ML - East Windsor

3/25/83

Brief for Δs in support of motion for summary judgment - Civil action in lieu of perogative writs

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ML 000786 B

SUPERIOR COURT OF
NEW JERSEY
MERCER COUNTY
LAW DIVISION
DOCKET NO. L-6433-83-P.W.

CENTEX HOMES OF NEW JERSEY, INC., a Corporation of the State of Nevada,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION IN LIEU OF PREROGATIVE WRITS
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 DEFENDANTS IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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56 Am Jur 2d, Mun. Corp., Sec. 193, 195

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State Development Guide Plan (DGP)

Grass Roots (1980)

DVRPC Regional Development Guide

208 Water Quality Plan

N.J. Dept. of Agriculture, Agricultural Land Sales in N.J. Five Year Trend.

1982 Zoning & Planning Law Handbook, John C. Keene, "Conclusions & Recommendations for Agricultural Land Preservation."

1977 Journal of Soil & Water Conservation. Donn Derr, Leslie Small, & Pritam Dhillon. "Criteria & Strategies for Maintaining Agriculture at the Local Land."

The Outlook for Historic Preservation in N.J., July, 1982.

The Legal Authority of Local Government To Engage In Historic Preservation Activities (1980).

Trends in Historic Preservation Case Law (1980).

APPENDICES

Appendix	Description
A-1	July, 1982 Report on Agricultural Preservation by Peter Abeles, prepared for Township Attorney.
A-2	October, 1982 Report on Agricultural Preservation by Peter Abeles, distributed to Township Council and on request to Centex Corporation and members of the public during hearings on Ordinance 1982-16.
B	Transcript of November 11, 1982 hearings before Township Council on Ordinance 1982-16.
C	Transcript of November 23, 1982 hearings before Township Council on Ordinance 1982-16.
D	Transcript of December 14, 1982 hearings before Township Council on Ordinance 1982-16.
E	Map of East Windsor Township.
F	Letter to East Windsor Township Planning Board from Mercer County Planning Board dated March 30, 1979.
G	East Windsor Township Council Resolution 1981-46 and attachments.
H	Exerpts from East Windsor Township 1979 Master Plan.
I	Memo re: Soil quality from Peter Abeles dated December 24, 1981.
J	Documents from East Windsor Township Township Assessor Edward C. Noller: 1. Memorandum to Michael A. Pane re: ownership of lands in Agricultural Preservation Zone dated November 4, 1982.

2. Calculations showing, respectively, all land farmed in East Windsor Township and owner-farmed land in East Windsor Township.
3. Affidavit and attachment re: amount and percent of land in Agricultural Preservation Zone, dated March 21, 1983.

K Letter To East Windsor Township from Kenneth J. Butko, Acting Director, Division of State and Regional Planning, New Jersey Department of Community Affairs, re: the State Development Guide Plan, dated February 22, 1983.

L Affidavit of Michael K. Mueller, Township Planner and attachments, re: development of REAP Zone, dated March 17, 1983.

Letter from Eastern Properties to Michael A. Pane, Esq., dated March 18, 1983.

M Memorandum from Municipal Land Use Law Drafting Committee Sub-Committee on Development Rights to entire committee dated February 15, 1983. Cover letter forwarding same dated February 25, 1983.

N Text of Maryland decision upholding TDR - Dufour, et al v. Montgomery County Council, Law No. 56964, et al, decided January 20, 1983 in the Circuit Court for Montgomery County, Maryland by John F. McAuliffe, Judge.

PROCEDURAL HISTORY AND BACKGROUND

The ordinance sub judice--Ordinance 1982-16--was adopted by the East Windsor Township Council on 14 December, 1982.

The ordinance essentially does three (3) things:

1. Zones some 3,000 acres for agriculture and agricultural-related uses (i.e., Agricultural Preservation-AP) with limited residential use. This land was previously zoned for agriculture and 2-acre residential development. (See page vi of the Statement of Facts.)
2. Zones some 700 acres for intensive housing development, including substantial low and moderate income housing. This land was previously zoned for Planned Development with a minimum 400 acre requirement. (See page vi of the Statement of Facts.)
3. Awards Development Rights (DR's) to the owners of land in the Agricultural Preservation Zone. These rights must be used by builders in the 700 acre intensive housing development zone if they wish to build at high density (including densities in excess of ten (10) units per acre). (See page xxx the Statement of Facts.)

On this Motion for Summary Judgment plaintiff is only challenging the Township's right to award development rights. There is no request for summary judgment as to the validity of the Agricultural Preservation Zone or intensive development zone enactments. Indeed, such a motion would probably not be proper under R.4:46-2. Odabash v. Mayor and Council of Dumont, 65 N.J. 115 (1974).

BACKGROUND

The ordinance resulted from extensive work by the Township's outside Planning Consultant. The consultant's report is set forth in full and abbreviated forms in the Appendix as Items "A-1" and "A-2". It is summarized on page xii of the Statement of Facts.

The consultant's initial report on agricultural preservation and meeting housing needs was delivered in October, 1981. Thereafter, the Township held numerous public meetings and forums for landowners to familiarize the community with the three (3) sets of proposals:

1. Agricultural zoning and preservation;
2. Intensive housing development; and
3. Use of development rights to foster success of the Township's planning and zoning objectives. (See Statement of Facts, page xii).

The Township held extensive hearings on Ordinance 1982-16 and even sent notices of the ordinance hearings to every landowner to be effected. (The transcripts of the hearings are attached as Appendices "B", "C", and "D" respectively.)

Included in the transcripts are testimony from several recognized experts in the area of agricultural preservation They include:

The ordinance was adopted on an affirmative vote of 6-1 by the East Windsor Township Council on 14 December, 1982.

Thereafter, Centex Homes of New Jersey, a Nevada Company owning some 600 acres in the Agricultural Preservation Zone, filed the present action on 24 January, 1982, and then filed a Motion for Summary Judgment as to Count I of its Complaint (ultra vires). The Township now has cross-moved for summary judgment as to Counts:

I (a prayer for dismissal)

II (ultra vires as regulation of property)

IX (implied pre-emption).

The questions to be decided by the Court, then, are:

1. Is use of a development rights program in a municipal land use ordinance an ultra vires act?
2. Is use of a development rights program in a municipal land use ordinance within the express or implied powers of the Township?
3. Is use of a Development Rights program in a municipal land use ordinance pre-empted by any federal or state enactment?

For purposes of this motion and cross-motion, the reasonableness of agriculture as a use and of intensive development to meet regional housing needs must be assumed, as must all the discretionary aspects of this enactment (such as the location of the high-density housing zone.) The only questions sub judice at this time deal specifically with the legality of using development rights as an adjunct to an otherwise valid zone plan.

FACTUAL BACKGROUND

The Township of East Windsor is a 15-square mile municipality located at Exit 8 on the New Jersey Turnpike, approximately midway between New York and Philadelphia in the northeast corner of Mercer County. The Township forms a circle around the Borough of Hightstown (Appendix "E"). Essentially, development has occurred in the northern half of the Township. The area of the Township south of the Borough of Hightstown from U.S. 130 east to the Monmouth Couny line represents a virtually undeveloped area of some 3,700 acres. At all times since 1976, this vacant land has been zoned as follows:

> a. Seven hundred (700) acres as Planned Development. This area is immediately south of Twin Rivers, an existing PUD of 700 acres and 7,000 residents, and Etra Lake Park, 200 acre park the Township acquired after adoption of the 1971 Master Plan with a 1972 Green Acres grant, precisely to service the new Planned Development zone. Since 1978 the Township has spent $85,000 studying how to dredge Etra Lake to use it for recreational purposes. This spring the Township will spend over $1 million to begin development of park facilities there.
>
> b. three thousand (3,000) acres as Agricultural. This zone permitted agricultural uses and two (2) acre residential uses.

AGRICULTURAL PRESERVATION

In 1979 the Township adopted an update of its Master Plan, (Appendix "H"). That plan placed a high priority on Agricultural Preservation and stated that the Township should:

"encourage continuation of farming as a part of an agricultural-related industrial base (1979 Plan, p.16)...(and) further explore such emerging alternatives for agricultural preservation that will compliment the agricultural land use district herein advanced". (op. cit, p. 22). This plan was favorably reviewed by the Mercer County Planning Board which said in particular:

> "...your Land Use Plan, as proposed, would certainly reflect the Board's thinking, particularly in the area of residential land use, as it appears that the total housing spectrum and needs have been considered.
>
> In the past, our Board has expressed concern as to the preservation of prime agricultural land within Mercer County. The Board, therefore, was happy to note that prime agricultural land is proposed as low density residential." (Appendix "F" attached)

The actions of both municipal and County planning boards recognized recognized that the Municipal Land Use Law now included among its purposes--in its broad grant of powers to municipalities--that they should:

> "...provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens". (NJS 40:55D-2g).

EAST WINDSOR AGRICULTURAL PRESERVATION PROGRAM IN STATE AND REGIONAL PERSPECTIVE

1. The State Policies and Plans

The State Development Guide (DGP) notes in general terms where major public investments for public facilities,

services and energy needs should be concentrated. East Windsor is indicated within a broad corridor extending from New York to Philadelphia labelled as a "growth area." The plan does note that not all lands within the Growth Areas are equally appropriate for development. Future development in these areas would occur in a variety of patterns including residential, industrial and commercial uses as well as open space, agricultural uses and conservation areas (pp.iii, 71, 111). The Plan further notes that prime farmland and sensitive aquifer recharge areas are found in the southeastern portion of the corridor in which East Windsor is located and suggests that "development should be channeled, if possible, so as to conserve these part natural, part manmade assets: (pp. 57, 111) This would mean that proposals for the undeveloped portions of the town -- southeast of Hightstown -should bear special examination in future plans.

The 1979 Master Plan Update is consistent with the policies in the DGP. The concept map which shows East Windsor in a growth area "consists of broad, generalized areas without site specific detail or precise boundries, and areas designated for growth should not be thought of as solid urbanization without any open space, farmland or recreation area" (DGP, p.ii). "Growth area designation does not imply that only growth supporting investments will be made within the area... local controls protecting floodplains, steeply sloped areas, wetlands, agricultural uses and forested areas consititue valid components

of the kind of land use pattern which should characterize growth areas" (DGP, p.49). The DGP went further in defense of agricultural uses by saying that areas suitable for "agriculture...no matter how they are assigned on the concept map - should be protected from incompatible development to the extent feasible within the context of local planning and land use regulation" (DGP, p.71). The preservation of agriculture depends on the actions of local planning (DGP, p.144). Even though it is designated a growth area, East Windsor still has the responsibility to preserve sensitive areas, including farmland, through its local planning efforts.

Another important State Policy Document is the 1980 Grass Roots report which said:

> Another important background condition of farmland preservation is the degree of urgency and how it varies across the state, much like the state's diverse agricultural character itself. Despite the fact that New Jersey's farm acreage decreased by fifty (50) percent during the past twenty (20) years, the current rate of farmland loss on a Statewide basis has stabilized somewhat. Farmland preservation, then ought to find an appropriate role in land planning activities at each level of government and be achieved for the long term over a ten (10) year period." Grass Roots: An Agricultural Retention and Development Program for New Jersey. State of New Jersey Department of Agriculture & DEP. Oct. 31, 1980. (emphasis added)

Finally, and most recently, Mt. Laurel II goes to great lengths to emphasize the importance of municipal agricultural preservation efforts. As set forth on page 7 of

this brief, the Supreme Court makes no less than ten (10) major statements on the validity and importance of municipal agricultural preservation efforts through land use planning and zoning.

Regional Plans and East Windsor Township's Agricultural Preservation Program

The DVRPC Regional Development Guide provides more specific guidance in terms of regional development policy. The guide carries with it added importance in that it is the basis for federal review (A-95 process) of potential township grant requests for water/sewer, open space and roadway improvements among other public facility projects; the implication being that inconsistencies between local and regional plans would cause applications for grant requests to be unfavorably commented upon.

Under the Delaware Valley Regional Plan, the limits of a growth area to the year 2000 in East Windsor are indicated. These limits follow a general development corridor paralleling Route 33 and the Princeton-Hightstown Road, the present infill areas of East Windsor Master Plan. Again this indicates that those areas in the Township currently outside of this general development corridor should be either preserved as agricultural uses or not developed until the year 2000. It is important to note that the DGP and DVRPC Regional Development Guide Plan are consistant documents. The DVRPC Regional Development Guide Plan

is more specific than the DGP and, therefore, clarifies the general regional planning framework. (DGP, p.iii)

The 208 Water Quality Plan builds upon the Regional Guide and further suggests growth limits, as well as areas of growth to the year 2000, which would be desirable to sustain and improve water quality within the region. The plan shows narrow areas along streams in the southeastern portion of the Township as "preservation--areas recommended for maximum protection with little or no development". The 208 Plan designates a large area south of Hightstown as a "conservation area", where performance standards should encourage only sensitive redevelopment so that environmentally fragile areas would be preserved.

In terms of growth guidelines, the 208 Plan assumes a population base of some 35,600 people by the year 2000. In order to maintain and improve water quality in the Township, most of the projected new development will have to be sewered. It does not imply that the town must or would grow to that limit by the year 2000, but merely that capacity in terms of subsequent sewer facility expansion would be justified and could be planned for accordingly. Such growth would best be accommodated within the general development corridor as previously outlined above.

Review and Improvement of Township Plans

In March 1981, the Township Council adopted Resolution R81-46 which stated in part that the Planning Board should:

> Review immediately the PD regulations as found in the zoning ordinance to insure that the requirements for the PD Zone are achieveable and realistic; and
>
> Review the areas presently zoned agricultural to determine of alternate low-density development regulations consistent with goals of continuing agriculture in those areas while preserving open spaces can be expanded beyond those presently available (p.5).

Thereafter, the Township Council and Planning Board retained a planning consultant to work with the Township planning staff to review policies as to agricultural preservation and the PD district.

The consultant's report emphasized the importance of preserving prime agricultural lands.

> "Agricultural preservation in East Windsor. Concern over the conversion of agricultural land to other uses has arisen in recent years throughout the United States. Agrigulture now provides a significant share of the country's balance of trade, and the need for increased farm production is expected to rise until the turn of the century. A second important consideration in the preservation of agriculture is to encourage additional farms in and close to existing metropolitan areas. In the last ten (10) years, transportation of foods has changed from an insignificant to a significant cost. Due to changes in transportation this trend is expected to continue into the foreseeable future. Thus, it is important to citizens of New Jersey and the urban areas of New Jersey and New York that local farms be preserved and remain active in the future. East Windsor Township is an area especially suited for such a future activity.

This goal is a worthy one, for the benefits of saving prime farmland close to urban centers are numerous. Urban sprawl, which costs money in terms of providing utilities and services, is reduced. This depletion of non-renewable resources is halted. Energy costs in transporting agricultural products is reduced. Prime soils require less energy to farm than other soil. Preservation maintains open space and promotes a desirable rural lifestyle. Because farmers are producers, and not consumers, of land, they strengthen the local economic base and promote self-sufficiency. The New Jersey Municipal Land Use Law (MLUL) specifically recognizes the need to protect farmland in its statement of purpose. The MLUL contains the statement that its intent is:

'to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens.' (NJS 40:55D-2g)

Providing sufficient space in appropriate locations has come to mean efforts to preserve land in agriculture. New Jersey's farmers have been contributing to the state's well-being for a lengthy period due to the state's fine soils and proximity to good markets.* It should also be recalled that New Jersey has historically been known as 'The Garden State'. Now, however, this proximity to large urban concentrations is hurting New Jersey agriculture. Farmland in New Jersey, especially in areas such as Mercer County, adjacent to other economic activity, is being converted to non-agricultural uses as the spreading suburbs of cities encroach on rural areas. In

*Derr, Donn, Application of the Agricultural Districts Concept to Farmland in New Jersey, Cook College, Bulletin #849, November 1978.

addition to this direct harm to farming, increased development in rural areas harms farmers who remain. The farm service community shrinks, the planning and investment horizons of farmers are reduced as the owners consider selling their farms for development, regulations on farm noise, animal keeping, etc. become stricter, land values rise, causing taxes to follow and market facilities begin to disappear."

As to how to preserve agriculture in East Windsor, the conclusions of the consultant's work can be summarized as follows:

1. Traditional strategies purporting to preserve agriculture do not appear to do so.

- Large-lot zoning, for example, while employed in many municipalities, is often a 'holding action,' merely preventing more intensive development for a time. More importantly, even if a substantial portion of the land zoned for, say, 2-acre residences were actually to be built as zoned, the agricultural economy would be destroyed, since 2-acre homes do not preserve agriculture any better than 1/4 or 1/2 acre homes. They both break up the contiguous land areas necessary for farming.

- Cluster zoning, while more rational in theory, may also be a problem in practice because putting large tracts of residential development in agricultural areas brings two incompatible uses into proximity. Experience shows that suburban development in agricultural areas fragments the large areas needed for modern agricultural productivity and creates large constituencies within farm zones for elimination of: night harvesting, fertilizing, etc.

2. Thus, the only realistic approach to preserving agriculture was to zone the land in such a way that modern agro-business could flourish in the zone. This meant developing land use regulations which:

a. gave clear primacy to agriculture over competing forms of land use; and

b. gave farmers rights to engage in agricultural practices which, in some cases, were incompatible with traditional suburban residential development (e.g., harvesting in season at all hours, using fertilizer and soil nutrients as necessary, etc.); and

c. provided sufficient certainty as to future agricultural use so as to encourage investment in land and soil enrichment.

The Township realized that the preservation of agriculture as a significant aspect of the Community depended on answers to two (2) preliminary questions:

1. Is agriculture a reasonable use of the land in East Windsor Township today? The report of the Township's planning consultant, Peter Abeles, a planner with a degree from Cornell University's College of Agriculture with a specialty in agricultural economics, concluded that the Township's prime agricultural areas--active farmland for 300 years - could still be farmed today (see Appendices "A-1" and "A-2"). The report concluded:

a. East Windsor's agricultural lands had, over recent years, been productive and their returns were comparable to those elsewhere in the state and nation.

b. As time passed, the proximity of these lands to large markets would make them even more valuable and important as metropolitan development proceeded.

c. If agriculture were to be preserved -and to remain -intensive development pressures would have to be met in other parts of the municipality.

2. <u>What parts of the Township's agricultural lands should be preserved</u>?

The Township had reviewed all pertinent soil data as part of its 1971 and 1979 Master Plans (see Appendix "E"). During the 1981-1982 period further reviews were conducted in examining strategies for agricultural preservation. (see, Appendices "A-1" and "A-2"). The Planning consultant even examined the soils in the Centex area, particularly to determine their agricultural quality versus those in the Etra(PD) area. (see, Appendix "I"). Since some of the land currently being farmed was needed for housing pursuant to the Master Plan, it was determined to continue the area south of Twin Rivers (Etra) as the area for intensive housing. The reasons for this choice were:

a. the area was adjacent to Twin Rivers--and existing municipal service lines--and close to the Turnpike and Route 33.

b. the area was adjacent to the 200 acre park designed to serve intensive development.

c. the area was at the far border of the 3000 acre agricultural area and its development would not interfere with agricultural preservation efforts in the major part of the agricultural area.

d. the area south of Twin Rivers had been zoned for PD - i.e., intensive development--since 1976.

Thus, the Township determined that 700 acres closest to Twin Rivers should remain designated for intensive development while the balance of the agricultural area--some 3000 acres--would be preserved. The appropriateness of the Township's choice is borne out by the statement of one local farmer, Max Zaitz, who said "...whoever the expert was that picked out the zone, he left most, I'd say 90 percent of...in the agricultural zone of the good lands...there is no better land anywhere and I've traveled a good bit of the U.S. and on farms and you've got some of the best lands, good as lands as there is anywhere in the U.S. So it's just as good or better." (Appendix "C", pp.87-88.)

Thus, as a result of intensive study for over a year (1981-1982), the Township had developed a long-time policy for

preserving agriculture to implement the 1979 Master Plan. This policy--zoning 3000 acres primarily for agriculture and related uses--is embodied in Ordinance 1982-16, the ordinance currently under review by the Court. These zoning provisions are found in Sections 20-17.2000A, -17.3000A,-17.4000A and -17.5000A of the ordinance. Briefly, these provisions create the following zone plan in the AP (Agricultural Preservation) Zone.

1. Permitted Uses
    a. Agriculture (no limit on type)
    b. Roadside stands
    c. Farm dwellings (no limit on numbers on any farm)
2. Conditional Uses
    a. Any commercial or industrial use serving the needs of the agricultural community (farm equipment dealerships, feed and fertilizer stores, food processing or storage such as canneries, slaughter houses, etc.)
    b. Non-farm single family dwellings
        (1) one for each twenty (20) acres on large parcels (to be on lots of one [1] acre or less);
        (2) one for each acre on parcels are not suited for agriculture (to be clustered).

In both cases, residential use is made subject to recorded notice as to farm practices to avoid nuisance complaints.

After extensive study of local needs the Township is convinced that the above regulation is the only reasonable zoning regulation to preserve agriculture as part of the land use and economy of East Windsor Township. Further, the Township believes that the above regulations are reasonable and clearly within the zoning power of the municipality (See, POINT II).

INTENSIVE DEVELOPMENT

The Township is unique in its region in offering a full mix of housing opportunities, including:

-three (3) mobile home parks

-3000 apartment units (40 percent of the Township's dwelling units)

-New Jersey's first PUD- Twin Rivers- with 1,700 townhouses under fee simple ownership, plus condominiums, apartments and single family detached dwellings

-1,500 single family homes on half-acre lots

-1,500 condominiums and townhouses open since 1981 or under approval

-new low-income housing about to be built with the sponsorship of local church group

-old existing neighborhoods of small lots and modest homes, preserved by zoning and upgraded by Township rehabilitation grants and loans.

In 1976 the Township signed a consent order which provided, inter alia, that up to 25% of any new PD would consist

of low and moderate income housing (see Mt. Laurel II, slip opinion p.111). The 1976 zoning ordinance and the 1979 Master Plan continued these policies of growth and diversity. Thus, the Township has historically been committed to recognizing and meeting its fair share of regional housing needs. The 1976 zoning ordinance and the 1979 Master Plan provided that these needs should be met through developing unused sites in developed areas (infill) and through development of the PD zone south of Twin Rivers.

For a variety of reasons, no developer has yet come forward to develop the PD. Part of the Township's charge to its special planning consultant was to determine what could be done to improve the prospects of the PD's being built in the present economy. He concluded several things:

1. The economic climate today simply did not permit a builder to take the kind of risk a builder would in a Twin Rivers size project. The problems of land assemblage, carrying charges, etc., discouraged large-scale development.
2. As a result, the Township should prepare a detailed, comprehensive plan for the PD zone--a plan which showed housing types and location, infrastucture, etc., so that a developer could come in and buy a part of the PD area and develop same relatively quickly and cheaply. The advantages to the developer would be:

a. At the outset the developer would know exactly what he was doing--what he was responsible for.

b. The cost and time in obtaining municipal approvals would be greatly minimized--all the major decisions would have been pre-planned.

c. The developer's obligations as to infrastructure cost and low and moderate income housing would be quantified in advance.

(It should be noted that the Township has already undertaken an identical detailed planning approach in the Town Center zone to encourage investment there as well).

Thus, the Township resolved to do a detailed comprehensive plan in order to encourage the development of the PD zone, including low and moderate income housing. This decision is reflected in another section of the ordinance under challenge. Subsection 20-18.2000f., which reads:

> "REAP Plan. Within 9 months of the adoption of this ordinance the Township shall adopt by ordinance an amendment to the Township official zoning map and capital improvement and utilities plan for the REAP zone. The amended zoning map and capital improvement and utilities plan shall, inter alia, set forth: -- the types of housing and other uses to be allowed within the zone and the locations for each of same; and --the method by which such improvements will be financed, as well as detailed plans for financing off-tract improvements pursuant to N.J.S. 40:55D-42; and --the method of apportioning obligations among developers to insure the

construction of low and moderate income housing in the same proportion as would be constructed in a Planned Development District pursuant to Section 20-16.0301b of the Revised General Ordinances or as required by State laws." (emphasis added).

Thus did the Township seek to implement the recommendations of its planning expert in order to achieve the preservation of agricultural lands and agriculture as a part of the Township's economy while meeting regional housing needs.

MAKING THE PLAN WORK

Having developed a plan which could preserve prime agricultural land and meet regional housing needs, the Township was determined to make sure that both preservation and intensive development occurred as planned.

The planning consultant confirmed that historically the type of agricultural zoning the Township sought to implement suffered from several defects which, over the course of time, tended to lessen the chances of agricultural preservation, rational planning and intensive residential development in a particular designated area. Most critical among these problems were:

1. The "wealth or wipeout" syndrome, and
2. The eroding effect of increases in the speculative value of farmland.

The instant "wealth or wipeout" syndrome has been commented on since the beginning of zoning itself. Given two

land parcels of otherwise equal inherent characteristics and value, a zoning decision to zone one parcel for intensive development and one for low-density development can increase the value of one parcel geometrically while reducing relatively or absolutely the value of the otherwise equal parcel. Thus, one owner may have the value of his parcel greatly enhanced, while the owner of the other parcel receives nothing--or even loses some of the value he had ("wipeout"). This "boom or bust" cycle has not generally been regarded as a legally cognizable loss. Usually regarded as a form of damnum absque injuria, the phenomenon has always been regarded as inherent in the power to regulate land use. (See, Euclid v. Ambler, 272 U.S. 365 (1926).

But whether legally cognizable or not, the real and practical effects of the syndrome on the stability of municipal zoning are very real indeed. Such a syndrome is recognized by property owners, almost all of whom wish to be zoned for the most profitable possible uses. This, in turn, generates significant and constant constituent pressure against any zoning regulatory scheme which tends to lessen the opportunity for maximum profit through land development.

The second problem is that farmland in urban New Jersey traditionally sells for more than its value as farmland--no matter how it is zoned--because it is believed to have a certain speculative value, bared are possibilities for future

zoning changes, no matter how remote. The effect of this phenomenon is several-fold.

First, it creates a situation in which farmers are under great pressure to sell farmland to land speculators. At present, over two-thirds of the land in the 3000 acre Agricultural Preservation zone of East Windsor is farmed by farmers who lease the land from non-farm owners. (Appendix "J").

Second, this obviously discourages long-term investment in soil enrichment, drainage tiles, etc. Virtually all of the agricultural leases in East Windsor today are one-year leases. (Appendix "D", p. 9). No farmer will make significant investments for a one-year lease.

Third, because the price of farmland is artifically high due to speculative value, it becomes difficult if not impossible for even successful current farmers--much less new young farmers--to buy farmland to continue it in farming. In Mercer County, for example, the average price per acre of farmlands bought for continued agricultural use between 1976 through 1981 was $3,141.00. The average price per acre of farmlands bought for investment during that same time period was $5,561.00--some 77% higher.*

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*New Jersey Department of Agriculture. Agricultural Land Sales in New Jersey, Five Year Period. July 1, 1976 to June 30, 1981.

The results of this phenomenon are obvious:

-existing farm families live in uncertainty and cannot invest in the Township's agricultural future;

-new farmers cannot begin farming their own land;

-non-farm landowners neither want to farm nor to commit their land for long-term farm investment.

As a result, the agricultural segment of the Township's economy is year-by-year eroded, making even more probable the eventual loss of this valuable farmland to New Jersey and the Township. At the same time, the departure of farmers and potential farmers from the area, the closing of agricultural service establishments, and the depletion of soil resources and lack of maintenance and drainage improvements all render agriculture a decreasingly viable use in the Township and the surrounding areas. This, in turn, makes non-farm landowners more anxious than ever to develop what was once prime farmland, thus closing out the cycle as large areas are, finally, rezoned for "sprawl" development--the final step in a process of irreversible loss.

While we can convert one residential or commercial or industrial use to another almost interchangeably in many instances, we cannot simply "rip up the asphalt" and begin farming again. Farming takes natural resources--and human resources--which cannot be instantly synthesized for re-development. It takes years--perhaps decades--to build the

resources necessary for successful agriculture.

The Township perceived these problems and realized that a traditional zoning ordinance merely creating a zone for agricultural uses did not represent a permanent solution to the problem of preserving agriculture as a land use or as part of the Township's economy.

> "The limited number of judicial decisions dealing with low density agricultural zoning suggest that a well-conceived agriculture zoning ordinance will usually be upheld in court. On the other hand, zoning is only a product of the political balance of power at the time it is enacted, at least within certain broad constitutional and legal limitations. It has a quality of impermanence and can be changed overnight if desired." John C. Keene. "Conclusions and Recommendations for Agricultural Land Preservation." 1982 Zoning and Planning Law Handbook. Clark Boardman. p. 363.

> "In areas of low development density (agricultural and rural zones), an appropriate strategy for maintaining agricultural production must be future-oriented. Agriculture is likely to continue for the time being, even without special government policies. But governmental policies implemented when urban pressures are still minor may substantially improve the possibility of maintaining agriculture at a reasonable social cost in the future. Donn Derr, Leslie Small, and Pritam Dhillon. "Criteria and Strategies for Maintaining Agriculture at the Local Level". 1977 Journal of Soil and Water Conservation, Vol. 32, No. 3 (emphasis added).

Generally it is best to set up a program long before development pressures have become strong. By the time development pressures have risen it may be more difficult politically to establish a program. By that time, the farm economy might be seriously weakened, a radical shift of expectations of both landowners and developers might be required, and land losses to owners would be more substantial." Keene, op cit, p. 368.

One possible strategy (for agricultural preservation--ed) is agricultural zoning, coupled with a tax policy that ensures that land zoned for agriculture is taxed only at its agricultural value. Since the imposition of zoning results in little or no loss in value to the owners of agricultural land, this strategy, on the surface, has the potential for being quite effective. But the ease with which zoning has traditionally been charged militates against such a strategy, unless procedures that increase the permanence of zoning are adopted. ...Where the development density has reached the levels of the urbanizing and urbanized zones, the difference between the market price of land and its agricultural value is so great that there is a strong incentive to convert the land to urban uses. ...Agricultural zoning also would be opposed because of the sharp reduction in agricultural land values that would result." Derr, et al, op cit.

"One of the clear lessons that emerges from the welter of evidence collected in the course of this study is that protecting farmland is intimately related to managing urban growth. The two problems must be solved together. The source of the pressures that cause the loss for farmland is the need to find places for the nation's expanding and mobile population to live and work. Unless growth can be managed so that needed development is provided in locations which do not threaten agriculture, efforts to protect agricultural lands will not be effective for long.

> Programs to protect land for its long-run resource value represent fundamental social decisions. Therefore, they should be developed in a comprehensive planning context, taking account of the community's needs for land for industry and commerce, and for residences for people of all social and income classes.
>
> Comprehensive growth management may rely on a variety of techniques, including the provision of transportation and other public facilities and the regulation of land use. A central technique is that of defining an urban growth boundary, within which urban development would be encouraged by providing the full complement of urban facilities and services and outside of which public policy would actively discourage or prevent development. The urban growth boundary clearly separates those areas in which agriculture is to be regarded as a long term use from those in which it is eventually to be replaced by urban activities. In so doing, it provides a consistent geographic and policy framework for specific efforts to protect agricultural land, and directs expectations of landowners and developers accordingly." Keene, op cit, p. 365.

Thus, the Township sought to develop a zoning technique which would provide both agricultural preservation and intensive development. To do this it needed to achieve permanence for its planning policies and ameliorate the economic problems inherent in traditional zoning. While many municipalities in New Jersey face the issue of farmland preservation, East Windsor felt that it had to act immediately to meet its local needs--before the pressures of economy and development made agricultural preservation impossible.

> "Although strong state leadership is the ideal, local governments should not wait for the state to take the first step. Many strong local programs have already been undertaken in the absence of state action. The inherent deficiencies of independent, scattered local programs can be remedied when a state program is eventually enacted. But the farmland that would have been lost in the absence of any program can never be restored. Keene, op cit, p. 368

The Township examined the alternatives and concluded that Development Rights represented the best local response to the problems of preserving agriculture and meeting regional housing needs in East Windsor Township.

DEVELOPMENT RIGHTS

The use of Development Rights is an easily misunderstood concept. In essence it is a device for sharing the economic benefits of development so as to further the aims of zoning and provide stability to a zone plan.

We recognize that, in reality, though we may zone one area for agriculture and one for intensive development, the relentless pressures on the agricultural lands, as discussed above, will lead owners to seek rezoning and never to allow agriculture to flourish or even maintain itself by long-term investment. At the same time, the mere act of zoning other lands for high density creates windfalls. These windfalls are created by a public act--zoning--but achieve no public benefit. Quite the contrary, they make owners of agricultural lands even more anxious to obtain rezoning so they, too, can "share the wealth."

The Township has recognized this phenomenon. It has realized that zoning traditionally creates windfalls--unintentionally creates situations which threaten the stability of planning through the unfortunate economic consequences of zoning. The Township has, therefore, sought to develop a zoning technique that modifies the windfall effect and at the same time recognizes the natural expectations of owners of agricultural land to participate in the benefit of development--even though their land continues to be used for agricultural purposes. While these landowners are not as a matter of legal right entitled to realize their expectation, it is clear that a program to preserve agriculture as a land use over the long-term demands realistic programs to facilitate long-term investment and use of land in agricultural production.

The Development Right (DR), is a material recognition of the marketplace and its inexorable forces. For each acre of farmland zoned for preservation in agricultural uses, the owner receives a Development Right (or multiple thereof). As he receives the Development Right, he gives the Township a recordable covenant against future non-agricultural use of the farmland.

At the same time, land in the 700-acre intensive development zone (REAP) is zoned as follows: certain uses--reasonable but not intensely attractive to developers (e.g., 2-acre residential)--as a matter of right; but, more importantly,

other uses, with high density development attractive to developers (e.g., over 10 units per acre), applicable if the developer has a required number of Development Rights. The density is planned so that the developer's total land cost (REAP land plus DR's) will not exceed what his land cost would normally be for land zoned for high density--if he could find such high density zoning elsewhere. Thus, the zoning creates real incentive for a developer to purchase Development Rights.

This, in turn, enables the owners of agricultural land to participate in the Township's development while:

1. effectively guaranteeing the preservation of prime agricultural lands; and
2. removing the speculative value from the price of farmland by effectively causing developers to purchase Development Rights and use them in the intensive growth zone.

Thus, the prime farmland remains available in future for agricultural investment and farmers and, at the same time, regional housing needs will be met.

THE AWARD AND USE OF DEVELOPMENT RIGHTS UNDER THE EAST WINDSOR ORDINANCE

AWARD

The method for awarding Development Rights is as follows:

Since the best agricultural lands are usually the easiest to develop (good soil, good drainage, no trees or swamps), owners of agricultural land in the preservation area are given certificates called Development Rights [DR's] based on the quality and acreage of the farmland they own. Award of the rights is based on a study of soil quality and related factors followed by: prromulgation of a plan, a quasi-judicial hearing after notice to all property owners (See Ordinance Section 20-19.2000) and adoption of an ordinance (Section 20-19.3000). Pursuant to Section 29-19.2000 d. of the ordinance, the total number of rights issued will not exceed the total number of rights usable under the REAP Plan (See Use, below).

ISSUANCE

Once the rights are awarded to each owner in the Agricultural Preservation Zone, Section 20-19.5000 provides that the Clerk shall issue rights certificates to each owner subject to:

1. The owner's executing a recordable deed of covenants and restrictions in form satisfactory to the Township, and
2. An affidavit of title.

In the event that there is a mortgage or other encumbrance on the farmland, no rights will be issued until the ownership of the rights has been resolved.

The Clerk will maintain a map and registry of all rights and transfers of same.

USE

In designing the land use plan for the REAP Zone, the Township's goal is to produce an area which will be a magnet for developers wishing to undertake high density housing. The Plan will do this in three ways:

1. The Plan itself will be in sufficient detail so that a developer will achieve substantial savings simply by coming into the zone. He will be on a "fast track" because the months spent obtaining intial approvals will be drastically reduced. The plan will specify: uses, locations, housing types, numbers, infrastructure contributions, low and moderate income housing requirements, etc. Thus, a developer will avoid significant and costly delay before a planning board.
2. The Plan will be broken down into pre-planned "pieces" so that a developer can select a tract of a size and density suited to his requirements and abilities.
3. Densities within the REAP Zone will be set at such a sufficiently high level that:
   a. All of the DR's issues in the preservation zone can be used in the REAP Zone; and

b. a developer will have a real economic incentive to use DR's. In other words, the permitted use with DR's is of such a high density that purchasing the DR's and purchasing the REAP land together will still not exceed the normal range of land costs for land zoned at very high density.

SUMMARY

The Township's clear plan and policy, then is:

1. To create a 3,000 acre Agricultural Preservation Zone.
2. To create a 700 acre intensive development zone to meet regional housing needs (REAP Zone).
3. To provide through the issuance of DR's, a device to enhance and provide stability for the zone plan, so that the usual pressure on agricultural land will be lessened by allowing owners of such land to participate in the benefits of development in the REAP Zone.
4. To develop a plan for the REAP Zone which allows such high housing densities to developers using DR's that their total land cost (cost of DR's plus REAP land) is no greater than would otherwise be the case if they were able to find and purchase a comparable piece of land zoned for the same high density without the use of DR's.

5. Thus, to insure that the developer, anxious to build in the REAP area, will buy DR's and, thereby "complete the circle" so that both Agricultural Preservation and intensive development to meet regional needs will occur in an equitable, rational and, therefore, successful manner consistent with good planning for a sound and diversified future for the Township and its people.

SUMMARY JUDGMENT

1. Questions before the Court

The questions sub judice at this time are:

a. Is use of a development rights program in a municipal land use ordinance an ultra vires act?

b. Is use of a development rights program in a municipal land use ordinance within the express or implied powers of the Township?

c. Is use of a development rights program in a municipal land use ordinance pre-empted by any federal or state enactment?

These questions involve no disputed factual issues and are, therefore, ripe for summary judgment. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67 (1954). The Court can and should render judgment as to whether enactment of a Development Rights (DR) program to enhance and further East Windsor's zone plan for Agricultural Preservation and intensive housing development is within the Township's police power.

2. Questions Not before the Court

These motions for summary judgment do not address the basic zoning decisions in Ordinance 1982-16:

a. The creation of a 3,000 acre Agricultural Preservation Zone within which agricultural uses are predominant; and

b. The creation of a 700 acre intensive development zone.

For purposes of these motions, the validity of these portions of the enactment must be assumed. This is true for three reasons.

1. Neither the plaintiff nor defendant has sought summary judgment as to these matters; and
2. Until successfully challenged, those portions of the enactment are clothed with a presumption of validity. Velinohos v. Maren Engineering Corp., 83 N.J. 282 (1980); Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335 (1973); Borough of Collingswood v. Ringgold, 66 N.J. 350 (1975).
3. Any attack on those portions of the enactment would necessarily involve significant factual review and expert testimony. Thus, any attack by plaintiff on those portions of the enactment should await a plenary trial. Odabash v. Mayor and Council of Dumont, 65 N.J. 115, 121, n. 4 (1974).

It would appear clear, therefore, that the actual zoning changes made pursuant to Ordinance 1982-16 are not and cannot be in question before the Court at this time.

Even were there any doubt as to the above, the "burden is on the party moving for summary judgment to show the clear

absence of a genuine issue of fact." Monmouth Lumber Co. v. Indemnity Insurance Co. of N.A., 21 N.J. 439 (1956); Hyland v. Long Beach Tp., 160 N.J. Super. 201 (App. Div. 1978); Steward v. Borough of Magnolia, 134 N.J. Super 312 (App. Div. 1975).

Therefore, if a genuine issue of material fact appears debatable, then

> "...doubts must be resolved in favor of [a] conventional trial and [the] matter cannot be decided on affidavits of parties where inferences for and against existence of a cause of action or a defense arise therefrom, no matter how strongly they point in one direction or the other. Frank Rizzo, Inc. v. Alatsas, 27 N.J. 400 (1958).

Thus, the Township submits that only that portion of the ordinance dealing with Development Rights and not the zoning enactments per se can be adjudicated in summary fashion at this time. While plaintiff has not sought summary judgment as to these zoning enactments per se, he has requested relief as part of his motion for summary judgment which, if granted, would have the affect of rendering an untimely summary judgment on the creation of the agricultural and REAP zones.

3. Remedies Proposed by Plaintiff

Even if the Court were persuaded that the use of Development Rights were wrongful as an adjunct zoning device, the remedies proposed by plaintiff are inappropriate.

Ordinance 1982-16 contains a severability clause (§6). Its zoning enactments are clear and within statutory parameters.

The Court has an obligation to retain so much of the enactment as it can and declare invalid only that portion it feels absolutely compelled to invalidate. Inganamort, supra, p. 421-424.

Since the zoning portions of the enactment are not directly before the Court, plaintiff's suggestion that the Court should strike them down and then proceed to direct the Township to fashion a new ordinance is clearly inappropriate and beyond the reasonable scope of summary judgment in this instance.

A judgment against the use of Development Rights will not affect the Agricultural Preservation Zone in any way. It must be presumed to be--and is--a reasonable zone lawfully enacted. The only effect of a judgment of invalidity as to Development Rights would be that the Township would have to recast the REAP Zone portion of the ordinance to eliminate any reference to Development Rights.

To illustrate that plaintiff's present assertions are untimely because they involve facts in serious dispute, we need only refer to the allegations set forth at page 35 of plaintiff's brief.

1. In the paragraph number "1", plaintiff alleges there is no market for expensive housing in the Township. He offers no facts. The Township on March 14, 1983, approved a small subdivision in which the cost of houses would be in excess of $140,000.00. The Township contains several new houses with a market value in excess of $200,000.00.

As to the Etra Lake P.D., the economic conditions and high interest rates of the past few years have had a chilling effect on many projects throughout New Jersey.

2. In the paragraph numbered "2", plaintiff attacks the quality of farmland in the Agricultural Preservation Zone. Yet, an expert local farmer said the Agricultural Preservation Zone contained the best farmland in the Township, (Appendix "C", page 87). This confirms the Township's own analysis by experts. (See Statement of Facts).

   As to how much of the preservation zone is currently farmed, the Assessor of East Windsor Township puts the figure at seventy-seven percent (77%) of the land area in the zone--not the fifty percent (50%) alleged by plaintiff. (See Appendix "J").

3. In the paragraph numbered "3", plaintiff makes a misstatement of fact. A review of Appendix "D", page 111 et seq. shows clearly that Dr. Rebecca Notterman never made the statement that she and her husband have no intention of developing their land. To the contrary, as the affidavit of Township Planner, Michael K. Mueller appended hereto indicates, Dr. Notterman has already begun discussions with the

Township aimed at developing her property--as have a number of landowners and developers. (Appendix "L"). In addition, some developers, such as Eastern Properties believe that Ordinance 1982-16 "will provide developers with an opportunity to produce good affordable housing in East Windsor Township and at the same time assure the permanent preservation of quality open space." (Appendix "L").

4. Even as to plaintiff's statements concerning the State Development Guide Plan, the Township submits as Appendix "K" a letter from the Division of State and Regional Planning, DCA the agency responsible for the State Development Guide Plan, clearly showing that the Township's plans are consistent with the letter and spirit of the State Development Guide Plan--not withstanding plaintiff's allegations.

Thus, the "facts" cited by Centex in its request for a massive re-zoning on summary judgment are simply not what they appear from Centex's representations.

Clearly, the remedy proposed by plaintiff is at once drastic and draconian, self-serving and overreaching in the present circumstances. The Court, therefore, should deny Centex the massive rezoning remedy proposed.

ARGUMENT

POINT I

THE LEGALITY OF ORDINANCE 1982-16

A. Introduction

The Courts of New Jersey have set clear standards for examing the legality of municipal ordinances. In the present case we are dealing with the issue of whether the police power delegated to East Windsor Township includes the power to adopt an ordinance which, in addition to creating an agricultural preservation zone and an intensive development zone, uses the technique known as the Transfer of Development Rights (TDR) to further the planning and zoning policies described above.

The Court's inquiry must focus on three questions as enunciated by the Supreme Court:

1. Is the enactment prohibited by virtue of any provision of the U.S. or N.J. Constitution which precludes delegation by legislature of such police power as the Township has herein exercised for the general health, safety and welfare?
2. Has the Legislature expressly or impliedly delegated such power as the Township has herein exercised?
3. If such power is vested in the Township, has some federal or state enactment pre-empted or otherwise barred the Township's exercise of police powers in the area under scrutiny?

Inganamort v. Borough of Fort Lee, 62 N.J. 522 (1973); Dome Realty v. Paterson, 83 N.J. 212 (1980); State v. C.I.B. International, 83 N.J. 262 (1980).

Each question will be dealt with in turn.

B. The East Windsor Zoning Ordinance Providing for an Agricultural Preservation Zone and REAP Zone and the Use of TDR is not Ultra Vires

The threshold question is substantive in nature and relates to the constitutionality of the enactment. Is the enactment of the Ordinance explicitly prohibited by the Constitution of the State of New Jersey or the Constitution of the United States?

A claim of facial unconstitutionality is a most difficult burden for any plaintiff to bear. Hutton Park Gardens v. West Orange, 68 N.J. 543 (1975); Brunetti v. Boro of New Milford, 68 N.J. 579 (1975); Troy Hills Village v. Parsippany-Troy Hills Twp. Council, 68 N.J. 604 (1975). Plaintiff in the present case has not cited any authority in support of that proposition as to this ordinance in question. Thus, there is no reason for the Court to construe that the ordinance is ultra vires by virtue of any constitutional prohibition.

The only constitutional argument advanced by plaintiff in his brief really deals with the issue of statutory delegation, even though his argument depends on whether Art. 4, §6, Para 2 and Article 4, §7, Para 11 of the New Jersey Constitution should be read in pari materia or not.

The concept of an ultra vires act does not only cover the substance of the enactment, however. Rather, the analysis should examine whether procedural prerequisites have been complied with. A review of plaintiff's preliminary statement of facts starting on page 1 (unnumbered) and continuing until the end of page 2 sets forth the manner in which Ordinance 1982-16 came into being. In every respect the procedural adoption of the ordinance conformed to required constitutional and statutory procedural regulations. Accordingly, enactment of the ordinance is procedurally in conformance with the law and, therefore, not ultra vires.

C. Has the Legislature Delegated Such Powers as the Township has Herein Exercised?

1. General

The United States Supreme Court has recognized that zoning is inherently an attribute of the police power. Euclid v. Ambler, supra. Our own State Constitution of 1947, Art. 4, §6, Para. 2 provides for an affirmative grant of zoning power to the municipalities. Art. 7, §4, Para. 11 further enhances the ultimate grant by mandating a liberal construction of any such exercise of municipal authority.

In adopting the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., the Legislature made it clear that:

> "This act being necessary for the welfare of the State and its inhabitants shall be considered liberally to effect the purposes thereof." N.J.S.A. 40:55D-92.

This section is to the Municipal Land Use Law what Art. 7, §4, Para. 11 is to Art. 4, §6, Para. 2 of the Constitition.

All the courts of this State have consistently construed Art. 4, § 6, Para. 2 and Art 4, §7, Para. 11 powers as both being independent grants of authority as well as complimenting and reenforcing each other.

Municipalities are further vested with broad general police powers through N.J.S.A. 40:48-2. Enchanced by the application of Art. 7, §4, Para. 11, the scope of legislative authority thereby delegated to municipalities for local initiative is great indeed. Inganamort, supra.

Thus, the basic grant of police power, including the power zone, is broad and its construction liberal.

2. Land Use Legislation in New Jersey

In general, the Constitution is viewed as giving municipalities the power to zone, subject to legislative standards.

> "The constitutional power to zone, delegated to the municipalities subject to legislation, is but one portion of the police power and, as such, must be exercised for the general welfare." Mt. Laurel II, p. 16.

The Supreme Court has recently summarized the Legislature's role in land use legislation as follows:

> "In New Jersey, it has traditionally been the judiciary, and not the Legislature, that has remedied substantive abuses of the zoning power by municipalities. A review of

zoning litigation and legislation since the enactment of the zoning enabling statute in the 1920's shows that the Legislature has confined itself largely to regulating the procedural aspects of zoning." Mt. Laurel II, p. 23, Note 7. (emphasis added).

A review of the Municipal Land Use Law indicates the correctness of the Court's view. The only delineation of broad powers to be exercised is found at N.J.S.A. 40:55D-2--the "purposes" section. In that section, the Legislature has set forth the following purposes:

"It is the intent and purpose of this act:

a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;...

c. To provide adequate light, air and open space;...

e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;

f. To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies;

g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

h. To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location of such facilities and routes which result in congestion or blight;...

j. To promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land;

k. To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site;

m. To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land; and

n. To promote the conservation of energy through the use of planning practices designed to reduce energy consumption and to provide for maximum utilization or renewable energy sources." (emphasis added).

It would appear from the above that both the preservation of agriculture and the development of a high-density area to meet local and regional housing needs are clearly among the explicit purposes--and, therefore, among the explicit powers--of municipal government in exercising its constitutional grant of zoning power.

The recent pronouncements of the Supreme Court in Mt. Laurel II, while focusing on municipal housing obligations in

exercising zoning power, also spelled out the right and duty of municipalities:

> To preserve open space and prime agricultural land...Builders may not be able to build just where they want--our parks, farms, and conservation areas are not a land bank for housing speculators." Mt. Laurel II, pages 19-20.
>
> "The lessons of history are clear, even if rarely learned. One of these lessons is that unplanned growth has a price: natural resources are destroyed, open spaces are despoiled, agricultural land is rendered forever unproductive, and people settle without regard to the enormous cost of the public facilities needed to support them. Cities decay; established infrastructures deteriorate for lack of funds; and taxpayers shudder under a financial burden of public expenditures resulting in part from uncontrolled migration to anywhere anyone wants to settle, roads leading to places they should never be--a patters of total neglect of sensible conservation of resources, funds, prior public investment, and just plain common sense. These costs in New Jersey, the most highly urbanized state in the nation, are staggering, and our knowledge of our limited ability to support them has become acute. More than money is involved, for natural and man-made physical resources are irreversibly damaged. Statewide comprehensive planning is no longer simply desirable, it is a necessity recognized by both the federal and state governments." Mt. Laurel II, page 60. (emphasis added)

In all, the Court makes no less than ten major references to the need to protect agriculture through the municipal zoning power in Mt. Laurel II.

While some of those references deal only with areas designated on the Concept Map of the State Development Guide Plan as "Limited Growth" or "Agricultural", the Guide Plan itself says:

> "Agriculture in other portions of the State--no matter how they are assigned on the Concept Map--should be protected from incompatible development to the extent feasible within the context of local planning and land use regulations." State Development Guide Plan, page 71.

> "It should be emphasized that the Growth Area designation does not imply only growth supporting investments will be made within this area or that development of environmentally sensitive lands is encouraged. Land acquisition for recreation and resource conservation, as well as local controls protecting floodplains, steeply-sloped areas, wetlands, agricultural uses and forested areas constitute valid components of the kind of land use pattern which should characterize such Growth Areas." State Development Guide Plan, page 49.

Moreover, as to Mercer County, the State Development Guide Plan speaks of the Delaware Valley Regional Planning Commission Plan, which includes the agricultural preservation areas herein being challenged.

> "The DVRPC Plan identifies scattered agricultural sites within the Growth Area. Although the Guide Plan supports the continuation of agriculture in such areas, existing operations are not of sufficient magnitude to be reflected at a statewide scale. The preservation of such areas must therefore rely primarily on local planning, land-use regulation and investment strategies." State Development Guide Plan, page 144.

From the foregoing, it would appear abundantly clear that the power to zone so as to preserve agricultural lands and uses has been delegated by the legislature to municipalities.

The municipal role in planning and in agricultural preservation is highlighted by a letter to East Windsor Township from a Division of State and regional planning concerning the relationship between the State Guide Plan and the East Windsor Planning Policies and Zoning Ordinances currently before the Court. According to the Division, which developed the State Development Guide Plan, municipalities are intended under the Plan to preserve agriculture in growth areas and to develop agricultural areas--if municipal and regional planning agencies have rational plans to support their zoning decisions. Appendix "K".

Having established that municipalities have a right and duty to use their power to preserve agriculture as well as to meet regional housing needs, the analysis must now focus on the question of whether the enactment in this case has been in any way pre-empted or is otherwise banned by any federal or state act.

D. Is the Township's Enactment Pre-empted or Otherwise Barred by Any Federal or State Enactment.

INTRODUCTION

As the foregoing section indicated, the Township has the right and duty to zone so as to protect prime agricultural

lands from destructive encroachment. Plaintiff has not cited, nor can the Township suggest to the Court, any authority to the contrary.

As to those sections of the ordinance creating an agricultural preservation zone, and a high density housing zone, therefore, there is no suggestion of pre-emption. To that extent, they are not under challenge here.

The gravamen of the motions before the Court deals with those sections of the ordinance which create development rights and establish a method for their use. Plaintiff contends that the Township lacks the authority to enact any ordinance involving the issuance or use of Development Rights.

This section will attempt to deal with the question of whether the use of development rights has, in fact, been pre-empted so that the Township cannot adopt such a program to meet a lcoal need in conjunction with and furtherance of the use of its constitutional and statutory zoning powers to preserve agricultural lands and build needed housing.

THE LAW OF PRE-EMPTION

Since public policy favors the enactments of local authorities, the burden of establishing pre-emption rests with the party asserting it. If the issue is debatable, it should be resolved against pre-emption. Summers v. Teaneck, 53 N.J. 548 (1969).

> "A legislative intent to pre-empt a field will be found either where the state scheme is so pervasive or comprehensive that it effectively precludes the coexistence of municipal regulation or where the local regulation conflicts with the state statutes or stands as an obstacle to a state policy expressed in enactments of the Legislature." Garden State Farms v. Bay, 77 N.J. 439 (1978).

Over the years the Courts of New Jersey have examined the issue of pre-emption in a variety of contexts. Discussion of several significant cases may be helpful in bringing the relevant principles into focus.

Operation of the Federal Communications Act of 1934 formed the foundation for a claim by a homemaker seeking to erect a radio tower in a residential zone without complying with the local zoning ordinance. The Court met this claim of Federal pre-emption in Skinner v. Board of Adjustment of Cherry Hill, 80 N.J. Super. 380 (App. Div. 1963) by holding that the pervasive scope of regulation did not reach what was, in fact, an accessory use of the property and it was, therefore, properly subject to local control.

In Traino v. State, 187 N.J. Super. 683 (Law Div. 1982), Judge Haines rejected plaintiff's contention that municipal ethics boards were ultra vires, at 646. But, after reviewing the numerous statutes dealing with the term and tenure of elected officials, he concluded that the "num erous statutes" confirmed the sole right of the legislature to establish remedies against elected officials, at 646-7.

The issue was framed in a different context in Mental Health Association of Union City v. Elizabeth, 180 N.J. Super. 304 (Law Div. 1981) where the establishment of a group home ran afoul of the local zoning ordinance. On the particular facts present the Court found that N.J.S.A. 40:55-66.1 did support preemption--but only for the limited purpose of the group home. Pre-emption did not permit, however, the group home to be utilized for office purposes even though the offices were related to the group home. "In determining whether the Legislature has pre-empted an area," the Court noted, "the primary consideration is whether the municipal action adversely affects the Legislative scheme." Id. at 309.

In the case of United Building and Construction Trade Council v. Camden, 88 N.J. 317 (1982), the Court upheld the Camden requirement that, if possible, 40% of a contractor's employees be city residents. In his opinion, Justice Pashman said in part "local affirmative action programs doubtless contain many requirements that were not contemplated by the legislators who drafted the affirmative action laws...Such requirements may be authorized by the implied power of the locality under the law against discrimination...or by the general police power" at 329. The Supreme Court upheld the Camden requirement because it could find no clear intent to pre-empt the field. "...A legislative intent to supersede local powers must clearly be present." at 344.

Pre-emption criteria were carefully sentinized in Inganamort v. Boro of Fort Lee, 62 N.J. 522 (1973). At issue were rent control ordinances. The Court addressed:

> "The naked legal issue whether the police power delegated to these municipalities includes the power to deal with the evil of inordinate rent arising out of a housing shortage." Id. at 527.

Plaintiff's claim that rent control required statewide uniform treatment was thoroughly rebuffed by the Court.

> "...if the evil is of statewide concern, still practical considerations may warrant different or more detailed local treatment to meet the varying conditions or to achieve the ultimate goal more effectively." Id. at 528.

Plaintiff further asserted that such local treatment would result in a myriad of different schemes. That claim was quickly dismissed as misperceiving the constitutional framework favoring local initiative.

> "It is of no constitutional moment that local decisions will mean diversity of treatment within the State. Diversity is an inevitable incident of home rule, for home rule exists to permit each municipality to act or not to act or to act in a way it believes will best meet the local need." West Morris Regional Board of Education v. Sills, 58 N.J. 464, 477 (1971) cert. denied 404 U.S. 986, S. Ct. 450, 30L. Ed 2d 370 (1971); Two Guys from Harrison Inc. v. Furman, 32 N.J. 199, 231-232 (1960); Jamouneau v. Harner, 16 N.J. 500, 517-521 (1954) cert. denied, 349 349 U.S. 094, 75 S. Ct. 580, 99L. Ed. 1241 (1955); In Re Cleveland, 52 N.J.L. 188, 190-191 (E.A. 1889); Paul v. Gloucester County, 50 N.J.L. 555, 608-609 (E.A. 1888).

The last part of the Court's analysis entailed a panoramic view of the legislative landscape to determine the scope, if any, of state action. The Court concluded that since there "presently [was] no statute dealing with rent control... the municipal power is not pre-empted by any such measure." Id. at 537. Interestingly enough, the Court went one step further to expound upon the effect of the State's withdrawing from a previously regulated area.

> "Surely it cannot be that when the State withdrew from the area in the 1950's, it thereby ordained that the subject matter shall thereafter be the promise of the State Legislature alone." Id.

In addressing the allegation that the ordinance was void because it regulated what state law did not and was, therefore, pre-empted, the Court said that the fact that

> "The ordinance imposes restraints which the State law does not, does not spell out a conflict between State and local law. On the contrary the absence of a statutory restraint is the very occasion for municipal initiative." Id. at 538. (Emphasis added).

Nor should legislative action on a bill, or even a gubernatorial veto, be determinative of proof of pre-emption. The Supreme Court has said, that:

> "...caution must be exercised in using the action of the legislature on proposed [legislation] as an interpretative aid..."

in discerning legislation intent. Garden State Farms v. Bay, 77 N.J. 439 (1978) at 453.

Some seven years after Inganamort the Court found itself addressing the same pre-emption issues in Dome Realty, Inc. v. Paterson, 83 N.J. 212 (1980) wherein the zoning ordinance was being utilized to enforce habitability standards of rental housing. The Court emphatically adopted the reasoning of Inganamort, supra. In addition, it concluded that the habitability standards could be enforced as an exercise of Art. 4, §6, Para. 2 power as enunciated in N.J.S.A. 40:55D-62 (Dome, at 226) as well as a mutually independent and separate exercise of Article 4, §7, Para. 11 power through N.J.S.A. 40:48-2. Id. at 230.

Whereas the Inganamort Court, supra, found that absence of state statute defeated a claim of pre-emption, the Dome Court went even further. "While a municipality may not legislate in an area which the State has pre-empted, admonished the Court, "the Legislature's intent to prevent local initiative must appear clearly." Id. at 232. (Emphasis added). Borrowing from Summer v. Teaneck, 53 N.J. 548 (1969), Justice Pashman wrote:

> "It is not enough that the Legislature has legislated upon the subject, for the question is whether the Legislature intended its action to preclude the exercise of the delegated police power..." Summer at 584. (Emphasis added).

> "The ultimate question is whether upon a survey of all the interests involved in the subject, it can be said with confidence that the Legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act." Summer at 555. (Emphasis added)

The heavy burden a plaintiff bears in seeking to establish pre-emption is illustrated by a recent Supreme Court case which shows the findings necessary before a court will find pre-emption. In State v. Crawley, 90 N.J. 241 (1982), the Court reviewed the unusual language of N.J.S. 2C:1-5(d) which is far reaching in that it enjoins the enactment of any local ordinance "conflicting with any policy of this state...whether that policy be exposed by inclusion of a provision in the code or by exclusion of that subject from the code." (emphasis added). In adjudicating pre-emption as to a municipal loitering statute, the Court addressed several factors:

1. The clear legislative statement in the statute;
2. the fact that the code had repealed a previous statute on the same subject;
3. the explicit testimony of the draftors at the legislative hearings;
4. the fact that loitering statutes were being found unconstitutional at the time the New Jersey statute was repealed and the new code adopted.

In the later case of Belmar v. Buckley, 187 N.J. Super. 107 (App. Div. 1982), however, the Appellate Division upheld a municipal ordinance against public nudity as being outside the scope of the code provision on public indecency.

Thus, for the Court to find pre-emption requires that there be no doubt that the Legislature specifically intended to prevent municipalities from enacting programs using development rights in order to exercise their zoning powers for the public good.

With this legal framework in mind we may now look at State statutes to see if the use of development rights in zoning is pre-empted or otherwise barred.

The mere fact that development rights may not have been used in this manner before--or that plaintiff views them as involving "socio-economic" regulations--or that development rights are not "pure" (i.e., purely 'Euclidian') zoning has been declared by the Supreme Court to be a specious ground for rejection. As the Court said in Mt. Laurel II, all zoning has socio-economic consequences, at p. 118.

Most importantly, plaintiff's suggestion that the Township's enactment may be "impliedly pre-empted" (Count IX of Complaint) finds no basis in law. To the Courts of New Jersey, at least since the 1947 Constitution and in some respects since the Home Rule Act of 1917, there has been no such thing as

'implied' pre-emption. The Courts of our State have only found pre-emption where the clear and applicable enactment of the Legislature demanded such a finding.

Pre-Emption and the Municipal Land Use Law (MLUL)

The Municipal Land Use Law contains no references to development rights.

As previously shown, however, the Municipal Land Use Law:

1. contains only broad and general grants of power (including agricultural preservation);
2. otherwise focuses on procedural issues;
3. contains a section requiring liberal interpretation of municipal powers in implementing its purposes;
4. has always been viewed as procedural rather than all-encompassing as to the substance of municipal zoning powers.

Historically, the Courts of New Jersey have had no qualms about approving municipal zoning ordinances which went beyond the explicit provisions of the then current land use law. The following provisions of municipal zoning ordinances have been upheld by courts even though there was no specific statutory authority for their enactment.

- Cluster zoning, for instance, was upheld in a local ordinance before the legislature saw fit to

enact any provisions regarding same. Chrinko v. South Brunswick Planning Board, 77 N.J. Super. 594 (Law Div. 1963); Nelson v. South Brunswick Planning Board, 84 N.J. 265 (App. Div. 1964).

- Senior Citizens' Housing. Taxpayers Assn. of Weymouth Twp. v. Weymouth Twp., 71 N.J. 249 (1976)

- Certificates of Occupancy. Dome, op cit.

- Mandatory set-asides. Mt. Laurel II, page 110.

- Deed Restrictions for low/moderate income housing. Mt. Laurel II, page 113.

Thus, it would seem that the existence of the Municipal Land Use Law per se--or the lack of a specific authorization to enact a particular type of regulation--does not ipso facto suggest that the municipality is pre-empted from enacting a particular type of ordinance or new device to implement valid statutory goals such as preserving agriculture and meeting regional housing needs.

Other Statutes

There would appear to be nothing in the laws of the United States or New Jersey which would otherwise deal with the issue. The only reference to development rights outside of the Pinelands regulations is the reference to Development Easements in L. 1983, C. 32 (S 867 of 1982; N.J.S.A. 4:1C-11 et seq.) This

law merely implements the 1981 Farmland Preservation Bond Act by providing how State Bond funds should be spent. Thus, there is no other state statute dealing with development rights.

E. The East Windsor Ordinance in Perspective

Against this background, what can be said about East Windsor Township's Agricultural Preservation Ordinance? We have previously established that the enactment as it stands now is not ultra vires. Is agricultural preservation not properly a subject for local legislation? Are there now state statutes or regulations which expressly occupy the field? Can Centex Homes demonstrate that a legislative intent to imobilize East Windsor Township can be clearly perceived by this or any other Court? We believe not.

Land Use Powers

To start with, from the perspective of the Municipal Land Use Law, the Legislature has stated that:

> "It is the intent and purpose of this act: a. to encourage municipal action to guide the appropriate use or development of all lands in this State in a manner which will promote the public health, safety, morals, and general welfare." N.J.S.A. 40:55D-2a.
>
> "The concept of the general welfare in the realm of land use regulation is broad and inclusive..." Shepard v. Woodland Twp., 71 N.J. 230, 238 (1976).

It can also prove illusive as noted by Justice Hall in South Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151 (1975) (hereinafter "Mt. Laurel I").

> "The demarcation between the valid and the invalid in the field of land use regulation is difficult to determine, not always clear and subject to change." Id. at 176.

What signposts can this Court utilize in establishing and defining the line; and then determining which side of the line Ordinance 1982-16 falls. Frequently, in such situations, the simpler the signpost is in concept, the easier it is to find the line.

First, Passack v. Washington Township, 74 N.J. 470 (1977) footnote 2, p. 483 indicates that the new Municipal Land Use Law L.1975 c.291 did not constitute a new substantive enactment, but primarily acted to consolidate and incorporate more definitive procedural aspects.

Beyond that, the Court need look no further than the following provisions of N.J.S.A. 40:55D-2 which constitute the substantive zoning powers (Glenview Development Company v. Franklin Township, 164 N.J. Super. 563 [1978]).

> "g. To provide sufficient space in appropriate locations for a variety of agricultural...uses... according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;"
>
> "j. To promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land;"

These sections coupled with the operation of N.J.S.A. 40:55D-92 requiring that:

> "This act being necessary for the welfare of the State and its inhabitants shall be considered liberally to effect the purposes thereof."

are compelling indications that the object of Agricultural Preservation is one explicitly encouraged by the Legislature.

Aside from the Municipal Land Use Law itself, the Legislature has expressly designated preservation of agriculture as a pressing public need. Qualified farmland receives special treatment under the Farmland Assessment Act, N.J.S.A. 54:4-23.1 et seq. Within the last several years, bond issues have been approved to fund the creation of agricultural preservation districts. The Legislature has not acted alone. Within the Executive branch, several studies have been undertaken regarding agricultural preservation. Foremost among these is the 1980 report entitled Grass Roots. Recently, the designation of agricultural lands in the State Development Guide Plan has received additional prominence.

Perhaps the most definitive statements concerning agriculture preservation are found in Mt. Laurel II. Re-evaluating the interplay among the between municipalities to provide adequate housing, the Court nonetheless recognized that municipalities have "...the clear obligation to preserve open space and prime agricultural land..." Mt. Laurel II, p. 19. Operation of the "Mt. Laurel doctrine [should] not restrict other measures, including large-lot and open area zoning..." Id. at 34.

As the Court further observed:

> "There may be areas that fit the 'developing' description that should not yield to "inevitable future residential, commercial and industrial demand and growth."

The rationale is quite simple.

> "Those areas may contain prime agricultural land,..." Id. 41-42.

East Windsor Township is such an area.

This Court is urged to compare the statement of purpose in Ordinance 1982-16 with the following:

> "The lessons of history are clear, even if rarely learned. One of those lessons is that unplanned growth has a price--natural resources are destroyed, open spaces are dispoiled agricultural land is rendered forever unproductive, and people settle without regard to the enormous cost of the public facilities needed to support them." Id., 60.

East Windsor Township has learned the lessons so eloquently enunciated by Chief Justice Wilentz. The ordinance here under analysis is East Windsor Township's response to insure that the Township is not condemned to relieve history.

In particular, the designation of some 3,000± acres within the Township which has been under active agricultural use for almost three hundred years provides sufficient land for agricultural uses. (Appendix "A"). Second, East Windsor Township's orientation in New Jersey astride major transportation corridors close to major urban areas, represents

a most appropriate location for agricultural uses. Having and maintaining a viable agricultural segment of the economy in the "Garden State" certainly operates to meet the needs of all New Jersey citizens.

As to the intensive development zone, creation of the REAP Zone undoubtably furthers the goal of preventing urban sprawl. The directing of additional residential growth into those areas of the Township in closest proximity to existing municipal services will prevent degradation of the environment. In the final analysis, land itself is the most precious of all natural resources because it is not renewable and cannot be syntheized.

We submit, therefore, that the ordinance in question is a logical and lawful component of East Windsor Township's zoning ordinance under State powers.

Equal and Alternative Authority for Enactment

There is, however, an alternative and equally valid base for sustaining East Windsor's use of DR's to enhance and strengthen their planning and zoning efforts. All New Jersey municipalities are vested with additional broad police powers pursuant to N.J.S.A. 40:48-2. Historically, our courts have "...expressly rejected a narrow view of N.J.S.A. 40:48-2" and "...consistently held the statute is itself a reservior of police power." Adams Newark Theatre Co. v. City of Newark, 22

N.J. 472 (1956), affirmed, 354 U.S. 931, 77 Supreme Court 1395, 1L. Ed. 2d 1533 (1957); Kennedy v. City of Newark, 29 N.J. 178 (1959); Moyant v. Paramus, 30 N.J. 528 (1959); Summer v. Teaneck, supra, 53 N.J. 548; New Jersey Builders Assn. v. Mayor of East Brunswick Twp., 60 N.J. 222 (1972); Inganamort, supra, at 536; Larson v. Mayor and Council of Spring Lake Heights, 99 N.J. Super. 365 (1968)--authority to use general authority even if specific authority is available.

Chief Justice Weintraub, in Inganamort, put it quite succinctly:

> "The police power is vested in local government to the very end that the right of property may be restrained when it ought to be because of sufficient local need." Id. at 538.

Ordinances predicated upon N.J.S.A. 40:48-2 "are subject to the...narrow scope of review under principles of substantive due process." Hutton Park Gardens v. West Orange, 68 N.J. 543, 563 (1975).

In the present case, the Township knows that development pressures drive up the price of prime agricultural land beyond its actual use to reflect some irrational speculative value predicated upon assumed future development. The most carefully considered and implemented master plan becomes subject to the vagaries of tearful landowners and rising economic expectations. Conversion of prime farmland to housing

development is not an orderly and planned sequence. Rather, it leapfrogs as the owners of the land succumb, for whatever reason, to the lure of a quick profit at the expense of the community as a whole.

East Windsor Township could seek to foreclose this chain of events by merely zoning land for agricultural purposes. Provided such restrictions afforded the landowner a reasonable use of the land, such zoning would be lawful. But, in order to preserve the integrity of the master plan and the zoning ordinance, as well as to ameliorate the effects of pure agricultural zoning, East Windsor Township can draw upon N.J.S.A. 40:48-2 to supplement its zoning power. Quick Check Food Stores v. Springfield Twp., 83 N.J. 738 (1980).

That part of Ordinance 1982-16 which creates the TDR mechanism may alternatively be viewed as a function of that power. It recognizes that the speculative component of agricultural land prices will always be with us. Rather than try to change or constrain human nature, it affords the landowner the opportunity to capitalize on the "developmental value" of his land without the ruinous effect of permanently converting prime agricultural land to more intensive uses.

In using its N.J.S.A. 40:48-2 powers a municipality:

> "...is entirely free to impose such regulation provided only that it does not employ means which are arbitrary, discriminatory or demonstrably irrelevant to a legitimate purpose." Inganamort at 358.

Ordinance 1982-16, when read in its entirety, clearly serves a legitimate public need and purpose. For present purposes, it cannot be viewed as arbitrary or unreasonable to the contrary, it must be presumed reasonable.

To say that East Windsor Township has the power to zone land for agricultural use but not to use development rights to ensure the success of such zoning and to ameliorate its arbitrary and adverse economic effects is to deprive the Township of a necessary and important tool to achieve proper planning goals it has and to meet the public good.

East Windsor Township's use of development rights is a local response to meet an important local problem in the most efficient, effective and equitable manner. This is exactly why Home Rule exists in New Jersey.

POINT II

MUNICIPALITIES IN NEW JERSEY ARE VESTED WITH BROAD POWERS WHICH EXPRESSLY OR INCLUDE BY IMPLICATION THE POWER TO ADOPT TDR ORDINANCES PROVIDING FOR THE PRESERVATION OF VALUABLE FARMLANDS AND FOR INTENSIVE HOUSING

A. The Police Power and Zoning in New Jersey

Clearly, in New Jersey, municipalities are creatures of the State and only possess those powers delegated to them by the State. As is the case in all areas of municipal authority, municipal governments do not possess any inherent authority to enact ordinances. Rather, municipal authority, rests upon the delegation of the State's police power to each municipal government. The power to zone is an exercise of the police power. Rockhill v. Chesterfield Twp., 23 N.J. 117 (1957); Art 4, §6, Para. 2, New Jersey Constitution (1947). The New Jersey Constitution vests in the State the authority to enact laws delegating the power to zone and to repeal or alter such laws. This delegation is currently embodied in the Municipal Land Use Law, N.J.S.A., 40:55D-1-92. In Taxpayers Association of Weymouth Twp., Inc. v. Weymouth Twp., 71 N.J. 249 (1976) our Supreme Court observed:

> Zoning is inherently an exercise of the State's police power. P. 263.

The Court commented that ordinances adopted under the Zoning Enabling Act must bear a real and substantial relationship to

the regulation of land within the municipality and "must advance one of the several purposes specified in the enabling statute" at p.263-264. Zoning has been described in a recent Supreme Court Opinion as:

> An exercise of the States' power to protect the public health, safety and morals and to promote the general welfare. Local governments have the power only through legislative delegation of the States' police power. Lusardi v. Curtis Point Property Owners Association, 86 N.J. 217-226 (1981).

Since 1947, the Courts of this State have subscribed to a broad and enlightened view of the zoning power. "Planning and zoning...affirmatively encouraged by our 1947 Constitution, Art. IV, §VI, Para. 2,* and by the aforementioned legislative enactments, are designed to control and direct the physical development of the Community and its environs in order to promote both immediate and ultimate, social and economic well-being." Metzdorf v. Rumson, 67 N.J. Super. 121, 126-127 (App. Div. 1961) (emphasis added).

However, even prior to 1947, in the seminal case of Mansfield and Swett v. Town of West Orange, 120 N.J.L. 145 (1938), our Supreme Court recognized that through its police power the State, either itself or through its municipalities, could regulate the use of land. The police power of the State was held to reach "all the great public needs". Plaintiff's

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*For cases supporting a reading of Art. IV, §VI, Para. 2 (Zoning) together with Art. IV, §VII, Para. 11 (Liberal Construction) see Thorton v. Village of Ridgewood, 17 N.J. 499 (1955); Bartlett v. Middletown Tp., 51 N.J. Super. 239 (1958).

brief totally ignores this essential point. Contrary to their assertions, the police power is intended to vest government with the ability to enact measures required to both protect the "public health morals and safety" and as well to "serve the public convenience, general prosperty and well being". Mansfield, supra, p. 153. Including those implied necessary powers required to "satisfy locally determined needs". Township of Berkeley Heights v. Berkeley Heights Board of Adjustment, 144 N.J. Super. 291, 296 (Law Div. 1976)

The need for and value of farmland preservation has been well recognized by both the State legislative and the executive branches. Governor Thomas Kean, in his recent annual message, dated January 11, 1983, warned:

> Those who live in New Jersey know well why we are called the Garden State. Despite our status as the most densely developed State in the Nation, we still retain agricultural land amounting to over twenty-five percent our our area. It is absolutely vital that we act to prevent any further erosion of our agricultural base. There is little question that in the coming decades, New Jersey's ability to feed herself will become increasingly important as the costs of transportation and the loss of farmland and elsewhere force us to be more self-sufficient. P. 11.

The legislature in the Right to Farm Act, (P.L. 1983, c.31), found that "the retention of agricultural activities would serve the best interest of all citizens of this State by insuring the numerous social, economic and environmental

benefits which accrue from one of the largest industries in the Garden State." To deny this valid governmental interest is to deny that our government may "resort to measures...as may be necessary to secure the essential common material and moral needs." Mansfield and Swett, supra, p. 150. The following verbatim quotes from the Mansfield and Sweet case are set forth at length. This statement by our Supreme Court in 1938 is still the definitive statement of the broad expanse of the State's police power:

> "The state possesses the inherent authorty--it antedates the constitution--to resort, in the building and expansion of its community life, to such measures as may be necessary to secure the essential common material and moral needs. The public welfare is of prime importance; and the correlative restrictions upon individual rights--either of person or or property--are incidents of the social order, considered a negligible loss compared with the resultant advantages to the community as a whole. Planning confined to the common need is inherent in the authority to create the municipality itself. It is as old as government itself; it is of the very essence of civilized society. A comprehensive scheme of physical development is requisite to community efficiency and progress.
>
> To particularize, the public health, safety, order and propserity are dependent upon the proper regulation of municipal life. The free flow of traffic with a minimum of hazard of necessity depends upon the number, location and width of streets, and their relation to one another, and the location of building lines; and these considerations likewise enter into the growth of trade, commerce and industry. Housing,

always a problem in congested areas affecting the moral and material life of the people, is necessarily involved in both municipal planning and zoning. And it is essential to adequate planning that there be provision for future community needs reasonably to be anticipated. We are surrounded with the problems of planless growth. The baneful consequences of haphazard development are everywhere apparent. There are evils affecting the health, safety and prosperity of our citizens that are well-nigh insurmountable because of the prohibitive corrective cost. To challenge the power to give proper direction to community growth and development in the particulars mentioned is to deny the vitality of a principle that has brought men together in organized society for their mutual advantage. A sound economy to advance the collective interest in local affairs is the primary aim of municipal government.

If it be required to promote the common good in a recognized sphere of activity, it is 'necessary' within the intendment of this element of sovereignty so reserved to the states. If it be reasonably demanded by the general welfare, it is embraced within this power. The sweep of the police power is coextensive with the public need as thus defined. A regulation that maintains the proper balance between collective and individual rights is ordinarily a legitimate exercise of the authority.

While the police power is not variable in either quality or quantity, it is coincident with the requirements of the general public welfare arising from changing conditions--social, economic, or otherwise. The complexities of modern community life necessarily impose a greater demand upon this reserve power for such reasonable supervision and regulation as may be essential for the common good and welfare.

> It suffices to add that, in the exercise of that authority, a large measure of discretion is necessarily vested in the legislative body to determine not only what the public interest requires, but what measures are necessary for the protection of that interest. If a police measure in a legitimate field fairly tends to accomplish the purpose of the enactment, and keeps within the reasonable demands of the occasion, neither the wisdom nor expediency of the means resorted to is subject to judicial review. Pacific States Box and Basket Co. v. White, 296 U.S. 176; 56 S. Ct. 159; 80 L. Ed. 138; Cooley Const. Lim. (8th ed.) 1228, 1231. The legislature is primarily the judge of the necessity of the law, and every possible presumption in favor of its vaildity will be indulged. It will not be declared void unless its repugnancy to a constitutional limitation is so manifest as to leave no room for reasonable doubt. A legislative enactment should not be set aside unless its unconstitutionality indisputably appears. State Board of Milk Control v. Newark Milk Co., supra; State v. Murzda, 116 N.J.L. 219.

Later, in 1971, the Supreme Court stated:

> It is elementary that substantive due process demands that zoning regulations, like all police power legislation, must be reasonably exercised--the regulation must not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the object sought to be attained, and the regulation or prescription must be reasonably calculated to meet the evil and not exceed the public need....Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 251 (1971).

In a discussion of the presumption of the validity and of conformity to enabling authority, then Judge Francis stated: "And so long as the use regulations bear a reasonable relation

to the health safety, morals or general welfare of the community they will not be condemned." Rockaway Estates v. Rockaway Township, 38 N.J. Super. 468, 473-474 (App. Div. 1955) (citing the general power to zone of N.J.S.A. 40:55-32, now N.J.S.A. 40:55D-62). See also, Struyk v. Samuel Braen's Sons, 17 N.J. Super. 1, 7, 8 (App. Div. 1951). In assessing plaintiff's claims in this case, this Court must assume the validity of the East Windsor's ordinance. Plaintiff has the burden of showing a statutory violation or that the ordinance is arbitrary or unreasonable. Struyk v. Samuel Braen's Sons, supra, p. 8. Plaintiff does not allege either that agricultural is not a viable use of land or that the perservation of agriculture is not in the public interest.

Plaintiff's view of New Jersey is Zoning Laws cannot be supported by a reading of the cases. In 1955 the Appellate Division recognized that "zoning cannot be static; it must look to the future and recognize changing conditions." Bartlett v. Middletown Township, 51 N.J. Super. 239, 262-263 (App. Div. 1958). The Court's words in that case are particularly instructive:

> Although stability and regularity, as plaintiffs argue, are undoubtedly essential to the operation of a zoning plan, a zoning ordinance is not immutable:
>
> '* * * Changed or changing conditions call for changed plans, and persons owning property in a particular zone or use district are not possessed with a vested right

to that classification, if the public interest demands otherwise. The power of a municipality to amend its basic zoning ordinance in such a way as reasonably to promote the general welfare cannot be questioned. The decision as to how a community shall be zoned or rezoned, as to how various properties shall be classified or reclassified, rests with the local legislative body; its judgment and determination is presumed to be reasonable and valid, [and] will be conclusive, beyond interference from the courts, unless shown to be arbitrary, unreasonable or capricious. The burden or rebutting this presumption and establishing such arbitrariness is imposed upon him who asserts it [citing cases].' Jones v. Zoning Board of Adjustment, Long Beach Tp., 32 N.J. Super. 397, 405 (App. Div. 1954), holding amendatory zoning ordinance valid.

Physical, economic and social conditions determine what may be the most appropriate use of particular property in a municipality. What is the most appropriate use also depends on the needs of the municipality, present and reasonable prospective, on the nature of the entire region where the municpality is located, and the use to which land in that region has been or may most advantageously be put. Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, 513 (1949) (Vanderbilt, C.J.).

Where a zoning ordinance may fairly be said to have as its objects the preservation of the character of the community, the maintenance of property values and the devotion of land throughout the municipality to is most appropriate use, such legislation finds ample justification under our State Constitution and the Zoning Act, and is beyond attack. It may not be insisted that such ordinance provide the ultimate zoning pattern; all that is required is that the ordinance be reasonable

> in the light of existing conditions and planning problems. Should changed conditions in the future prove the zoning arrangement to be no longer reasonable or workable, it may be changed. Fischer v. Bedminster Tp., above, 11 N.J. at page 205; Pierro v. Baxendale, 20 N.J. 17, 29 (1955); Kozesnik v. Montgomery Tp., above, 24 N.J. at page 167.

The accepted judicial role in reviewing a zoning amendment was aptly stated in Harvard Enterprises, Inc. v. Board of Adjustment of Madison, 56 N.J. 362 (1970) where the Supreme Court held:

> Preliminarily, it should be noted that the judicial role in reviewing a zoning ordinance is tightly circumscribed. There is a strong presumption in favor of its validity, and the Court cannot invalidate it, or any provision thereof, unless this presumption is overcome by a clear showing that is arbitrary or unreasonable...The total factual setting must be evaluated in each case, and if the issue be in doubt, the ordinance must be upheld. Harvard Enterprises, supra at p. 368-369.

The concept of changing legislative techniques to carry out stated legislative purposes was addressed by Judge Furman in Chrinko v. South Brunswick Township Planning Board, 77 N.J. Super. 594 (Law Div. 1963), where the Court upheld a cluster zoning ordinance in the face of a lack of specific legislative authorization. The Court held "although the state zoning law does not in so many words empower municipalities to provide an option to developers for cluster or density zoning,

such an ordinance reasonably advances the legislative purposes of securing open spaces, preventing overcrowding and undue concentration of population and promoting the general welfare."

B. The MLUL and Agricultural Preservation

In 1975, the State enacted the Municipal Land Use Law, (MLUL) (PL 1975, c.291). This Law consolidated all three existing municipal enabling statutes into one comprehensive law dealing with zoning and planning. The role of planning was strengthened as part of the stated intention of the Law to revise, simplify, codify and streamline and intergrate all land use laws. See, I.C.L.E. Municipal Land Use Law, P. 2 (1980). One of the amendments related to N.J.S.A. 40:55D-2 (Purposes) which established as a purpose of municipal regulation under the MLUL the provision of "sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens". N.J.S.A. 40-55D-2g. This provision was called a "consideration critical to the adoption of zoning plans and zoning ordinances" Kinnelon v. South Gate Associates, 172 N.J. Super. 216 (A.D., 1980). This provision is a legislative recognition of the problems identified by the State in a number of reports on agriculture in New Jersey. A report prepared by

the New Jersey Department of Environmental Protection and Department of Agriculture dated October, 1980 entitled Grass Roots which was designed to study the ways to preserve New Jersey's farms found:

> Another important background condition of farmland preservation is the degree of urgency and how it varies across the state, much like the state's diverse agricultural character itself. Despite the fact that New Jersey's farm acreage decreased by 50 percent during the past 20 years, the current rate of farmland loss on a Statewide basis has stabilized somewhat. Farmland preservation, then, ought to find an appropriate role in land planning activities at each level of government and be achieved for the long term over a 10-year period.

Support may also be found in N.J.S.A. 40:55D-2e, i and j, respectively:

> e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment:
>
> i. To promote a desirable visual environment through creative development techniques and good civic design and arrangements;
>
> j. To promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through improper use of land.

In Mindel v. Township Council of Franklin, 167 N.J. Super. 461 (1979), the Law Division stated:

> Clearly, New Jersey now favors preservation of farmland and open spaces over that of development for residential or commercial uses. Or even over uses which maximize municipal tax revenues.
>
> Indeed, much has been said of late, that the policy in this State should be to diminish the growth of residential building in our rural and semi-rural areas and encourage residence within our cities. Such a policy may well be implicit in an expansive view of the Farmland Assessment Act...
>
> The proofs show a great demand for farmland in this area. Local farmers actively bid against each other whenever farmlands become available. Cultivation here fills this demand.
>
> The benefits from continued farming are enormous. And this without detriment to the health, safety or welfare of the public. On the other hand, the evidence demonstrates that the only respect in which farming of this land is offensive is that it is not more economically lucrative to the Township.

Further, in Glenview Development v. Franklin Township, 164 N.J. Super. 563 (Law Div. 1978) the Court in ruling on a challenge to Franklin Township's three acre single family zoning observed "continued development of Franklin into three acre residential lots may, in the long run, destroy its rural flavor and its agriculture as effectively as high-density development. Solutions of that dilemma are beyond the power of this or any other court and will require imagination and creativity at the local level and probably new approaches to land use control and planning from State Government." Glenview Development, supra at P. 577.

In referring to certain purposes of zoning as set forth in the MLUL, i.e., N.J.S.A. 40:55D-2a, d, and e, the Court held "whether, how, and to what extent the purposes of the act, as expressed in subsections (a), (d) and (e), are effected is a decision reserved to each municipality, subject to judicial review at which time the municipality's decision must be upheld unless found to be arbitrary or capricious." Glenview Development, supra at P. 578. In sustaining the subject ordinance, the Court relied on the oft quoted statement from Bow and Arrow Manor v. West Orange, 63 N.J. 335 (1967).

> It is fundamental that zoning is a municipal legislative function, beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute. N.J.S.A. 40:55-31, 32. It is commonplace in municipal planning and zoning that there is frequently, and certainly here, a variety of possible zoning plans, districts, boundaries, and use restriction classifications, any of which would represent a defensible exercise of the municipal legislative judgment. It is not the function of the court to rewrite or annul a particular zoning scheme duly adopted by a governing body merely because the court would have done it differently or because the prepondernace of the weight of the expert testimony adduced at a trial is at variance with the local legislative judgment. If the latter is at least debatable it is to be sustained. [at 343]. Bow and Arrow, supra, 63 N.J. 335, (1973).

Support is also to be found in the MLUL for the concept of transfer of development rights. N.J.S.A. 40:55D-65 (contents of zoning ordinances) provides that zoning ordinances may contain provisions which:

> a. Limit and restrict building and structures to specified districts and regulate buildings and structures according to their type and the nature and extent of their use, and regulate the nature and extent of the use of land for trade, industry, residence, open space or other purposes.
>
> b. Regulate the bulk, height, number of stories, and size of buildings and the other structures; the percentage of lot or development area that may be occupied by structures; lot sizes and dimensions; and for these purposes may specify floor area rations and other ratios and regulatory techniques governing the intensity of land use and the provision of adequate light and air.

The East Windsor TDR ordinance can be sustained on either or both of these provisions. The Agricultural Preservation District and the REAP offer a means to carry out the purposes of the MLUL and the Township's Updated Master Plan of 1979. The TDR program is both a regulation of the "nature and extent of use" of land and a devise which regulates the "intensity of land use."

Recently, in a communication addressed to Michael A. Pane, Esq., members of the New Jersey American Planners Association Land Use Drafting Committee recognized that

authority for the existing municipal TDR ordinances can be found in N.J.S.A. 40:55-D-2,e,g,i,j and k. The committee is suggesting that as more and more towns utilize TDR ordinances, it may be wise to give the concept "some legislative direction." (Appendix "M"). Here, as in so many other cases, such as cluster zoning and inclusionary zoning devices, State legislation is based on, follows and ultimately confirms existing municipal zoning legislation.

C. TDR'S Acceptance by Land Use Experts

In a seminar held in 1977 on transferable development rights, Professor John J. Costonis, the author of Space Adrift, Saving Landmarks Through the Chicago Plan, (1974), a lawyer and a recognized landuse expert, commented:

> One of the things that I think probably ought to be attractive to the courts, as far as TDR is concerned, is that TDR is a revanchist idea. It is not an effort to further expand the police power to unknowable limits, but actually is an effort to take earlier positions in which some concept of reasonable beneficial use is used to accommodate the developers' interests to the extent possible with the TDR scheme. Transcript, supra P. 138.

Contrary to Plaintiff's assertions, this position was seconded by former Justice Frederick W. Hall, who in his talk to the first session on legal aspects of TDR, explained that the "increased development over the years of judicial approval of land use regulation as need for it began to become more

prominent in the minds of judges. And further "the sudden realization by so many people that it's darn near time that we begin to look at some of the environment and protection of it" and "the limit to governmental financial ability to handly all those things by acquiring land itself, which made it necessary to have some other method..." Transcript, supra P. 82.

Justice Hall's words are instructive for us:

> I suppose to sum it up we can say that the courts have come to recognize that greater police power regulation is necessary for the good of all, and they have approved a lot of regulation of property which they wouldn't have dreamed of 50 or even 25 years ago.
>
> With that kind of background you approach this novel concept of transferable development rights and how a court would look at it. In my view, I think they would look at it in light of the progress and the development of the land use regulation law that has taken place..." Transcript, supra P. 83.

With this background and in light of the broad zoning powers of New Jersey municipalities it is impossible to conclude that the New Jersey Zoning Enabling Act does not permit the enactment of a TDR ordinance intended to carry out the policies of farmland preservation.

Professor John M. Hunter of Rutgers University, Cook College, a specialist in agricultural policy, has written that zoning ordinances generally treat agriculture on the "left over use" which receives little positive concern. John M. Hunter,

"Agricultural Definitions for Local Zoning Ordinances in New Jersey", as cited in Grass Roots (N.J.D.E.P./Agriculture, October 31, 1980). Professor Hunter testified in support of East Windsor's TDR ordinance stating candidly that although he was not an advocate of the TDR concept, East Windsor's was prepared in such a manner as to be sensitive and conscious of the concerns of farmers. (App. B, pp. 79-85). Dr. Hunter terms East Windsor's ordinances "innovative" and "unique". (App. B. at P.80), and that the Township did a "rather good job" in preparing this ordinance (App. B. at P.85).

East Windsor has chosen not to wait and see which lands will be left after the developers are finished. As our Supreme Court wrote in the recent Mt. Laurel case:

> Builders may not be able to build just where they want--our parks, farms and conservation areas are not a land bank for housing speculators. Mt. Laurel II, supra, at p. 20.

And further,

> We assure all concerned that Mount Laurel is not designed to sweep away all land use restrictions or leave open spaces and natural resources prey to speculators. Mt. Laurel II, supra, at p. 33.

Professor William Toner of Governors University, Illinois and co-author of the National Agricultural Lands Study, listed three basic planning guidelines necessary for a successful farmland preservation program:

1. Input from the farm community.

2. Reliance on conventional planning tools and techniques, particularly "new combinations of existing techniques".

3. Provision of sufficient land for housing and directing of public investment to population concentratons. Grass Roots, supra at P. 55.

East Windsor's program is consistant with the advice of both Professors Hunter and Toner. It is a clearly articulated, positive and unequivocal action on the part of the community to act to preserve farmlands. The Township's actions also honored the three basic guidelines established by Professor Toner. Input was obtained from local farmers and agricultural experts from both Rutgers University and elsewhere. The DR program relies on the Township's traditional zoning power to zone areas in accordance with a comprehensive master plan and to establish appropriate residential concentrations. Sufficient land has been provided in the REAP zone to meet the Township's housing needs and goals to the year 2000. The Township's planning program is consistant with both Mercer County's plan and the State Department of Environmental Protection.

D. Other TDR Programs have been Upheld as Constitutional.

1. New York City

The New York City TDR Program has been upheld as constitutional by both the New York Court of Appeals, the highest Court of that State and the U.S. Supreme Court. In Penn

Central Transportation Co. vs. City of New York, 42 N.Y. 2d 324 (1977), aff'd 438 U.S. 104 (1978), (hereafter "Penn Central I"), the New York Court of Appeals gave its unanimous approval of the City's landmark preservation law* which incorporated a TDR Program which allows a property owner to transfer development rights from above a landmark to other sites in the vicinity. Id. at 1277.

Chief Judge Breitel, writing for the Court, held the regulation did not violate due process since the plaintiffs could earn a reasonable return on their property rights, especially in light of the TDR Program which permitted plaintiffs to transfer their "above the surface development rights" to other specific parcels of property. Id. at 1273. The Court minced no language when it stated that the developmental rights accorded plaintiffs "may be considered as part of the owner's return on the terminal property". Id.

The Court considered the facts of French Investing Co. v. City of New York, 39 N.Y.2d 587, app. dsmd. 429 U.S. 990 (1976), a case also written by Chief Judge Breitel when the City TDR Program was in its infancy. Id. at 591.

In French, supra, the New York Court of Appeals struck down an amendment to a New York City zoning resolution which purported to create a "Special Park District," and rezoned two

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*The New York City Law is based on a general enabling authority to protect and preserve building plans of special historical or aesthetic interest or value. N. Y. General Law §96-a.

private parks as public parks. Id. The Court found the City's regulation as an unconstitutional deprival of due process because plaintiff French was not permitted any return on its investment in the property downzoned as a public park.

The regulation in French deprived the original site of any possibility of producing a reasonable return since only public park uses were permitted on the land. Id. at 1278. The transferable development rights "were left in legal limbo" since they were "not readily attachable to any other property". Id. Hence plaintiffs were deprived of property without due process of law. Id.

By contrast, the City's regulation of the Grand Central Terminal "permitted productive use of the terminal site as it had been used for more than half a century, as a railroad terminal". Id.

The East Windsor TDR Program should also pass constitutional muster when analyzed under the Penn Central I test. The Township's designation of plaintiff's property as part of an agricultural district permits productive use of the land as it has been used by generations of farmers. The development rights granted plaintiffs under the Township's DR Program provides an added compensation--even above reasonable use--to plaintiffs and other agricultural land owners who maintain their land in agriculture.

Plaintiffs appealed the Court of Appeal's decision to the U.S. Supreme Court and, in June, 1978, Justice Brennan delivered the opinion of the Court affirming, on essentially the same grounds, the decision of the Court of Appeals. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) (hereinafter referred to as "Penn Central II").

The Supreme Court first engaged in an analysis of "taking jurisprudence" under the Fifth Amendment and determined that "the New York City law is not rendered invalid by its failure to provide 'just compensation' whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws". Id. at 135-36.

The Court then turned to the issue of "whether the interference with appellant's property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain it.' Pennsylvania Coal Co. v. Mahon, 260 U.S. at 413". Id. at 136. The Court then refined its inquiry to consist of "a careful assessment of the impact of the regulation on the Terminal site". Id.

The Court found that the Landmark Law did not "interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the precisely as it has been used

for the past 65 years... (and) on this record... we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment". Penn Central II, supra at 136.

Likewise, the Township's DR Program affords plaintiffs both a continued reasonable use of its lands and, additionally, valuable development rights which may be transferred to enable either the plaintiff or a buyer of the rights to develop sites in the REAP District.

There is no doubt that both Penn Central decisions provide significant legal legitimacy to the East Windsor DR Program which was developed after careful consideration of the TDR jurisprudence including these cases and the French case.

2. TDR Regulations Upheld in Maryland.

In a case recently decided by the Circuit Court for Montgomery County, Maryland on January 20, 1983 entitled Raymond A. Dufour, et al v. Montgomery County Council, (Appendix "N"), the Court upheld a challenge to Montgomery County Council's TDR Program which was adopted as part of a comprehensive rezoning that affected 1/3 of the County's land. Montgomery County adopted zoning regulations affecting plaintiff's property which consisted of 548.5 acres by rezoning it to a density of 1 dwelling per 25 acres. Prior zoning had permitted 1 dwelling per each 1/2 acre and subsequently 1 dwelling for each 5 acres.

In a comprehensive opinion the Court dealt with a number of issues: (1) was there a taking; (2) the extent of the police power; (3) the value of development rights; (4) the absence of a receiving zone; and, (5) the absence of specific enabling authority. The Court dealt with this case as a typical zoning case dealing first with the extent of the police power,* holding "that the objectives of the ordinance are reasonably related to the public welfare and the accomplishment of legitimate State interests and that the means employed bear a real and substantial relation to the end sought to be achieved, without being arbitrary, capricious." Dufour, supra P. 7. In concluding that the ordinance was valid,** the Court looked to the following: (1) the rezoning follows and implements an adopted master plan for the preservation of agricultural and rural open space; (2) although Montgomery County is not generally thought of as an agricultural county, the County's agricultural industry was economically viable and contributed to the regional support of agriculture; (3) agriculture and open

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*The Maryland Zoning Enabling Act contains no specific enabling authority for a TDR program. Maryland Statutes Annotated Title 66B

**See also Dupont Circle Citizens Association v. District of Columbia Zoning Commission, 355 Atlantic 2d, 550 (1976) where the Court of Appeals broadly read the D.C. Zoning Act and Regulations to permit the transfer of development rights within a PUD.

space preservation is in the public interest;* (4) the preservation program was linked to a County-wide growth management plan; (5) development pressures were threatening and eroding the agricultural preservation area.

All of these elements are present in the Master Plan and in the DR Program enacted by East Windsor as part of Ordinance 1982-16.

It is interesting to note that in Montgomery County, the areas in which DR's could be used had not yet been designated when the agricultural zoning went into effect. Judge McAucliffe addressed this issue by stating that his opinion upheld the agricultural zoning exclusive of the issuance of DR's and that TDR should be considered almost as an added measure to "buttress the determination. Dufour, supra, P.20.

E. MLUL Powers Which Are Not Specifically Expressed But Have Been Permitted by the Courts

Plaintiff's contention that Agricultural Preservation TDR must find precise expression in the Municipal Land Use Law is not only contrary to the broad grant of powers set forth in the Purposes section, but also ignores the realities of zoning as exist in New Jersey today. Certainly, the Court can take

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*The Court inferred that it was prepared to uphold the rezoning, even in the absence of a demonstrated need and legislative determination to preserve an agricultural industry, Page 9, citing Agins v. City of Tiburon, 447 U.S. 255 (1980). (The protection of residents of Tiburon from the ill effects of urbanization was held to be a proper exercise of the police power as a legitimate governmental goal).

notice of the fact that, on a municipality-by-municipality basis, the nature and number of zone designations varies. And even if the designation is the same, the requirements for the particular zone are unique to each locality. To the like effect are provisions for clustering and historic preservation.

Additionally, the Courts have, at one time or another, recognized the validity of density bonuses, (Mt. Laurel II, supra); Senior Citizen Housing, (Weymouth, supra); Minimum of Floor Area, (Kirsh, supra); not to mention least cost housing, (Mt. Laurel I). If Mt. Laurel I were not enough, the language in Mt. Laurel II should make it crystal clear that municipalities have the affirmative obligation to use creative, although unenumerated techniques in effectuating their zoning ordinances. Such practices in the Court's mind have included: incentive zoning, mandatory set asides and mobile homes.

Further, plaintiffs claim that Agriculture Preservation TDR amounts to social-economic planning and a taking without due process. This position has been thoroughly refuted in Mt. Laurel II. The logic applied to inclusionary zoning is certainly applicable to Agricultural Preservation TDR.

> "It is nonsence to single out..." [one type of zoning] "...and label it 'social economic' if that is meant to apply that other aspects of the zoning are not. Detached single family residential zones, high-rise multi-family zones of any kind, factory zones, clean research and development zones, recreation, open space

conservation, and agricultural zones, regional shopping mall zones, indeed practically any significant kind of zoning now used, has a substantial social-economic impact and, in some cases a social-economic motivation." Mt. Laurel II at pages 118-119.

POINT III

ORDINANCE 1982-16 IS NOT ULTRA VIRES BECAUSE IT REGULATES PROPERTY RIGHTS

In its brief, plaintiff asserts the novel proposition that:

> "Municipal zoning authority is limited to regulation only of physical use of land and may not be extended to affect ownership or title to property." Plaintiff's brief, P. 24.

While this view might have been criticized as being outdated before Mt. Laurel II, it is clearly inoperative today in view of the Supreme Court's pronouncements on the issue. In dealing with low income housing, the Supreme Court recognized that zoning has "socio-economic" implications; therefore, to say that 5-acre zoning was acceptable because it was a regulation of "physical use" while regulation for law and moderate income residents was not acceptable because it was using zoning for socio-economic regulation was "nonsense". Mt. Laurel II, p. 118.

> "The specific contentions are that inclusionary measures amount to a taking without just compensation and an impermissible socio-economic use of the zoning power, one not substantially related to the use of land. ...We hold that where the Mount Laurel obligation cannot be satisfied by removal of restrictive barriers, inclusionary devices such as density bonuses and mandatory set-asides keyed to the construction of lower income housing, are consitutional and within the zoning power of a municipality.

In Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 71 N.J. 249 (1976), we upheld a zoning ordinance that allowed mobile homes in a particular zone, limited however to 'elderly' persons or families. Our decision was based, in part, on the conclusion that meeting the special housing needs of the elderly served the general welfare, and that the restriction of this use to a mobile home district satisfied the requirement that the zoning ordinance be related to the physical use of the land. See also, Shepard v. Woodland Twp. Comm. & Planning Bd, 71 N.J. 230 (1976); DiSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428 (1970).

The rationale of Weymouth could, under appropriate circumstances, sustain a zoning ordinance that restricted a particular district exclusively for mobile homes for the elderly (the actual restriction allowed other uses). If that is permissible, then the comparable special need of lower income families for housing, and its impact on the general welfare, could justify a district limited to such use and certainly one of lesser restriction that requires only that multi-family housing within a district include such use (the equivalent of a mandatory set-aside). Since the objective here goes beyond serving the special needs of a particular class of citizens for the general welfare and extends the fulfillment of a constitutional obligation, the constitutionality of such devices, and the power of the municipality to impose them, is even clearer.

The contention that generally these devices are beyond the municipal power because they are 'socio-economic' is particularly inappropriate. ...It is nonsense to single out inclusionary zoning (providing a realistic opportunity for the construction of lower income housing) and label it 'socio-economic' if that is meant to imply that other aspects of zoning are not. Detached single family residential zones, high-rise

multi-family zones of any kind, factory zones, 'clean' research and development zones, recreational, open space, conservation, and agricultural zones, regional shopping mall zones, indeed practically any significant kind of zoning now used, has a substantial socio-economic impact, and, in some cases, a socio-economic motivation. ...We find the distinction between the exercise of the zoning power that is 'directly tied to the physical use of the property,' Madison, 72 N.J. at 517, and its exercise tied to the income level of those who use the property artificial in connection with the Mount Laurel obligation, although* it obviously troubled us in Madison. The prohibition of this kind of affirmative device seems unfair when we have for so long allowed large lot single family residence districts, a form of zoning keyed, in effect, to income levels. The constitutional obligation itself is not to build three bedroom units, or single family residences on very small lots, or high-rise multi-family apartments, but rather to construct lower income housing. All of the physical uses are simply a means to this end. We see no reason why the municipality cannot exercise its zoning power to achieve that end directly rather than through a mass of detailed regulations governing the 'physical use' of land, the sole purpose of which is to provide housing within the reach of lower income families. We know of no governmental purpose relating to zoning that is served by requiring a municipality to ingeniously design detailed land use regulations, purporting to be 'directly tied to the physical use of the property,' but actually aimed at accommodating lower income families, while not allowing it directly to require developers to construct lower income units. Indirection of this kind has no more virtue where its goal is to achieve that which is permitted--indeed,

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* ...This problem does not arise when a municipality wants to create upper income housing since the physical requirements of the zoning district ("directly tied to the land") combined with housing market forces are sufficient. The explicit requirement of lower income units in a zoning provision may be necessary if the municipality's social goals are to prevail over neutral market forces. Zoning does not require that land be used for maximum profitability, and on occasion the goals of zoning may require something less.

> constitutionally mandated--than it has in achieving that which is prohibited." Mt. Laurel II, pp. 116-121.

The Court specifically upheld a number of devices which can be viewed as being within what Plaintiff Centex would call regulation of property or ownership rights. For example, the Court upheld deed restrictions in a zoning ordinance to ensure that successive purchasers would be in the low/moderate income category. Mt. Laurel II, pp. 113-114.

Clearly, the Section of Mt. Laurel II dealing with inclusionary zoning devices, beginning at p. 108, goes a long way toward changing the more traditional and narrow concept of zoning.

But, in a broader sense, as the Court points out, all of zoning law regulates property rights. All of zoning has "socio-economic" implications. The question becomes, then not whether we regulate property rights, but how and why we do so.

It must be emphasized at the outset that one's use of DR's does not affect ownership or title to property in any greater degree than any other municipal police or zoning regulation.

In the present case, the Township is "regulating property rights" throughout the establishment of an Agricultural Preservation Zone and a REAP Zone. Clearly, valid exercises of zoning power for present purposes.

The ordinance as drafted must be viewed as doing several separate and distinct things, one of which is to zone 3,000 acres for agricultural uses. Another, and entirely separate portion, provides that owners of agricultural land will receive DR's in exchange for an instrument covenanting that their land will in the future be used for agricultural purposes. If the owner does not accept the DR's, the land is still zoned as agricultural. Thus, there is no effect on title unless and until the owner accepts DR's in exchange for his recordable covenants. It is, of course, anticipated that most owners will seek to obtain DR's, but there is no sanction against them if they fail to do so.

The use of DR's to further the Township's planning and zoning policies is not any more of a regulation of property rights than is the basic zoning decision; it is merely a different form of the same thing, aimed at furthering the clearly valid and lawful purposes of agricultural preservation and meeting regional housing needs.

Moreover, to say that municipalities cannot regulate "property rights" also ignores substantial municipal powers--express and implied--in such areas as health and economic regulation.

Rent control, for example, is a clear regulation of property rights. Yet, even without enabling legislation it has been consistently upheld as being within the authority of municipal police power under N.J.S.A. 40:48-2.

From any perspective, therefore, the essence of municipal regulation--the very core of the police power--involves intimate regulation of human behavior and property rights for the general health, safety and welfare.

The measure of any regulation is not merely rhetorical; rather, it is a balance of need and lawful purpose against the real human effect and consequences of the regulation. In such a balance, the use of DR's to further valid statutory public goals is both proper and reasonable; it is well within the mainstream of municipal police regulation under both the Municipal Land Use Law and under N.J.S.A. 40:48-2.

POINT IV

THE ABSENCE OF ENABLING LEGISLATION--OR CONTINUED FAILURE TO ENACT ENABLING LEGISLATION--DOES NOT LESSEN THE MUNICIPALITY'S ABILITY TO ENACT ORDINANCES NECESSARY FOR THE HEALTH, SAFETY AND WELFARE OF ITS INHABITANTS

The brief submitted by plaintiff takes a view of municipal powers which has been inoperative in New Jersey since Dillon's Rule was explicitly overruled by Art. 4, §7, Para. 11 of the New Jersey Constitution.

Our courts have consistently viewed municipalities as having a broad base of local police power which should be interpreted liberally. Inganamort, supra.

There are numerous areas of local police activity in which not only is there a local need, but some or all of the intergovernmental system may depend on local enactments for full implementation--even though the New Jersey Legislature has not explicitly authorized such enactments.

The Absence of Enabling Legislation.

One such example is in the area of historic preservation. There is no such state legislation authorizing local historic preservation ordinances. The only statutory references to historic preservation in New Jersey are in the Municipal Land Use Law.

N.J.S.A. 40:55D-28(6) states that the Master Plan may be composed of elements among which, if appropriate, shall be:

> "A community facilities plan element showing the location and type of educational or cultural facilities, historic sites, libraries, hospitals, fire houses, police stations and other related facilities, including their relation to the surrounding areas".

and N.J.S.A. 40:55D-4, in which historic site is defined as follows:

> "'Historic site' means any building, structure, area or property that is significant in the history, architecture, archeology or culture of this State, its communities or the Nation and has been so designated pursuant to this act."

Yet, over 40 New Jersey municipalities, including Trenton, Haddonfield and Middletown, have historic or landmark preservation commissions, most of which operate completely independently of the Municipal Land Use Law. New Jersey County and Municipal Government Study Commission. The Outlook for Historic Preservation in New Jersey, July, 1982. These commissions almost invariably have power to designate landmarks and historic districts. In many cases, they also have the power to deny a landowner the right to demolish a landmark or alter it significantly--or they impose a "waiting period" which may have a chilling effect on a builder's plans.

Obviously, this exercise of power would not appear to flow from the Municipal Land Use Law, since the land use agencies are usually not involved. Rather, it flows from N.J.S.A. 40:48-2.

Interestingly enough, the receipt of federal historic preservation tax incentive program benefits by local businesses may depend on the existence of a qualified local landmarks program.

Thus, in New Jersey and elsewhere in the nation, landmark preservation has met substantial acceptance even absent specific state enabling legislation. New Jersey County and Municipal Government Study Commission. The Legal Authority of Local Government to Engage in Historic Preservation Activities (1980) and Trends in Historic Preservation Case Law (1980).

Development Rights/Credits

Even in the award of DR's, a recent survey by the New Jersey Department of Community Affairs Municipal Land Use Drafting Committee shows that eighteen (18) municipalities in addition to the twenty-eight (28) Pinelands' municipalities are at some stage of considering or enacting a DR or Development Credit ordinance. (Appendix "M").

As has been historically true in areas such as cluster zoning, PUD's senior citizens' housing, etc., the amendment of the MLUL follows rather than preceeds municipal enactment to meet local needs.

Continued Failure to Adopt Enabling Legislation

In 1973, the Supreme Court of New Jersey rendered its landmark rent control decision in Inganamort v. Fort Lee, 62

N.J. 532 (1973). In that case, the Court said of local initiative under N.J.S.A. 40:48-2 that:

> "the absence of a statutory restraint is the very occasion for municipal initiative." at 538.

The factual background to Inganamort makes this statement even more significant.

> Inganamort v. Fort Lee, supra, was decided after a State rent control bill had passed the Assembly and was withdrawn in the Senate (reportedly it was facing serious opposition). Hutton Park v. West Orange, 68 N.J. 543 (1975) at 573.

Thus, even faced with a specific and immediate failure to enact rent control enabling legislation, the Supreme Court opened wide the doors for local initiative on rent control.

Following the decision in Inganamort, supra, a flurry of legislative action to enact rent control statutes failed to produce a law. For the better part of three years, a variety of bills were introduced and either defeated or withdrawn. In the meantime, municipalities recognizing that their individualized needs warranted such action followed in Fort Lee's footsteps and enacted local ordinances.

The issue was brought to a head in 1975 when the Supreme Court heard the three companion cases of Hutton Park v. West Orange, supra; Brunetti v. New Milford, 68 N.J. 516 (1975); and Troy Hills Village v. Parsippany Troy Hills, 68 N.J. 604 (1975). There the Court considered the myriad claims of pre-emption, over-regulation, and ultra vires. In general, the Court found that the plaintiffs

> ...have produced no evidence to meet their burden of proof and to overcome the ordinance's presumption of validity..." Hutton p. 565.

Notwithstanding the extensive legislative wrangling of the prior three years, the Court further stated that

> The Court knows of no fact of which it may take judicial notice that would support such a result. Ibid.

The Supreme Court in Hutton Pk. did feel compelled to

> "...call the attention of the Legislature to the high desirability of a carefully-drawn local option enabling statute on the subject of rent control..." Op cit, 574.

The Court, nonetheless sustained the power of the municipalities involved to regulate in this area.

In subsequent cases, the Supreme Court has drawn no inferences from the Legislature's failure to act, even though the Court has continued to uphold municipal rights to enact rent control ordinances and simultaneously to decry the Legislature's failure to enact uniform statewide enabling Legislation. Helmsly v. Borough of Fort Lee, 78 N.J. 200 (1978) at 243.

Thus, in a significant area of municipal legislation--an area in which the interplay of action and inaction between and among the Legislature, the Supreme Court and municipal government is clearly documented for a decade, the Supreme Court has clearly and consistently rejected plaintiff's assertions in the present case. The Courts of New Jersey cannot, do not and

should not view the Legislature's failure to enact any particular bill as indicative of any intent to pre-empt or failure to delegate.

Based on the foregoing, it is clear why the Supreme Court has been unwilling to divine pre-emption from legislative action or the absence thereof, Garden State Farms, supra, and has required a clear legislative statement of an obvious intent to immobilize local police power.

Moreover, the burden of proving pre-emption rests squarely with the plaintiff. Velinohos v. Maren Engineering, supra.

In the present case, the authority for preserving agriculture and meeting regional housing needs is obvious. The use of development rights is a reasonable local response to a local need and it should be sustained as being within the Township's police powers.

Absent a clear showing by plaintiff of ultra vires or pre-emption, the use of development rights should be sustained.

POINT V

THE COURT SHOULD UPHOLD THE USE OF DEVELOPMENT RIGHTS AS A CONSTITUTIONALLY-SANCTIONED LOCAL INITIATIVE NECESSARY TO MEET LOCAL NEEDS

The municipality in New Jersey is "the repository of the broad police power over local affairs". Bergen County v. Port of New York Authority, 32 N.J. 303 at 313 (1960).

In the present case, the Constitution and the Legislature have granted to the Township of East Windsor:

1. The power to zone. New Jersey Constitution, Art. 4, §6, Para. 2.
2. The power to use zoning to preserve agricultural lands and other natural resources. N.J.S.A. 40:55D-2(g).
3. The power to use zoning to promote good planning, meet regional housing needs, conserve open space, prevent urban sprawl, use land efficiently and promote energy conservation through good planning. N.J.S.A. 40:55D-2. Passim.
4. Broad powers to enact laws "necessary to effect the powers and duties imposed by...any law". N.J.S.A. 40:48-2 (emphasis added)

Numerous policy documents of the State Judiciary and Executive have also spoken of the importance of creative local planning and zoning efforts to achieve these goals. Mt. Laurel II, Grass Roots, State Development Guide Plan, op cit.

All of the above acknowledge and encourage the use of municipal planning and zoning powers to achieve these important aims. None of the above specifies any precise manner in which the above are to be accomplished--nor do they forclose any manner in which they may be accomplished.

The logical conclusion, therefore, is that the means of accomplishment are left to local discretion in view of local needs. Such discretion to meet diverse need is the essence of Home Rule in New Jersey. Inganamort, supra, 529.

Having established that East Windsor Township has been directed to preserve agriculture and to meet regional housing needs and has been vested with substantial discretion as to the means by which to accomplish these goals, it only remains to determine how the Court should view the Township's use of development rights to further these goals.

The Statement of Facts and the Township's own research has established clearly that:

1. Agricultural zoning alone may have little permanence because of relentless economic pressures; and
2. only by effective planning to channel growth and by stabilizing land use and development policies, especially in the agricultural preservation zone, can both preservation and housing goals be achieved.

In order to succeed in agricultural preservation and to meet regional housing needs, the Township has used its local legislative initiative and enacted a development rights program as an adjunct to its zoning regulations.

The Court must determine whether, given the legislative discretion vested in the Township by the Constitution, the Municipal Land Use Law and N.J.S.A. 40:48-2, this development rights program represents a reasonable exercise of this discretion.

> "The rule is well settled that courts will not interfere with the exercise of discretionary powers conferred upon municipal corporations for the public welfare unless their action is so clearly unreasonable as to an oppressive and manifest abuse of discretion." McQuillen Mun. Corp. (3d Ed.), Sec. 10.37 P. 895.

In the present case, given the clear delegation of zoning duties and powers to the Township under a variety of laws and judicial interpretations, the Township submits that the following statements of interpretation are relevant:

> "The provisions of this Constitution and of any law concerning municipal corporations...shall be liberally construed in their favor. 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 by law." New Jersey Constitution, Art. 4, §7, Para. 11 (Emphasis added).

As to exercise of powers under N.J.S.A. 40:55D and under N.J.S.A. 40:48-2 simultaneously:

> "An express authority to a municipality to do an act may be general as well as particular. There is nothing to prevent a municipality from exercising all the powers conferred by two or more acts, where the acts do not involve, in and of themselves, substantial contradictions." 56 Am. Jur. 2d, Mun. Corp., Sec. 193.
>
> "Where particular powers are expressly conferred upon a municipality, and there is also a general grant of power, such general grant of intendment includes all powers that are fairly within the terms of the grant and are essential to the purposes of the municipality, and not in conflict with the particular powers expressly conferred. The law does not expressly grant powers and impliedly grant others in conflict therewith." Am. Jr., op cit, Sec. 195.

See Quick Check Food Stores v. Springfield Twp., 93 N.J. 438 (1980) at 443-4, 449-50, 455, n.4 where Justice Pashman in his dissent says:

> Like the majority, I find no infirmity from the ordinance being in substance an exercise of the zoning powers, although denominated as an exercise of the general police power.

The Township submits that in the present case the Court should find that the development rights program is a reasonable ancillary program enacted to the further zoning plan under N.J.S.A. 40:55D-1 et seq. and also a legitimate enactment under N.J.S.A. 40:48-2 for the purposes herein stated.

To render judgment in favor of East Windsor Township's local legislative discretion in this case is soundly and plainly within the statutory and judicial policy of this state as articulated over many decades.

To render a decision against local legislative discretion in this case would simultaneously:

1. leave owners of agricultural land without the benefits of the development rights program, by which they could otherwise share in the economic benefits of development in the REAP zone; and
2. thereby prevent the Township from using part of the windfall created by high-density housing zoning to the benefit of the entire community as a means of preserving agriculture and furthering sound long-term planning.
3. thus deprive the Township of the ability to meet its zoning responsibilities in the manner it deems most effective in view of local needs.

The Court should, therefore, as a matter of law and equity, affirm the Township's reasonable enactment to serve the public good and maintain a stable zone plan for a balanced community in the decades to come.

Respectfully submitted,

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GARY S. ROSENSWEIG

Dated: March 25, 1983