ML-East Windsor

4-21-83

Reply brief + appendix for π in support of motion for summary judgment as to Count I of complaint and brief in support of π's Cross motion for summary judgment as to Δ to Count II, and in opposition to Δ's motion for summary judgment as to Counts I, II, IX

P 45

ML 000788B

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

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

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REPLY BRIEF AND APPENDIX FOR PLAINTIFF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO COUNT I OF THE COMPLAINT AND BRIEF IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT AS TO COUNT II, AND IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO COUNTS I, II, IX.

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PRELIMINARY STATEMENT

With slavish dedication to the litigation ploy of arguing the facts when the law clearly supports your opponent's position, the first forty one (xli) pages of Defendants' Brief and the bulk of their Appendix is devoted to a discussion of factual "contentions" that are irrelevant to the resolution of the fundamental legal issues raised by Centex-New Jersey's and Defendants' Motions and Cross-Motions for Summary Judgment.* Accordingly, although Centex-New Jersey disputes many of Defendants' factual "contentions," including Defendants' motive for adopting an Ordinance whose purported purpose is "farmland preservation," it need not address these "contentions" at this time.

The only Appendix Exhibit that has any relevance to the legal issues before the Court is Exhibit M. The various documents included as part of this Exhibit attempt to gloss over the significant legal distinctions between two zoning techniques, one of which is clearly illegal (Transfer of Development Rights)(TDR), and the other (Transfer of Development Credits) of which is arguably nothing more than an extension of the "clustering" technique authorized by the Municipal Land Use Law.

The commentators on New Jersey's experiments with TDC recognize the significant differences between this technique and TDR. As William Queale, Jr., P.P. (also a member of the

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* Centex-New Jersey has also cross moved for Summary Judgment in its favor on Count II of its Complaint.

Legislative Committee of the NJAPA) states in his article entitled, "Transfer of Development Credits (TDC): A New Form of Cluster Zoning":

"THE BASIC CONCEPT

> "Working within the existing planning and zoning statutes, the Transfer of Development Credits (TDC) concept was conceived as an extension of cluster zoning and planned unit development. The rationale was that the traditional cluster or PUD proposal begins with one tract and is subsequently subdivided into major parcels consisting of public open space, common property, apartments, townhouses, or single family homes. The basic concept, however, remains the same; namely, one tract becomes fragmented into non-contiguous properties serving different functions and owned by different individuals or corporations. The question raised and subsequently answered by the TDC approach was, 'If you can end up with parcels fragmented in a logical design, why can't you start out with fragmented parcels?' The TDC concept has become more easily envisioned as a community-wide cluster zoning concept. As in a traditional cluster zoning proposal, the TDC approach also requires the applicant to control all the land for which he is seeking 'credit'.... This is the major difference between this concept and the Transfer of Development Rights (TDR). Under TDR, the development rights can be sold separately from the land. Under TDC, both the land and the credits remain intact until approval of the development proposal by the municipality, the same as practiced now with the traditional cluster development proposal." (Emphasis added).

See also, booklet entitled, Planning for Agriculture in New Jersey, prepared by the Middlesex-Somerset-Mercer Regional Study Council, Inc. (see chart at Page 42 entitled, "Comparison of Transfer Development Rights (TDR) and Transfer of Development Credits (TDC)") and booklet entitled, Grassroots: An Agricultural Retention and Development Program for New Jersey,

prepared by the New Jersey Department of Agriculture, Pages 40-42.*

Finally, it should be noted that of the handful of New Jersey municipalities that have adopted some form of "development transfer," only East Windsor has been arrogant enough to adopt a TDR scheme. But then again, the defendants' motive for adopting a TDR scheme may have colored its judgment.

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* Both these publications acknowledge that the legal status of TDR is not certain and that TDC is simply a variation of the cluster technique specifically authorized by the Municipal Land Use Law.

ARGUMENT

POINT I

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AS TO COUNT I, AND THE ENTIRE EAST WINDSOR TDR ORDINANCE SHOULD BE INVALIDATED.

A. No State Enabling Legislation Has Delegated Any Authority To Permit The Adoption Of Municipal TDR Ordinances.

The defendants agree, at least as to the Motion of Centex-New Jersey for summary judgment on Count One of its Complaint in this matter, that no disputed issues of material fact exist and that summary judgment is the appropriate procedure by which to assess the facial validity of the East Windsor TDR Ordinance. See Brief for Defendants at xxxvi. Defendants also concede that the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq. embodies the delegation of zoning authority from the State to municipalities which is authorized by N.J. Const. (1947), Art.IV, §VI, ¶2. See Brief for Defendants at 28. Finally, Defendants admit that the Municipal Land Use Law contains no references to transferable development rights. See Brief for Defendants at 18. Accordingly, for the reasons set forth more fully in Plaintiff's Brief in Support of Motion for Summary Judgment as to Count One of the Complaint, the court should enter summary judgment for the plaintiff as to Count One and declare that the East Windsor TDR Ordinance is ultra vires.

Defendants' attempt to argue that the "purposes and intent" section of the Municipal Land Use Law (N.J.S.A. 40:55D-2) provides the implied authority to enact a TDR ordinance is

unconvincing. That statute merely provides in relevant part that

> it is the intent and purpose of this Act:
>
> * * *
>
> (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;
>
> * * *
>
> (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;
>
> * * *
>
> (j) to promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through the improper use of land....

Centex-New Jersey has never contended that preservation of open space, and of agricultural land in particular, is not a proper zoning objective. The above-quoted statute concededly indicates that preservation of agricultural land is an appropriate purpose of municipal zoning.

However, defendants are simply wrong in asserting that the above-quoted portion of N.J.S.A. 40:55D-2 imbues the Township of East Windsor with any "substantive zoning powers" (Brief for Defendants at 21). In effect, defendants argue that they may devise and implement any mechanism whatsoever under the guise of zoning, so long as it can be linked to the fulfillment of one of the multitudinous, broadly stated purposes set forth in N.J.S.A.

40:55D-2. In this case, defendants argue that any action whatsoever which they take in the name of agricultural preservation is presumptively valid so long as it is not expressly prohibited by the Municipal Land Use Law. See Brief for Defendants at 6.

The defendants' argument is without merit for a number of reasons. Firstly, N.J.S.A. 40:55D-2 on its face provides no "substantive zoning powers." Rather, the statute merely contains a recital of the factors which led the Legislature to adopt the Municipal Land Use Law as well as the types of land use concerns which are expected to be addressed pursuant to the Law at the municipal level. In short, N.l.S.A. 40:55D-2 provides a listing of the types of subjects which municipal zoning ordinances should address. Such municipal zoning ordinances, however, must conform in all respects to N.J.S.A. 40:55D-62, which contains the specific delegation from the State to municipalities of the "power to zone." Under this provision, municipal zoning ordinances must relate "to the nature and extent of the uses of land and of buildings and structures thereon," and the regulations designed to accomplish the goals of municipal zoning must "be uniform throughout each district for each class or kind of buildings or other structures or uses of land, including planned unit development, planned unit residential development and residential cluster...." Nowhere, of course, does the "power to zone" statute anywhere empower a municipality to enact a TDR ordinance.

Next, Defendants have offered a classic "end justifies the means" argument to bolster its position that TDR is appropriate so long as, for example, it is designed to promote preservation of agricultural lands. This argument, however, misses the fundamental point that municipal zoning power must always be "exercised within statutory limits, and for legitimate zoning purposes." Morris v. Postma, 41 N.J. 354, 359 (1964)(emphasis added). In the present case, agricultural preservation is concededly a "legitimate zoning purpose" because N.J.S.A. 40:55D-2(g) so specifies. Because the "power to zone" provision does not expressly or implicitly authorize TDR, however, a TDR ordinance is clearly outside the statutory limits of the Municipal Land Use Law and is, therefore, unavailable as a device to be used by a municipality even for the authorized purpose of preserving agricultural lands. Unless both the goal to be achieved and the means to achieve it are authorized by the Municipal Land Use Law, it is clear that a municipality lacks the requisite delegated authority to act.

As recently as late 1982, the Legislature had a further opportunity to specifically authorize the use of TDR in connection with preservation of agricultural land. In fact, while the Legislature was deliberating on S.867 which was eventually enacted as the Agriculture Retention and Development Act, P.L. 1983, Ch. 32 (approved January 26, 1983), an act which implements the Farmland Preservation Bond Act of 1981 and provides for the purchase of "development easements" to save agricultural land, East Windsor Township urged that TDR be

expressly authorized as a preservation technique. Specifically, the Mayor recommended that the Legislature include a provision which would

> Provide for the possibility of "re-use"of State bond funds through municipal or county purchase of transferable development rights, combined with subsequent re-sale of those rights for use in other parts of the community, followed by subsequent re-use of the sale proceeds for purchase of additional rights. [Pa6].

Moreover, the East Windsor Township Solicitor, in a memorandum critiquing the proposed legislation, indicated that

> If we truly wish to preserve agriculture we must realize that the mere process of buying development easements will not be enough. All levels of government must involve planning, zoning, and general and fiscal policy-making which promote and sustain agriculture. To do this the enabling legislation must do the following:
>
> * * *
>
> 3. Provide flexibility for local programs such as TDR under which municipalities can buy rights from farmers with State funds and then, if they wish, re-sell them in areas of the municipality targeted for intensive residential or industrial/commercial development (thus creating more funds with which to buy other development easements). [Pa9 - Pal0].

The Legislature, however, rejected East Windsor's request that authority to utilize TDR be delegated. See Section 25 of P.L. 1983, Ch. 32. Notwithstanding this failure to obtain authority to enact a TDR Ordinance, East Windsor enacted its TDR Ordinance anyway.

Recognizing the inherent weakness in relying upon N.J.S.A. 40:55D-2, defendants have alternately contended that

N.J.S.A. 40:48-2 provides a reservoir of power which may be used to "supplement [the municipality's] zoning power." See Brief for Defendants at 26. N.J.S.A. 40:48-2 reads:

> Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws not contrary to the laws of this State or of the United States, as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties confered and imposed by this subtitle, or by law.

Defendants' resort to this provision is equally unavailing.

For example, Art. IV, §6, ¶2 of the New Jersey Constitution provides that the Legislature "may enact general laws under which municipalities...may adopt zoning ordinances...." The courts have uniformly agreed that the "general law" which currently embodies the legislative delegation of zoning authority referred to by the Constitution is the Municipal Land Use Law. Lusardi v. Curtis Point Property Owners Association, 86 N.J. 217, 226 (1981); see Taxpayers Association of Weymouth Twp. v. Weymouth Twp., 71 N.J. 249, 263 n.4 (1976). Indeed, the defendants have admitted that the delegation to municipalities of the power to zone "is currently embodied in the Municipal Land Use Law." See Brief for Defendants at 28. As such, it is difficult to understand defendants' argument respecting N.J.S.A. 40:48-2. On its face, it is evident that this statute was in no way intended by the Legislature to serve as a vehicle for the delegation of any authority respecting zoning. Since N.J.S.A. 40:48-2 was clearly not enacted by the

Legislature under the authority of N.J. Const. (1947), Art.IV, §VI, ¶2, it simply has no application to the present case.

Defendants' position regarding N.J.S.A. 40:48-2 makes no sense whatsoever. If the use of TDR in zoning is not expressly or implicitly authorized by the Municipal Land Use Law, its use clearly cannot be authorized by a combination of the Muncipal Land Use Law and a catch-all statute which contains an extremely broad and rather vague grant of essentially residual powers. In addition, N.J.S.A. 40:48-2 only grants a municipality authority relating to "matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability." Summer v. Teaneck, 53 N.J. 548, 552-553 (1969); Wagner v. Mayor and Municipal Council of City of Newark, 24 N.J. 467, 478 (1957). For example, a municipality cannot legislate upon the subject of wills or title to real property. Summer v. Teaneck, supra, 53 N.J. at 553. Where title to real property is concerned, municipal action would not be useful because needs with respect to real property do not vary locally in their nature or intensity. Id. Indeed, diverse local decisions in this area could be mischievous and even intolerable. For this reason, a municipality may not legislate under N.J.S.A. 40:48-2 upon an aspect of a subject "inherently in need of uniform treatment." In re Public Service Electric and Gas Co., 35 N.J. 358, 371 (1961).

The East Windsor TDR Ordinance, however, is clearly a municipal attempt to preserve agriculture by regulating title to real property. It does so by requiring that the development potential of land be severed from property in the agricultural district (which land is then restricted by deed only to agricultural uses) as a condition for more intense development of land located within the Residential Expansion for Agricultural Preservation (REAP) zone. In short, the municipality has purported, by ordinance, to create and recognize the existence of a "new" interest in real property (i.e., a severable development right) and has required that title to such a development right pass as the condition for residential development approval in the REAP zone. Clearly, as pointed out in greater detail in Point III, infra, East Windsor has improperly attempted to regulate an area of title to real property which is inherently in need of uniform state-wide treatment. Accordingly, N.J.S.A. 40:48-2 cannot serve as the enabling legislation underlying the East Windsor TDR Ordinance.

Perhaps acknowledging that TDR is unauthorized by the Municipal Land Use Law and/or N.J.S.A. 40:48-2, defendants unabashedly resort to the desperate argument that TDR may be utilized notwithstanding the lack of any statutory authority. In support of their position, defendants offer the surprising and absurd statement that:

> 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. [Brief for defendant at 18].

The cases cited by defendants in support of this statement are clearly inapposite.

For example, defendants rely heavily upon the recent decision in Southern Burlington County N.A.A.C.P. v. Mt. Laurel Twp., 92 N.J. 158 (1983)(Mt. Laurel II). In that case, the Supreme Court held that "every municipality's land use regulations should provide a realistic opportunity for decent housing for at least some part of its resident poor who now occupy dilapidated housing." Id. at 214. Moreover, the Supreme Court held that municipalities located wholly or partially within a "growth area"* designated by the State Development Guide Plan have an obligation to provide a realistic opportunity for a fair share of the region's present and prospective low and moderate income housing needs. Id. at 215. In order to meet their prospective fair share and to provide for their indigenous poor, "municipalities must remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety." Id. at 259. Merely removing such restrictions and exactions (which otherwise have the effect of precluding the development of low and moderate income housing), however, is insufficient to satisfy the constitutional obligation of the Mt. Laurel doctrine. Rather, the Supreme Court made clear in Mt. Laurel II that municipalities have the duty "affirmatively to

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* Significantly, most of the land located in the "Agricultural Preservation Zone" is located within a "growth area" and about one-half of the "REAP zone" is located within an "agricultural area" under the State Development Guide Plan.

provide a realistic opportunity for the construction of [their] fair share of lower income housing." Id. at 259-260. Among the affirmative measures which the court will require municipalities to adopt in order to meet their constitutional responsibility are inclusionary zoning devices such as incentive zoning, mandatory set-asides, and deed restrictions for low/moderate income housing. Id. at 265-274.

Defendants in this case point out that such affirmative measures are nowhere authorized by the Municipal Land Use Law, but have nonetheless been approved as measures which should appropriately be utilized by municipalities in meeting their Mt. Laurel obligations. Similarly, defendants argue, TDR ordinances ought to be permitted to further the statutory purposes of the Municipal Land Use Law even though such ordinances are not expressly authorized by that law.

What defendants fail to realize is that the instant situation is hardly comparable to that which was the subject of Mt. Laurel II. The Supreme Court sanctioned the use of affirmative measures such as mandatory set-asides, deed restrictions, and incentive zoning because it found that the mere removal of restrictive barriers alone would not realistically cause low income housing to be constructed. Therefore, in order to compel municipalities to meet their obligations under the New Jersey Constitution regarding the provision of housing for low income residents, the court fashioned a remedy which required municipalities to adopt extraordinary affirmative devices designed to achieve precisely that result.

By contrast, the goal of agricultural land preservation, while perhaps worthy, is not one of constitutional dimensions. For this reason, neither the Judiciary nor the Legislature has required any municipality to take the affirmative step of adopting TDR or any other technique in order to preserve agricultural land. In sum, the unique situation which gave rise to the need for affirmative measures to comply with Mt. Laurel responsibilities is completely inapplicable in the case of a TDR ordinance. In fact, although it is not an issue raised by any of the pending motions in this case, TDR will probably be seen in the future as precisely one of the restrictive barriers and exactions unnecessary to protect health and safety which poses a substantial impediment to compliance with Mt. Laurel II by the Township of East Windsor.

The fact that the Supreme Court approved senior citizens' housing zoning in Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 71 N.J. 249 (1976) is similarly inapposite in the present case. In Weymouth, the Supreme Court upheld an ordinance which restricted residential dwellings in a certain area for senior citizens on the basis that the ordinance bore a real and substantial relationship to the use of land. 71 N.J. at 276-277. The court observed that "as a conceptual matter regulation of land use cannot be precisely dissociated from regulation of land users." Id. at 277. The court found that zoning for senior citizens' housing involves special use qualities and characteristics which justify the conclusion that uses based on this classification are cognizable within the municipal zoning

power. Id. at 278. The court did note, however, that "zoning ordinances which bear too tenuous a relationship to land use will be stricken as exceeding powers delegated to the municipalities by the enabling act." Id. at 276.

Importantly, the ordinance in Weymouth was at least related to the use of land and additionally furthered an important social purpose, i.e., provision of housing for senior citizens. By contrast, as previously pointed out in Plaintiff's Brief in Support of Motion for Summary Judgment in this matter at p. 23-27, the East Windsor TDR program is not really related to, nor does it regulate, the physical use of land or buildings. Rather, it goes far beyond such regulation by requiring, as a condition of obtaining approval for construction of single family residential dwellings on lots less than two acres, that ownership and title to agricultural land be radically altered. East Windsor is, therefore, really attempting to regulate title to land (i.e., stripping the development potential of agricultural land from the other incidents of the owners' fee interest) as well as ownership itself, since the development rights must eventually be surrendered to the municipality when a developer exchanges them for increased density in the REAP zone. Clearly, the Weymouth case provides no support for defendants' TDR Ordinance.

The case of Chrinko v. South Brunswick Twp. Planning Board, 77 N.J. Super. 594 (Law Div. 1963) also provides little solace to defendants. In that case, the Law Division upheld a local ordinance which provided an option to developers for

cluster or density zoning, even though the State zoning enabling legislation then in place did not "in so many words empower municipalities to provide [such] an option...." 77 N.J. Super. at 601. The court upheld the ordinance on the basis that this technique satisfied the substantive statutory criterion of uniform regulation of land throughout each district because the option was available to all developers within the zoning district.

The Chrinko case is of limited utility to defendants here. Subsequent to the Law Division's decision, cluster and density zoning were expressly authorized by the Municipal Planned Unit Development Act of 1967, formerly N.J.S.A. 40:55-54 et seq. Additionally, the current Municipal Land Use Law expressly authorizes cluster and density zoning. See, e.g., N.J.S.A. 40:55D-62(a); -65(c). As already indicated, however, TDR still lacks the benefit of any statutory authorization.

Moreover, Chrinko does not in even a limited way lend any support to defendants' claim that a municipality may create or modify property rights without explicit statutory authorization, let alone require that such rights be surrendered as a condition of local development approval. See Point II, infra.

In a vain attempt to attempt to bootstrap the "acceptability" of TDR programs elsewhere to the present case, defendants discuss at length cases in which TDR programs in New York City and Maryland have been upheld in the face of an attack under the United States Constitution on the basis that TDR violates the "taking without just compensation" clause of the

Fifth and Fourteenth Amendments. Brief for Defendants at 45-52. This discussion is completely irrelevant to both plaintiff's Motion for Summary Judgment as to Count One and to defendants' Cross Motion for Summary Judgment as to Counts One, Two and Nine because none of these counts involve the constitutionality of the TDR ordinance. The issue before this court at this time is not whether the East Windsor TDR Ordinance passes constitutional muster under the "takings" clause; rather, the issue is whether or not East Windsor Township was authorized by the New Jersey Legislature to enact any TDR program at the outset. As pointed out in plaintiff's opening Brief, nowhere is the issue of whether TDR ordinances are authorized by enabling legislation considered in any case reported to date. See Brief for Plaintiffs in Support of Motion for Summary Judgment at 19-20. Defendants have submitted to the court the unpublished decision in Dufour v. Montgomery County Council, decided by the Circuit Court for Montgomery County, Maryland on January 20, 1983. See defendants' Appendix N. A cursory reading of this decision, however, reveals that nowhere is the issue of specific enabling authority for TDR addressed. Rather, the court merely considers constitutional issues regarding the taking clause. As such, defendants have failed to cite any authority whatsoever which has considered or rendered a ruling upon the issue of the adequacy of enabling legislation authorizing the adoption of a TDR ordinance.

In sum, while preservation of agricultural land is clearly an appropriate goal specified in the Municipal Land Use Law, every conceivable means to achieve that goal is not

authorized to be employed by municipalities. Rather, they may only utilize those zoning devices which the Legislature has specifically authorized by delegating zoning authority to the municipalities. As the Supreme Court of New Jersey stated in Taxpayers Assoc. of Weymouth Twp., supra, 71 N.J. at 276, "admittedly, zoning is not a panacea for all social, cultural and economic ills especially where they are unrelated to the use of land." The East Windsor TDR Ordinance, which virtually compels individuals who wish to develop in the REAP zone to approach third parties in the agricultural zone and transfer title to an interest in land, is not justified merely by the admirable goal of preserving agricultural land. For this reason, and for the reasons initially set forth in plaintiff's Brief in support of its motion, summary judgment should be granted in favor of plaintiff on Count One of the Complaint.

B. The Severability Clause Is No Bar To Invalidation Of The Entire Ordinance.

Centex-New Jersey has urged (see Brief for Plaintiff at 32-36) that, by way of remedy, the East Windsor TDR Ordinance should be invalidated in its entirety and the Township ordered to rezone the area to a valid and appropriate use within ninety days under court supervision. Such a procedure is authorized by virtue of the Supreme Court decisions in Petlin Associates, Inc. v. Township of Dover, 64 N.J. 327 (1974) and Morris County Land v. Parsippany-Troy Hills Twp., 40 N.J. 539, 559 (1963). Defendants have not challenged the legal conclusions set forth in these cases. Rather, defendants point to the severability clause

(§6) of the East Windsor TDR Ordinance and argue that, in the event that summary judgment is granted in favor of plaintiff as to Count One, only those portions of the ordinance which specifically relate to TDR should be stricken and the remainder of the ordinance allowed to stand. Under the circumstances presented here, however, the severability clause of the ordinance should not be permitted to cause such a result.

In considering the issue of severability, the Supreme Court made clear in State v. Lanza, 27 N.J. 516, 527 (1958) that:

> The essential inquiry is whether the law-making body designed that the enactment should stand or fall as a unitary whole. It is not enough that the act be severable in fact; its severability in the event of partial invalidity must also have been within the legislative intention. It is a question of interpretation and of legislative intent whether the particular provision is so interwoven with the invalid clauses that it cannot stand alone.

The fact that a specific severability clause is part of the ordinance is not, per se, determinative:

> A severability clause "provides a rule of construction which may sometimes aid in determining that intent. But it is an aid merely; not an inexorable command." Dorchy v. State of Kansas, 264 U.S. 286, 44 S.Ct. 323, 68 L. Ed. 686 (1924). Even where a severability clause has reversed the presumption of an intent that unless the act operate as an entirety it shall be wholly ineffective, the void provisions may "so affect the dominant aim of the whole statute as to carry it down with them." Railroad Retirement Board v. Alton R. Co., 295 U.S. 330, 55 S.Ct. 758, 768, 79 L. Ed. 1468 (1938). [27 N.J. at 527-528].

Thus, even where as here the ordinance in question contains a severability clause, such a clause will not automatically be invoked. Instead, the courts will look to the underlying legislative intent to determine whether the objectionable features of the ordinance can be excised without substantially impairing the principal object of the ordinance. See New Jersey Chapter A.I.P. v. New Jersey State Board of Professional Planners, 48 N.J. 581, 593 (1967), appeal dismissed and cert. denied, 389 U.S. 8, 88 S. Ct. 70, 19 L. Ed. 2d 8 (1967); Angermeier v. Borough of Sea Girt, 27 N.J. 298, 311 (1958).

In Inganamort v. Borough of Fort Lee, 72 N.J. 412 (1977), the Supreme Court indicated that a severability clause will only be enforced "where the invalid portion [of the ordinance] is independent and the remaining portion forms a complete act within itself." 72 N.J. at 423. In conducting its examination, the Supreme Court considers the "dominant purpose" of the ordinance as a whole, whether the invalid portion of the ordinance is "functionally independent of the rest of the ordinance," and whether "the purpose of the enactment would be fully carried out without the severed portion." Id. Moreover, the court considers whether "the invalid section served as a principal or significant inducement to passage" of the ordinance and whether "the enactment would have been passed without the invalid section." Id. at 424. If it is clear that the invalidated portion of the ordinance served as the principal inducement for passage of the entire ordinance, and that the

ordinance would not have been passed without that provision, the proper course is to invalidate the entire ordinance notwithstanding the existence of a severability clause.

In the instant case, it is clear that the TDR provisions of the East Windsor Ordinance served as the principal inducement for its passage. Indeed, defendants admit that TDR is the centerpiece of the ordinance, and without TDR the primary goals of the ordinance (i.e., to preserve agricultural land and to provide intensive housing development in the REAP zone) cannot be achieved. This is highlighted in the portion of defendants' Brief entitled "Making the Plan Work" (Brief for Defendant at xxii to xxix), in which it is stated 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", and that only with the use of TDR could the "Plan" work. (Brief for Defendants at xxvi). With respect to the REAP zone, defendants describe the uses available as a matter of right as "reasonable but not intensely attractive to developers"*; with the use of TDR, however, a "real incentive" for development of the REAP zone is created. (Brief for Defendants at xxx to xxxi). Defendants describe their TDR program as "a device to enhance and provide stability for the zone plan" enacted by the TDR Ordinance (Brief for Defendants at

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* This statement is far more optimistic than statements made during the hearings on the East Windsor TDR Ordinance. At the time, the defendants "admitted" that PD development would not occur in the REAP zone and that the market for expensive homes ($200,000±) was limited, if one existed at all.

xxxiv). Only through the use of TDR, defendants concede, will substantial development proceed in the REAP zone and will the goals of agricultural preservation be met, thereby "complet[ing] the circle". (Brief for Defendant at xxxv).

From these statements in defendants' brief, as well as the enunciated objectives set forth in Section I of the East Windsor TDR Ordinance, it is evident that TDR was the principal inducement for the passage of Ordinance No. 1982-16 since, as far as East Windsor Township is concerned, the ordinance cannot work unless the TDR program works. There has been no showing that Ordinance 1982-16 would have been passed without the TDR provisions; moreover, it is clear that the purposes of the Ordinance cannot be fully achieved without the TDR program. Finally, notwithstanding defendants' conclusionary assertions to the contrary, there has been no demonstration that the non-TDR portions of the ordinance are functionally independent of the TDR portions and could, therefore, effectively survive.

For these reasons, it is clear that if Summary Judgment is entered on Count One in favor of Centex-New Jersey, the entire East Windsor TDR Ordinance should be invalidated notwithstanding the existence of a severability clause. The Township should thereafter be directed to properly and appropriately rezone the area in question within a ninety-day period, and submit the new zoning ordinance to the court for review.

POINT II

DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT II OF THE COMPLAINT BECAUSE ONLY THE STATE, AND NOT A MUNICIPALITY, MAY CREATE NEW REAL PROPERTY INTERESTS SUCH AS TRANSFERABLE DEVELOPMENT RIGHTS.

In Count II of the Complaint in this matter, Centex-New Jersey alleges that only the State Legislature, and not an individual municipality, may create, alter or modify property rights. By enacting its TDR Ordinance, the Township of East Windsor has purported to create a new interest in real property which the State Legislature has not authorized by appropriate legislation. Since East Windsor lacks any authority to create such rights, its action in doing so must be invalidated and thus the East Windsor TDR Ordinance is void. Defendant agrees that this count presents a purely legal issue and that no material facts are in dispute. Summary judgment on this count, therefore, should be granted in favor of the plaintiff.

It cannot seriously be denied that severable development rights, where properly created, constitute a "new" type of "interest" in real property. Indeed, this is the position espoused by B. Budd Chavoosian, a planner who is considered to be an expert in transferable development rights by defendants (Brief for Defendants at iv). In an article discussing TDRs, Mr. Chavoosian describes the nature of the right as follows:

> A development right is basically a creature of property law. It is one of the numerous rights included in the ownership of real estate. A mineral right (i.e., the right to mine and remove minerals from the land), an air right (i.e., the right to utilize the air space above the land's surface) or the right

> to travel across another's property are examples of the various rights of land ownership. A development right is the right that permits the owner to build upon or develop his land. [Chavoosian and Norman, "Transfer of Development Rights: A New Concept in Land Use Management," (Rutgers, the State University, New Brunswick)].

In addition, the Internal Revenue Service has concluded in Revenue Ruling 77-414 (1977-2 C.B. 299) that for tax purposes the sale of development rights should be treated as a sale of an interest in real property. See also, "Note - Tax Consequences of Development Rights Transfer: An Exploratory Essay," 33 Tax Lawyer 283, 291-292 (1981).

It is elementary that, at least to the extent that they are not recognized at common law, interests in real property may only be created by an act of the State Legislature. As stated in 28 Am.Jur. 2d, "Estates," §5 at 75, "The methods of conveyancing and the character and quality of the estates thereby created are matters that are entirely within the control of the Legislature." The Legislature, of course, may "alter or annul, the character and quality of the estates thereby created" at its pleasure. Id. The Supreme Court of the United States has recognized that property interests are not created by the U.S. Constitution. Board of Regents v. Roth, 408 U.S. 564, 576-78, 92 S. Ct. 2701, 2708-09, 33 L. Ed. 2d 548 (1972). Rather, the hallmark of property is "an individual entitlement grounded in state law." Logan v. Zimmerman Brush Co., ____ U.S. _____ , 102 S. Ct. 1148, 1155, ____ L. Ed. 2d ___ (1982).

The New Jersey courts have long acknowledged these principles. Thus, in McCarter v. Hudson County Water Co., 70

N.J. Eq. 695 (E.& A. 1905), the court considered Section I of the New Jersey Constitution which provides that all persons have the natural and unalienable right to acquire and possess property. Commenting upon this provision, the court indicated that:

> In our view, this clause does not guarantee to any man the right of acquiring property in anything that is not the subject of private property by law, nor the right of disposing of property that has not been duly acquired under the law of the land. (emphasis added).

In New Jersey, issues regarding the dimensions of a property interest "can only be answered by reference to State law." Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 7 n. 4 (1977). So long as no vested rights are disturbed, "the legislature is entirely at liberty to create new rights or abolish old ones...." Rosenburg v. Town of North Bergen, 61 N.J. 190, 199 (1972).

In the present case, of course, it is apparent that the Legislature has never adopted any bill authorizing the creation and utilization of transferable development rights. As pointed out in plaintiff's Brief in Support of Motion for Summary Judgment, the Legislature has considered a number of bills which would accomplish this purpose but has never adopted such a bill. In fact, when the Legislature was considering the adoption of the Agricultural Retention and Development Act, L. 1983, Ch. 32, just last term, East Windsor Township urged that TDR be authorized. The Legislature, however, rejected East Windsor's request for such authority to implement TDR, and the adopted bill lacks any reference to TDR. As such, transferable development

rights as purportedly created by East Windsor lack any legal basis.

Where the need for recognition of new interests in real property has existed, the New Jersey Legislature has consistently responded by adopting enabling legislation. For example, the use of air rights are authorized by N.J.S.A. 46:3-19; solar easements are authorized by N.J.S.A. 46:3-25 et seq. The condominium form of ownership of real property, authorized and defined by N.J.S.A. 46:8B-1, et seq., is perhaps the clearest example of the need for uniform statewide legislation governing unique and novel interests in real property.

The Legislature could easily have created transferable development rights and authorized them for use by municipalities in local planning and zoning. Because, however, it has not done so, the Township of East Windsor may not itself create and utilize TDR. Accordingly, plaintiff is entitled to summary judgment on Count II of its Complaint.

POINT III

DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COUNT IX BECAUSE THE STATE CONSTITUTION PROHIBITS DELEGATION TO MUNICIPALITIES OF POWER TO REGULATE MATTERS, SUCH AS TDR, WHICH REQUIRE UNIFORM REGULATION ON A STATEWIDE BASIS.

In Count IX of the Complaint, Centex-New Jersey alleges that East Windsor Township lacks the authority to enact a TDR ordinance because TDR of its very nature requires uniform treatment on a statewide basis. Defendants' Motion for Summary Judgment on Count IX must be denied on the basis that a material dispute of fact exists on this Count and, alternatively, because the municipality is prohibited by the State Constitution from regulating particular subjects which require uniformity of regulation throughout the state.

At the outset, it is clear that a material issue of fact exists as to Count IX. Paragraph 2 of defendants' Answer to Count IX indicates that "TDR programs must be suited to unique local conditions and to the local development pattern to create a realistic marketplace for rights." In providing this answer, defendants have expressly denied Centex-New Jersey's allegation in ¶2 of Count IX that the East Windsor TDR Ordinance is unconstitutional because "it attempts to legislate the creation of development rights and their transfer when the subject matter requires uniform state-wide treatment." Plaintiff has further alleged that "such state-wide legislation is required to insure fair and non-discriminatory treatment of land owners in receiving and transfer zones, to create and assure a market for development rights and to protect agriculture, not on a piecemeal municipal

level, but on a properly planned regional basis." (Complaint, Count IX, ¶3). Clearly, on the face of these pleadings there exists a material factual issue as to whether or not TDR by its very nature requires uniform state-wide treatment. As such, summary judgment is inappropriate and must be denied.

Alternatively, summary judgment must be denied because as a matter of law it is clear that East Windsor lacks the constitutional authority to regulate TDR, which is a species of real property interest. In Wagner v. Newark, 24 N.J. 467 (1957), the Supreme Court indicated that:

> Provisions for home rule have not given omnipotence to local governments. Matters that because of their nature are inherently reserved for the State alone and among which have been the master and servant and landlord and tenant relationships, matters of descent, the administration of estates, creditors' rights, domestic relations, and many other matters of general and state-wide significance, are not proper subjects for local treatment under the authority of the general statutes. [24 N.J. at 478].

See also State v. Crawley, 90 N.J. 241, 248 (1982). The broad statutory grants of power under provisions such as N.J.S.A. 40:48-2 (set forth in full supra at p. 9), relate only to matters of "local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability." Wagner v. Newark, supra, 24 N.J. at 478.

As the Supreme Court indicated in In Re Public Service Electric and Gas Co., 35 N.J. 358, 371 (1961), municipal power is constitutionally "restricted to those matters which are of purely

local concern, and even where the state legislature has not spoken, some matters, inherently in need of uniform treatment, are not a proper subject for municipal legislation." Clearly, the fact that the Legislature has failed to address an area such as TDR does not mean that a municipality may fill the void and enact its own regulations. On the contrary, if TDR is viewed as an area inherently in need of uniform state-wide treatment and not a matter of "purely local concern," a municipality is preempted from enacting a TDR ordinance even absent the existence of preemptive state legislation.

The listing of areas inherently reserved for State, as opposed to municipal, regulation in Wagner v. Newark, supra, (i.e., master and servant relationships, landlord tenant relationships, matters of descent, estate administration, creditors' and domestic relations) is clearly not exclusive. As pointed out in Summer v. Teaneck, 53 N.J. 548, 553 (1969), a municipality also "cannot legislate upon the subject of wills or title to real property." (emphasis added). The Summer court indicated that the needs relating to these matters "do not vary locally in their nature or intensity" and that, therefore, municipal action upon them "would not be useful, and indeed diverse local decisions could be mischievous and even intolerable." Id.

As pointed out in Point II, supra, TDR is really a species of interests in real property. The East Windsor TDR Ordinance requires that a development right be severed from property in the agricultural zone and said land deed restricted

to the municipality in order for the user of the TDRs to undertake any development at a density greater than one unit per two acres in the REAP zone. Accordingly, since the East Windsor TDR Ordinance is directly designed to affect title to an interest in real property, it is preempted according to the principles set forth in the Wagner and Summer decisions.

Notwithstanding, defendants' position to the contrary, it is clear that TDR programs are inherently in need of uniform treatment on a state-wide basis and that piecemeal municipal action such as East Windsor's will result in mischievous and intolerable results. For example, because TDRs are a species of an interest in real property, they will obviously be subject to taxation. Article VIII, §I, ¶1(a) of the New Jersey Constitution requires that

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

Development rights obviously must be taxed under uniform rules according to the same standard of value on a state-wide basis. There is no indication, however, that this will occur if each municipality is free to enact its own TDR system. Absent State enabling legislation which sets such rules and standards, taxation of development rights will vary in each of the municipalities which adopts a TDR program. Only by the enactment of State enabling legislation will the Constitutional mandate for uniform taxation be met.

Apart from the issue of taxation, there are numerous other issues related to TDR which indicate that by its very nature TDR programs are inherently in need of uniform treatment state-wide. Many of these issues are set forth in the document prepared by Professor Frank Schnidman entitled "Transfer of Development Rights: Questions and Bibliography," attached to the brief submitted in this case by amicus curiae, New Jersey Builders Association. Questions as to what type of document shall evidence a development right, where such documents ought to be filed and recorded, how such rights are to be taxed, how such rights are to be conveyed, whether such rights may be acceptable as collateral for a loan, how foreclosure of such rights may be handled, whether such rights may properly be the subject of eminent domain, and numerous other questions cry out for uniform state-wide treatment.

TDR programs are clearly distinguishable from other cases in which the Supreme Court has determined that a municipality possessed authority to regulate an area of local concern. For example, in New Jersey Builders' Association v. Mayor of East Brunswick Twp., 60 N.J. 222 (1972), the court found that a local ordinance regulating building contractors was a matter of local concern because the competence and responsibility of building contractors may differ widely throughout the state and because varying conditions (including, for example, the existence or lack of sufficient housing) may well give rise to problems in some localities that find no counterpart in others. Thus, the court concluded that "the regulation and supervision of

building contractors is a matter that may well call for different treatment in different parts of the state." 60 N.J. at 227. Likewise, in Dome Realty, Inc. v. Paterson, 83 N.J. 212 (1980), the court upheld a local ordinance designed to alleviate deteriorating housing conditions in an urban area. The court found that "enforcement of local housing standards is a particularly apt matter for local determination, since habitability standards vary from municipality to municipality according to the degree of urbanization." 83 N.J. at 227.

By contrast, the instant case concerns the basic power of state government to define and regulate the incidents of real property ownership. This is not an instance in which the problems in some localities will find no counterpart in others, because every municipality which desires to adopt a TDR ordinance will require a form of document to evidence the existence of development rights, a means of filing and recording those rights, a method of taxing the rights, and means to convey such rights. Just as in the case of all other real estate, regulation of development rights may logically only be regulated at the state level in a uniform manner under the New Jersey Constitution.

Accordingly, since TDRs by their very nature require uniform state-wide treatment, and no state enabling legislation has provided such treatment, municipalities have no authority to adopt TDR programs. As a result, defendants' Motion for Summary Judgment as to Count IX must be denied.

CONCLUSION

For the foregoing reasons and the reasons set forth in its opening brief, Centex-New Jersey's Motion for Summary Judgment as to Count I of the Complaint and Cross Motion for Summary Judgment as to Count II should be granted, and the entire East Windsor TDR Ordinance should be invalidated and set aside. East Windsor Township should furthermore be directed to adopt a proper and appropriate new zoning ordinance for the land in question within ninety days, and submit the new ordinance to the court for review.

Moreover, defendants' Cross Motion for Summary Judgment as to Counts I, II and IX of the Complaint should be denied.

Respectfully submitted,

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Attorneys for Plaintiff

By: 
Frank J. Petrino

Frank J. Petrino
Of Counsel and
On the Brief

Richard M. Hluchan
On the Brief

Dated: April 21, 1983

TESTIMONY OF

THE HONORABLE LEONARD J MILLNER, MAYOR

EAST WINDSOR TOWNSHIP

JUNE 3, 1982

GOOD MORNING.

MY NAME IS LEONARD MILLNER AND I AM THE MAYOR OF EAST WINDSOR TOWNSHIP, IN MERCER COUNTY. WITH ME THIS MORNING TO PROVIDE MORAL SUPPORT AND TO HELP ME ANSWER ANY QUESTIONS YOU MIGHT HAVE ARE _____, MEMBERS OF THE TOWNSHIP COUNCIL, AND REAGAN BURKHOLDER, OUR TOWNSHIP MANAGER.

OUR REASON FOR COMING THIS MORNING IS TO APPEAR IN OPPOSITION TO S3479 AND S 867, AND TO ASK THAT FURTHER TIME BE DEVOTED TO DRAFTING AGRICULUTRAL PRESERVATION LEGISLATION BEFORE YOU TAKE ACTION. WE BELIEVE THAT AGRICULTURAL PRESERVATION IS BECOMING A MAJOR INTEREST OF MANY MUNICIPAL AND COUNTY GOVERNMENTS IN THIS STATE. WE BELIEVE ALSO THAT THE LEGISLATION BEFORE YOU FAILS TO ALLOW FOR THAT MUNICIPAL INTEREST AND TO TAKE INTO ACCOUNT THE NEED FOR MUNICIPAL COOPERATION IN ANY PRESERVATION PROGRAM.

PRESERVATION HAS BEEN OFFICIALLY DESIGNATED AS THE NUMBER PRIORITY OF EAST WINDSOR TOWNSHIP FOR THE YEAR 1982. WE HAVE AN ORDINANCE READY FOR INTRODUCTION THAT WE BELIEVE WILL PROVIDE FOR AGRICULTURAL PRESERVATION IN OUR COMMUNITY. WE HAVE CONTRACTED WITH A CONSULTANT TO DEVELOP A PRESERVATION PROGRAM, BASED ON INFORMATION ABOUT PREVIOUS EFFORTS ALL ACROSS THE UNITED STATES. WE ARE SINCERELY INTERESTED IN PRESERVATION AND BELIEVE THAT WE HAVE SUFFICIENT SUPPORT WITHIN OUR FARMING COMMUNITY TO MAKE IT WORK.

HOWEVER, ONE OF THE MOST SIGNIFICANT OBJECTIONS WE HAVE HEARD TO OUR PROPOSAL IS THAT IT DOES NOT SEEM TO BE PERMITTED BY THE LEGISLATION YOU ARE CONSIDERING HERE THIS MORNING.

THIS LEGISLATION DOES NOT APPEAR TO PERMIT LOCAL INITIATIVE IN THE AREA OF AGRICULTURAL PRESERVATION. WE HAVE HAD ATTORNEYS AND OTHER INTELLIGENT PEOPLE LOOK AT THE DRAFTS, AND THEY ALL COME TO THAT SAME CONCLUSION, SO WE ASSUME WE ARE NOT MIS-READING THE INTENTION OF THE DRAFTERS OF THE BILLS.

WE RECOMMEND THAT THE LEGISLATION BE RE-DRAFTED SO THAT IT SPECIFICALLY PERMITS AND ENCOURAGES LOCAL INITIATIVE IN DEVELOPING PRESERVATION PROGRAMS AIMED AT SOLVING LOCAL PROBLEMS. WITHOUT THIS SPECIFIC PERMISSION, EACH COMMUNITY THAT DETERMINES THAT IT MUST DEVELOP ITS OWN PROGRAM WILL IMMEDIATELY BE FACED WITH THE PROSPECT OF HAVING TO PROVE IN COURT THAT IT HAS THE AUTHORITY TO ACT. THOSE WHO WOULD TURN THE FARMLAND INTO SUBDIVISIONS AND SHOPPING CENTERS WILL SAY, "LOOK, THE STATE LEGISLATION ESTABLISHES THIS SYSTEM OF PRESERVATION. YOUR COMMUNITY MUST USE THIS SYSTEM OR NOT PRESERVE THE FARMS." WE DON'T THINK THAT APPROACH TAKES INTO ACCOUNT EITHER THE INTENTION OF THE LEGISLATION THAT WAS APPROVED BY THE VOTERS OF NEW JERSEY, OR THE VOICE THAT THOSE SAME VOTERS SHOULD HAVE --- AT THE LOCAL LEVEL --- IN ESTABLISHING PRESERVATION PROGRAMS THAT WILL WORK FOR THEIR COMMUNITIES.

THE LEGISLATION HAS CHOSEN A SINGLE PERMITTED METHOD OF PRESERVATION FOR THE ENTIRE STATE, AND WE DO NOT BELIEVE THIS IS REALISTIC...A SINGLE METHOD MAY NOT WORK EVERYWEHERE. CONDITIONS ARE VERY DIFFERENT IN MERCER COUNTY, FOR INSTANCE...ON THE URBAN FRINGE...THAN IN RURAL HUNTERDON.

THE LEGISLATION ENVISIONS A SYSTEM IN WHICH THE LANDOWNERS...THE FARMERS...DEVELOP THE PROGRAM AND APPORTION THE FUNDS. BUT IN EAST WINDSOR TOWNSHIP, THE FARMLAND IS OWNED BY SPECULATORS WHO BOUGHT IT IN HOPES THAT IT WOULD NOT REMAIN FARMLAND. A VOLUNTARY PROGRAM WILL NOT WORK WHERE THE OWNERS HAVE A VESTED INTEREST IN ASSURING THAT THE LAND IS NOT PRESERVED. AND I SUBMIT TO YOU THAT THE FARMLAND THAT MOST NEEDS PRESERVING IS THE LAND ON THE URBAN FRINGE, WHICH IS THE LAND MOST LIKELY TO BE OWNED BY SPECULATORS.

WITHOUT QUESTIONING ANYONE'S INTEGRITY, WE DOUBT THE WISDOM OF ESTABLISHING A SYSTEM IN WHICH A FARMER-DOMINATED GROUP DECIDES HOW MUCH MONEY TO DISBURSE TO OTHER FARMERS. WE DO NOT ADVOCATE THE ESTABLISHMENT OF ADDITIONAL BUREAUCRACY, BUT WE DO NOTE THAT THERE IS LITTLE COMPLAINT ABOUT THE WAY THE DEPARTMENT OF ENVIRONMENTAL PROTECTION DECIDES ON THE WORTHINESS OF GREEN ACRES APPLICATIONS, OR ABOUT THE WAY THE DEPARTMENT OF TRANSPORTATION DECIDES AMONG ROAD IMPROVEMENT GRANT APPLICANTS. WE THINK THAT THE DISBURSAL OF MONEY --- STATE TAXPAYERS' MONEY --- SHOULD BE DECIDED UPON BY A DISINTERESTED GROUP. THERE SHOULD NOT BE THE SLIGHTEST APPEARANCE THAT ANY SINGLE BUSINESS GROUP IS DECIDING HOW TO SPEND STATE MONEY WITHIN ITS OWN GROUP.

IT ALSO APPEARS FROM THE LEGISLATION THAT THE DEVELOPMENT RIGHTS BEING PURCHASED COULD EXPIRE IN AS LITTLE AS EIGHT YEARS. THIS IS ENTIRELY TOO SHORT A PERIOD OF TIME. FOR ONE THING, THE PEOPLE OF THE STATE VOTED IN FAVOR OF "PRESERVATION," NOT "DEVELOPMENT POSTPONEMENT." FOR ANOTHER, IS IT WORTHWHILE SPENDING $50 MILLION FOR ONLY EIGHT YEARS' WORTH OF PRESERVATION?

IN SUMMARY, LET ME INDICATE THREE AREAS IN WHICH WE FEEL THE LEGISLATION OUGHT TO BE STRENGTHENED:

1 THERE IS TOO LITTLE COORDINATION, PLANNING AND CONTROL BY ELECTED MUNICIPAL AND COUNTY GOVERNING BODIES.

2 THERE IS TOO MUCH AUTONOMY AND THE APPEARANCE OF CONFLICT OF INTEREST IN THE "COUNTY BOARD" SYSTEM.

3 THERE IS SOME UNCERTAINTY THAT THE TAXPAYERS WILL ACTUALLY GET WHAT THEY EXPECT, BECAUSE OF THE POSSIBLE VOLUNTARY AND SHORT-TERM ASPECTS OF THE LEGISLATION.

WE RECOMMEND THAT THESE SHORTCOMINGS BE CORRECTED THROUGH THE FOLLOWING CHANGES IN THE LEGISLATION:

1 SPECIFIC RECOGNITION OF THE IMPORTANCE OF MUNICIPAL AND COUNTY PLANNING FOR FARMLAND PRESERVATION.

2 PROVIDE FOR COUNTY AND MUNICIPAL OFFICIALS' ROLES IN THE DECISION-MAKING PROCESS.

3 PROVIDE A METHOD FOR IDENTIFYING USEFUL, PRESERVABLE FARMLAND THAT CAN BE USED AS A GUIDELINE BY THE DECISION-MAKERS, AND PROVIDE THAT THIS IDENTIFICATION MAY, AT THE OPTION OF LOCAL AND COUNTY DECISION-MAKERS, BE INDEPENDENT OF THE DESIRES OF LANDOWNERS.

4 PROVIDE FOR A VARIETY OF PRESERVATION METHODS, BASED ON LOCAL CONDITIONS AND NEEDS.

5 PROVIDE FOR THE POSSIBILITY OF "RE-USE" OF STATE BOND FUNDS THROUGH MUNICIPAL OR COUNTY PURCHASE OF TRANSFERRABLE DEVELOPMENT RIGHTS, COMBINED WITH SUBSEQUENT RE-SALE OF THOSE RIGHTS FOR USE IN OTHER PARTS OF THE COMMUNITY, FOLLOWED BY SUBSEQUENT RE-USE OF THE SALE PROCEEDS FOR PURCHASE OF ADDITIONAL RIGHTS.

6 GUARANTEE THAT THE RESTRICTIVE COVENANTS IN DEVELOPMENT EASEMENTS BE IN EFFECT UNTIL STATE, COUNTY AND LOCAL OFFICIALS CONCUR THAT THEY SHOULD BE RELAXED OR ELIMINATED.

FOR THE COMMITTEE'S BENEFIT, WE HAVE PREPARED COPIES OF A RESOLUTION ADOPTED BY THE EAST WINDSOR TOWNSHIP COUNCIL, TOGETHER WITH AN ANALYSIS OF THE LEGISLATION PREPARED BY OUR TOWNSHIP ATTORNEY. TO THE EXTENT THAT YOU MIGHT FIND THEM VALUABLE. COPIES OF MY REMARKS ARE ALSO AVAILABLE.

NOTES ON DRAFT AGRICULTURAL RETENTION
AND DEVELOPMENT ACT (S3479) (S867)

From a municipal point of view, the Bill suffers from a number of weaknesses.

1. It places basic planning, regulatory and administrative powers largely in the hands of a county-level board a majority of whome are members of the agricultural "establishment" (Sec. 8a). Municipalities only get to appoint boards if the county's Freeholders fail to establish a county board. Moreover, the municipal board would also be "farm-based". Thus, the system has a majority of farmers voting to give money to other farmers. This runs counter to our basic notions about agencies that five away money. It creates the appearance and real possibility of self-dealing. (Quis custodiet ipsos custodes? Even the Green Acres Program - though state-administered and "dis-interested" - eventually came under criticism for the purchases it authorized. As a result valuations of property are now conducted by DOT rather than Green Acres - DEP. In a single county, how much more will be the proclivity to problems where local farmers are acting to buy easements from their local colleagues?

2. Funds are to be disbursed within "districts" which are defined as voluntary and initiated by landowners (sections 2c and 3h). The definition does not seem to leave room for agricultural zoning (ie, the definition of an exclusively agricultural use district by action of the Planning Board and Municipal Governing Body through the Master Plan and Zoning Ordinance.

3. The apparent exception to 2 above appears to be the fact that the definition of "Farmland Preservation Program" (sec. 3i) may or may not be read to include municipally-initiated programs. But such programs must be in areas approved by the County Boards, and even at that there is some question as to what may be done. Local initiative needs to be strengthened here - not frustrated.

4. The act seeks to supplant municipal decision-making in a number of areas in that it:

- virtually prevents the condemnation of land - or of development easements - within the district (sections 17 and 12).

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- provides that county plans cannot advocate agriculture as an exclusive use in an agricultural development area (sec. 11).
- specifically prohibits the municipality from re-using or re-selling development easements for use in non-agricultural parts of the municipality (sec. 23a). Section 25 provides that development easements may be sold by farmers to third parties who may in turn sell them to the Board, presumably at a profit. Thus, municipalities are precluded from using referendum funds to implement transfer development rights/farmland preservation programs while third parties can become "middle man".
- provides that development easements may be purchased and enforced by county and state agencies - and, therefore, implicitly, not by the municipality(sec. 22-24).
- may well authorize the formulation of agricultural development areas and districts with minimal municipal input and, in some cases, contrary to local zoning.
- may well permit the purchase of easements by the County in an area the municipality has not zoned for agricultural preservation.

5. There is some ambiguity as to how long a development easement, once purchased, can be in effect. Since Section 22 refers back to Section 15, and Section 15 speaks of 8-year periods, it is possible that the "preservation" program could be of short duration. Thus, conceivably, the state and local funds expended could not achieve the purpose the voters intended.

6. How does the County Board raise money when it decides to buy easements? The bill is silent as to where the "local" fifty percentum comes from (sec.22e).

7. The Farmland Preservation Act (L1981, c276) spoke at section 2c of state investment for acquisition of development easements in cooperation with counties and municipalities. The proposed bill clearly deprives the counties and municipalities of any real 'cooperative' powers or rights and relies heavily on autonomous boards - always a bad practice. Surely the intent would be better fulfilled through a Green Acres- type program where local planning and decision-making was an important element.

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8. Since the municipality cannot even enforce the development easements (sec. 24), the Board could presumably terminate the easements notwithstanding municipal plans and policies.

CONCLUSIONS: In its present form the enabling legislation has the following faults:

- too little coordination, planning and control by elected municipal and county governing bodies.
- too much autonomy and the appearance of conflict in the "county board" system.
- some uncertainty that the taxpayers will get their "money's worth".

RECOMMENDATIONS: The system should ideally seek to do three things:

1. plan for and implement a program to preserve our best farmland;
2. compensate farmers for development easements; and
3. do the above through an efficient system which meshes and synchronizes state, county and municipal policies, plans and practices.

If we truly wish to preserve agriculture we must realize that the mere process of buying development easements will not be enough. All levels of government must evolve planning, zoning, and general and fiscal policy-making which promote and sustain agriculture. To do this the enabling legislation must do the following:

1. Recognize the importance of municipal and county planning in determining agricultural preservation areas;
2. Provide for decision-making by county and municipal elected officials based on studies and recommendations by the farm community and agricultural experts sitting as official advisory bodies.
3. Provide flexibility for local programs such as TDR under which municipalities can buy rights from farmers with state funds and then, if they wish, re-sell them in areas of the municipality

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targeted for intensive residential or industrial/commercial development (thus creating more funds with which to buy other development easements).

4. Guarantee that the covenants against non-agricultural use in development easements on preserved farmland will run until and unless state, county and municipal governments concurrently agree to release same.

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