soon as may be possible after the appointment of its members and shall select a chairman from among its members and a secretary who need not be a member of the committee.

25. The committee shall be entitled to call to its assistance and avail itself and wherever possible utilize for the purpose of reducing costs, the services of such employees of any State, county or municipal department, board, bureau, commission or agency as it may require and as may be available to it for said purposes, and to employ such professional, stenographic and clerical assistants and incur such traveling and other miscellaneous expenses as it may deem necessary in order to perform its duties and as may be within the limits of funds appropriated or otherwise made available to it for said purposes.

26. The committee shall have the duty and responsibility:

a. To review, evaluate and monitor the activities and progress of municipalities which have adopted, or are in the process of determining the feasibility of, a development rights ordinance;

b. To determine the effect of implemented development rights ordinances on the preservation of lands and properties of historic, aesthetic, economic and environmental significance on the State, regional and municipal level;

c. To determine the effect of implemented development rights ordinances on the provision of increased density development in the State, regional and municipal levels;

d. To determine the effect of such implemented development rights ordinances on private sector industries and businesses associated with the preserved properties and on the provision of residential, industrial and commercial construction in the transfer zones;

e. To prepare regular reports to the Legislature advising it of the effect of this act, its implementation by municipalities, and recommending such changes, amendments or modifications to the act as it may deem necessary;

f. To recommend to the departments, divisions, bureaus and offices within the Executive Branch such rules and regulations, policies and practices which will enhance or otherwise improve the implementation of this act;

g. To provide direction to the counties and municipalities of this State in the implementation of this act.

ARTICLE V

27. The departments of the Executive Branch of this State are hereby directed to provide such assistance and cooperation to private sector involved in the construction or provision of residences or other structures within the transfer zones in municipalities which have adopted the provisions of this act. It is therefore deemed to be in the public interest to encourage the private sector to act to effectuate the provisions of this act and, as such, the departments of the Executive Branch of this State are hereby directed to provide such elements of the private sector expeditious service in processing applications for permits or other required documents, as authorized by statute or regulations to the private sector involved in such municipalities.

28. Nothing in this act shall be construed to prohibit or prevent the ordinary maintenance or repair of property contained within the preservation zone nor to prevent any structural or environmental change to such property which the building inspector of the municipality shall certify is required by the public safety because of an unsafe or dangerous condition it imposes.

29. Any two or more municipalities may enter into an agreement pursuant to the "Interlocal Services Act," P. L. 1973, c. 208 (C. 40:8A–1 et seq.), to jointly implement the provisions of this act.

30. Nothing in this act shall be construed to prohibit or otherwise prevent a municipality from receiving development rights for municipal property contained within the preservation zone on the same basis as other property owners within said zone, or from buying and selling development rights of other parcels.

31. In implementing any development rights ordinance adopted pursuant to this act, and in fulfilling the requirements of this act, any municipality may establish a Development Rights Bank or other such facility in which certificates acquired by the municipality may be retained and traded in its best interest.

32. If any clause, sentence, subdivision, paragraph, subsection or section of this act be adjudged unconstitutional or invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision, subsection or section thereof directly involved in the controversy in which said judgment shall have been rendered.

33. This act shall take effect immediately.

STATEMENT

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.

Transferable Development Rights (TDR) is a new land management concept that purports to offer State and local governments a way to preserve historic, agricultural or environmentally sensitive areas at no public cost, without financial loss to owners, and without sacrificing future growth. The idea behind TDR is that a property owner can sell the right to develop his land just as he can sell a right-of-way to an electric power company for a transmission line, or the right to drill for oil or extract other minerals. The major difference between TDR and these other "sale of rights" concepts is that in TDR the property owner sells his development rights for use on another piece of property where they will permit construction at a higher density than would be permissible without the use of such development rights.