ML - EastWindsor 5/13/83

Stenographic transcript of counsels' argument and judge's decision

p 81

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MERCER COUNTY
DOCKET NO. L-51177-80 & L-06433-83

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, THE PLANNING BOARD OF THE TOWNSHIP OF EAST WINDSOR, et al.; and THE EAST WINDSOR MUNICIPAL UTILITIES AUTHORITY,

Defendants.

and

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.

STENOGRAPHIC TRANSCRIPT OF
COUNSELS' ARGUMENT AND JUDGE"S DECISION

Date: May 13,1983
Place: Mercer County Courthouse
Trenton, New Jersey

B E F O R E:

HONORABLE PAUL G. LEVY

TRANSCRIPT ORDERED BY:
FRANK J. PETRINO, ESQ.

A P P E A R A N C E S:

MESSRS. STERNS, HERBERT & WEINROTH,
By: Frank J. Petrino, Esq., and Joel Sterns, Esq.,
Attorneys for Plaintiff.

MICHAEL A. PANE, ESQ.,
Attorney for Defendant, The Mayor
and Council of theTownship of East Windsor.

MESSRS. SCHWARTZ, TOBIA & STANZIALE,
By: Gary S. Rosensweig, Esq.,
Attorneys for Defendant, The Planning Board of
the Township of East Windsor.

MESSRS. GOLDSHORE & WOLF,
By: Lewis Goldshore, Esq.,
Attorney for Defendant East Windsor Municipal
Utilities Authority.

ANNE C. NEMETH, C.S.R.
OFFICIAL COURT REPORTERS
MERCER COUNTY COURTHOUSE

THE COURT: Well, you better put your appearances on the record, so we can get a scorecard.

MR. STERNS: Joel H. Sterns and Frank J. Petrino appearing on behalf of the plaintiff.

MR. ROSENSWEIG: Garys S. Rosensweig on behalf of the Planning Board.

MR. PANE: Michael Pane for the Township of East Windsor.

MR. GOLDSHORE: Lewis Goldshore for the East Windsor Municipal Utilities Authority.

MR. HUTT: Stewart Hutt for the New Jersey Builders Association.

THE COURT: Alright, Mr. Hutt, you want to tell me why you should be able to intervene.

MR. HUTT: As I said in my moving papers, I represent the New Jersey Builders Association, a group of, approximately, 2000 members who are interested on the legal question as to whether or not TDR is authorized under the Municipal Land Use Law. We have members who own land in the township and other townships that have proposed TDR, and the outcome of this case would vitally effect our interests.

THE COURT: What is it that you add to the case that the plaintiffs haven't already covered?

MR. HUTT: Just the view as to the legislative

history and, solely, for the issue as to whether or not TDR is an ultra vires act of municipalities, not any of the issues of this particular TDR ordinance or any other allegations or motions in the complaint.

THE COURT: One of their major points is TDR is not an authorized concept.

MR. HUTT: I understand that, your Honor. We're just here to try and help enlighten the court as to our knowledge of the issues.

THE COURT: Well, alright, anybody want to oppose that besides me? No?

Alright, is there anything plaintiff wants to say about that?

MR. STERNS: No, your Honor.

THE COURT: I think, frankly, that that motion to intervene should be denied. I have read your brief, but the brief on the merits, frankly, adds nothing to the resolution of the matter as far as I can tell. I believe that everthing that you've covered in your brief has been amply covered by the plaintiffs, and to bring in another party would just complicate matters and require for you to be a part of the matter as it works its way up through the Appellate Division and the Supreme Court. I think that enough is enough.

MR. HUTT: Your Honor, we're not asking to inter-

vene. We're only asking for -- we don't expect to participate in any trial or in any proceeding.

THE COURT: I read it as a motion to intervene as Amicus Curiae, but under Rule 1:13-9 --

MR. HUTT: But not as a party, your Honor.

THE COURT: But that still puts you into the case. I think the motion should be denied, and I will deny it.

There is, also, a motion to intervene as Amicus Curiae by the New Jersey Association of Professional Planners. I received a letter from Thomas Norman, attorney for this organization, dated April 7, 1983 indicating that moving papers would be filed. They never filed. Therefore, that motion is denied.

Why don't I let you proceed. We have several motions to cover. We have plaintiff's motion for summary judgment on Count 1 of the complaint.

MR. ROSENSWEIG: Your Honor, excuse me. I do have a copy of Mr. Norman's notice of motion.

THE COURT: I don't have that, let alone a brief and, therefore, the motion is denied. He's not even here.

Okay, first, we have plaintiff's motion for summary judgment on Count 1 of the complaint in the latest action, Docket I-6433-83. Defendant's cross-

motion for summary judgment on the same. Defendant's motion for summary judgment on Counts 2 and 9. Plaintiff's cross-motion for summary judgment on Count 2. Let's cover those first. Then get to defendant's motion to consolidate the two actions. Then the defendant's motion to file an amended answer and counterclaim in the first case, as well as plaintiff's motion to dismiss counterclaims filed in the 1983 case. After that, the Municipal Utilities Authority's motion for summary judgment in the first action, and, finally, plaintiff's motion to extend discovery to September 9.

So, I'll hear from the plaintiffs first on these four motions dealing with the 1983 action on summary judgment from every side.

MR. STERNS: Thank you, your Honor. If it please the court, most respectfully, the issue before you is a legal issue and one which we trust has been briefed thoroughly and adequately and which, obviously, your Honor has devoted much attention to already. So, I would prefer to be very brief and to respectfully request opportunity for rebuttal if that should be necessary.

With regard to the basic legal issue, it is quite simple, whether there is sufficient authorization, ex-

pressed or implied, for the defendant Township to have enacted a TDR ordinance. As I indicated, the brief goes extensively into that and into the legislative history, and I would only wish to add, by way of emphasis, certain facts, and that is that it is clear that the legislature did not feel that TDR adopted this type of authorization, or if it did, there would not have been the repeated efforts to pass similar legislation, all of which have failed. I think it is a fair reading of the transcripts, which are included in our briefs and reply briefs of the defendant Municipality's point of view, that it did not have the authority to do this, because if it did, it would not have, in other context, such as the Agricultual Development Act, been before the legislature saying we need this type of authority. I think it's a fair reading of the Municipality's actions, than of the legislature's actions, that the Municipality said, we can well afford to take this chance. Time is on our side. If we're wrong, we're wrong, but we will not have suffered anything and we will have saved some time. I, respectfully, point that out to your Honor and bring it to your attention because if you should find -- and as I've indicated, I think, we will rely on the brief -- if you should find that this is an ultra vires act and

if you should find that it should be struck down, then you are faced with the question of severability and the question of remedy, and this is, really, where I would like most fervently to address the court, because I think this case, comes closest in the case of Mount Laurel II decision.

One of the main thrusts as I read that Mount Laurel II decision is to cut through to the bare bones and to essentials of what are at issue between the various plaintiffs who will come up against municipal zoning ordinances and other actions, which tend to deter the development of a municipality. In that context, the Supreme Court had the opportunity -- and I refer to page 172, to deal with, in effect, ultra vires, in the case of Kruvant v. Mayor and Council of Cedar Grove. The court said at page 172 of Mount Laurel II, "depending upon the circumstances, a time must come when the courts will cease to defer in the conventional manner to municipal action. In Kruvant, we refused to consider the most recently adopted municipal ordinance; here we refuse --" going back to Mount Laurel -- "to accord presumptive validity to Mount Laurel's revised ordinance.

Now, the question of delay, the question of presumption of validity of municipal ordinance must give way to the overriding need that are expressed by Mount

Laurel, and we're not in the substantive due process. I, respectfully, recognize the fact issues of this matter, but it is clear how long these matters have been pending, and it is clear and it is on the record how many building permits a year are being issued by East Windsor Township, and I think that's on the record.

It is clear that East Windsor Township is within the State development guide plan, and, therefore, in dealing with this issue, one must then look secondly at where will we be, should the court find that the ordinance with regard to TDR is ultra vires. We most respectfully suggest that it is not severable, and that there would, therefore, be nothing of merit or substance, which would be survived in East Windsor.

THE COURT: You mean that if this ordinance, 1982-16, in its entirety is struck down, that there's nothing left in East Windsor?

MR. STERNS: No. No, of course, something would, of course, have to be constructed. We're saying that the ordinance of which the TDR is a part, should and would become moot, and that the court would be faced with two alternatives or should be faced with two alternatives.

Obviously, you can disagree with this analysis. Let's say there's something left in the ordinance.

What I'm suggesting is that to leave an ordinance with the kinds of extremes that this ordinance would have without the TDR, which is meant to be the mechanism which makes the REAP Zone viable and which, of course, we claim is ultra vires and is, in effect, a transfer --

THE COURT: What about the zoning ordinance that was in effect before, which you're already challenging in the original lawsuit?

MR. STERNS: You could return to that zoning ordinance, your Honor. It would certainly say this; the municipalities, obviously, have some protection from a complete strike down of the zone, and there are two alternatives. One would be to return to the zoning ordinance that we had before, which is in litigation, and the second would be to give municipality 90 days as it is suggested in the Mount Laurel II cases and other context to come up with a new ordinance, most respectfully.

THE COURT: Aren't you just asking for trouble to give them 90 days to come up with the new ordinance, when I already have a file 20 inches thick on the older ordinance, that your office has been amending the complaint, as well as defendants adding new counterclaims, too, so that it's finally ripe for determination?

MR. STERNS: Well, your Honor --

THE COURT: If they come up with a new ordinance that just invalidates the old one, then all that's out the window, and we have to start all over again.

MR. STERNS: Well, obviously, the plaintiff's interest is a resolution as rapidly as possible, and you make a very substantial point on the basis of the material that's there. I guess, most respectfully, I have taken a leap. The leap I've taken is that the original ordinance is so clearly unacceptable under Mount Laurel standards, that the township, itself, recognized that move to this new one, and that in the terms and the context of the Mount Laurel procedual decisions, that a deference should be given to see if a better and a good-faith effort can come up in the next 90 days.

Now, I realize that I've taken a leap and, perhaps, an impermissible leap in feeling that the decision has been rendered. In my mind and in plaintiff's mind, it has, against the prior ordinance.

The point that I make is that throughout this implementation of Mount Laurel II, is the issue of what do you do with good faith, and in some cases, the support founder was good faith and gave some discretion to municipalities. In Mount Laurel, itself, and in others, it found there was not good faith and gave severe castigation. The question is, if this is struck

down and if the township has the opportunity, it may be exemplary to this court as to how it proceeds, in what kind of context it proceeds to adopt an ordinance that attempts to meet Mount Laurel. Obviously, our contention is that the prior ordinance, to which you would return, does not accomplish that, and, obviously, we would be prepared to continue the litigation on that issue.

Your Honor, with regard to the question of severability -- and I don't want to belabor that, since we seem to be beyond that point -- we do want to refer to statements made by Mr. Pane with regard to what we consider to be the conclusion of the town, itself, that -- and I quote -- "The township has made a decision, and it does not feel agricultual zoning, pure and simple, which imposes heavier burdens on farmers is an appropriate vehicle, and that the social cost of preservation should not be borne solely by 'the people who own agricultual land.'" In our view, that seems to make it plain that when the municipal governing body adopted this ordinance, they adopted it with the understanding that the TDR was an integral part of the whole and that the ordinance could not, without that transfer of rights, survive, or else it would have the very consequences, which the township sought to avoid. So, I don't want

to dwell on it, except I don't think it's severable. I think it either stays or it falls, and for the reasons that are in the brief, we respectfully suggest that it should fall.

THE COURT: Mr. Pane.

MR. ROSENSWEIG: Your Honor, I won't attempt to go through the brief. I think you have substantial briefs. If I can just summarize what, I think, are the main points here, and Mr. Pane will address some other points, Needless to say, I think this case is important in the history of the State and the future of agriculture, as Mount Laurel was in the history of housing and zoning. I think this is an opportunity here to permit implementation of a long-term program and, perhaps, reverse the laughter I hear when people hear the lable for the State of New Jersey as a "Garden State."

We have an opportunity here to begin an agricultural preservation strategy and to continue, I think, the work that Judge D'Annunzio did in the Bethlehem case, that is upholding agricultural preservation as an appropriate proper goal of municipal governments in this State. It is clear --

THE COURT: Well, if you had two areas to choose from for placing an agricultural zone that were rated

by the State as "good agricultural land" and "bad agricultural land" -- to use gross, wide brushes -- why did you pick the worst?

MR. ROSENSWEIG: I don't think it's the worst. We think it was a reasonable choice based on the criteria that are appropriate to viability of agriculture. I think it's not whether one was -- well, we believe they were close, and one is good and there is -- 75 percent of the land in that particular area is presently zoned, as our tax assessor has shown. So, it is proper agricultual land. It doesn't mean there is a piece in another location that isn't better. I don't think that's the test.

THE COURT: I thought there was an analysis by the soil -- by State agency, which indicates what is prime agricultual land and what is not, and that the place where the prime agricultual land lies is in the REAP Zone, and the non-prime land was in the AP Zone.

MR. ROSENSWEIG: That's not the case. There's prime land in the AP Zone. It isn't -- there's a piece in the REAP Zone, but there's a contiguous piece or property that comports with excepted criteria for agricultural land. I think it's the choice, and the choice, I think, was reasonable. I think we have a recognition by State government, by the National govern-

ment, if you will, that agricultural preservation is important governmental policy, and you have actions taken by the State of New Jersey for many years now to assist in the preservation of agriculture. The agricultural assessments statutes, the various studies that the State government has done, and the programs carried out by the Department of Agriculture to attempt to preserve land with the realization that once it is lost, once it is converted, it will never return. It is a resource that will be irreparably damaged.

I don't think we're saying that the East Windsor program is the absolute best that man can create or is perfect, but it is a reasonable response to a need, and that need is to attempt, in a large-scale way and a rational way, to preserve agriculture in this State, and it would effect Central Jersey and the southern part of the State. In the northern part of the State, it is, probably, too late.

We've shown in the brief that it is the policy of the courts of this State to read municipals powers as broad and to allow municipalities great latitude in carrying out the purposes and powers that are granted to it by the State legislature. I think the basic test is whether the means is appropriate to carry out the goal and purpose. The Land Use Law in a number of

sections, 2(e), 2(g), 2(j), 2(i) provides, we believe, the authority to produce ordinances, which preserve agricultural land within an municipality. The argument was raised in the plaintiff's brief that it's not specifically provided in the Land Use Law. That just doesn't jive with the broad readings the courts have given to exercise the municipal power. Even prior to the Land Use Law, it had courts upholding site plan review where there was no motion of site plan review, courts upholding offsite improvement ordinances where there was no mention of that in the Land Use Law, uncluster ordinances where there was no mention of that. So, there's a variety of permissible responses that the courts have permitted.

Now, with the Land Use Law and the new Land Use law, or this amendment, I think, you'll find specific references, which, I think, this court can find as a basis to uphold the East Windsor ordinance. Mr. Sterns had a reference to East Windsor and the lack of building permits, perhaps, have occurred in East Windsor. I think the record of the municipality, your Honor, in the last year or two, I think, shows that there are over eighteen hundred approvals granted for housing in various stages of preliminary, final approval, and these are units. There's multi-family

units, condos, townhouses with ranges in price as low as $60,000. So, this is not a municipality that has not permitted the construction of housing or has even encoureged the construction of housing. I think that's a smoke screen that has been constantly raised, but the record of the municipality just does not bear that out.

MR. PANE: Your Honor, I would first like to speak to the question that you raised dealing with the location of preservation and development areas. I think it's appropriate to note that in 1979, in preparing the township's master plan update, the Planning Board and the Master Plan Review Committee relied extensively on the State development guide plan, reviewed all of the soils data available, and then made the decisions that it made, which decisions were approved by the Mercer County Planning Board, specifically citing the agricultural preservation features of the plan and the Delaware Valley Regional Planning Commission.

Now, the soils information that was contained in the '79 update was reviewed by our own expert, who, himself, is an agriculturalist by training. This material is found in appendices H and I to the brief that was submitted to your Honor. And, furthermore, the State development guide plan indicates, as your Honor

suggested, that we are dealing here with broad-brush stroke areas, and it is then the responsibility of regional and local planning bodies working together to fill in the intricacies and make final decisions. Accompanying our brief in the appendix was, in fact, a letter from the Acting Director of the Division of State and Regional Planning, who was answering the specific hypothetical question of whether or not development could occur in a preservation area and preservation in a development area if local planning authorities felt it was reasonable and appropriate, and the answer was very much in the affirmative citing the portions of the State Development Guide Plan that I have just indicated to your Honor.

Another thing that I think I should be raising is the issue of legislative history has raised its head here, and I think, perhaps, the best answer lies in the history of Inganamore. As we indicated in our brief just before the main Inganamore decision in 1973, there was a rent control enabling bill in the legislature. It was withdrawn from the Senate, apparently, because it didn't have enough votes to pass. The Supreme Court in one of the later rent control cases mentions this fact quite openingly, and yet a month after the bill was withdrawn from the Senate, the

Supreme Court felt perfectly free to pronounce on Inganamore and indicated that under 48-2 there was ample authority. Thereafter, a number of attempts were introduced to rent control legislation. None succeeded. Surely, it could be said that the legisla-- ture intended that there could be no rent control or it could be said that they were happy with what the court did. The court wasn't happy with the court. Why should the legislature be unhappy with what it did? The upshot has been stated time and again in cases like Bay v. Garden State Farms. It is very tricky to try and interpret legislative inaction as anything, other than inaction. To ascribe a reason to it, a reason pro or con, is very dangerous, and we would submit that the failure to enact a bill cannot -- especially in the circumstances here -- be treated as having any significance for whether or not the township has the right to enact what it's enacting.

As to the suggestion of Mount Laurel remedies, the obvious point we would make is this is not a Mount Laurel case in any way. As Mr. Sterns suggested, this gets closer to the merits, but we must suggest, in fairness, that the township of East Windsor, not only has been approving more housing than most of Mercer County put together for the last several years,

but was cited with approval for its practices in the Mount Laurel decision and in this 1977 Housing Handbook and has a thorough history of meeting its low and moderate income obligations and will continue to do so. In fact, if one looks at the counterclaim documents submitted by the township, it is obvious that one of the problems Centex had over the years was that they were not able to reconcile themselves to meeting the low and moderate income requirements that the township had set. So, we do not believe that there should attach to this township any implication of bad faith under the circumstances or that Mount Laurel remedies should be considered appropriate for the reasons stated.

THE COURT: Well, suppose in the off chance that I decide there's no authority for TDR, what do I do?

MR. PANE: Okay, in that case, your Honor, it seems to us that the reasonable approach would be to look at agricultural zoning as the appropriate zoning. Centex has admitted on page 5 of his reply brief that agricultural zoning is a legitimate act of the municipality. The Bethlehem case was submitted to your Honor. A case of first impression, recently handed down, seems to make it clear that the right to preserve land for agricultural production is a legitimate right confirmed

by our zoning laws. If that be the case, the township urges, as we have in our brief, that the court regard us as having two actions. Action one, that of zoning to preserve agriculture, a legitimate function in itself. Action two, the enactment of a program of development rights for the purpose of enhancing, ensuring the continuity of promoting the success of that zoning. Why have we done that? Why have we felt compelled to do that? Because the township, having decided that it should preserve agriculture, looked to the professional literature, looked to planning and saw from the sorry history of things that agricultural land didn't need to be preserved, until, suddenly, there was demand for development, at which point, when the price of land went from $3000 to $15,000 or $20,000 an acre, the preservation movement dwindled in its ranks, and the development movement was much greater. So, there had to be a way to try and give the owners of agricultural land a share in the benefits of development elsewhere, where the municipality was to keep integral a plan, which preserved agricultural resources.

To this end, the township sought to add to agricultural zoning this economic device of the use of development rights.

THE COURT: But if it's invalidated, what do you

do with the farmer that says, I'm tired of farming and you won't let me sell my land, nobody else wants to buy it to farm it?

MR. PANE: Is that any different from the owner of a single-family house, who says that, If I could turn this into a restaurant or a barber shop or funeral parlor?

THE COURT: Sure it is.

MR. PANE: Why? He can only sell it as a single-family residence. The farmer can only sell for, basically, agricultural uses. If those are economically reasonable uses, that's no different then any other use of the zoning power.

THE COURT: So, therefore, the bases for it is that the municipality assumes that those are economically feasible reasons?

MR. PANE: With all due respect, we don't assume. We studied.

THE COURT: And the farmer comes forward and says, I'm going to give up, and I can't make any money, and no other farmer will buy my land. Then because of the basis for the ordinance, you would just automatically have to give him a variance for something.

MR. PANE: I would assume, your Honor, that if it could be proven that, in fact, agriculture was not an

economically reasonable use, then we could not.

THE COURT: He sort of put you to it. You'd have to come up with a buyer; wouldn't you?

MR. PANE: We would have to come up with proof. Now, this gets us into some very tricky fact questions, as the court realizes, because the viability of agriculture is not a simple proposition. I think --

THE COURT: It seems to me you get right close to asking for inverse condemnation suits by the land owners.

MR. PANE: Well, you know, the township in deciding what is best for its future, has to take action even if that action may lead to litigation. We have studied the proposition, and we believe that agriculture in East Windsor township is as economically viable as it is in any other part of this State. That is why we enacted this ordinance, and we've submitted it to the court.

THE COURT: Okay, and suppose I decide that the entire ordinance has to be invalidated, then what? Plaintiff says I should order you to create a new ordinance in 90 days.

MR. PANE: Well, I would think that if the ordinance is invalid by any traditional standards, the existing zoning prior to the enactment of the ordinance would

then be operative.

THE COURT: Well, where does that leave us practically? We have a lawsuit challenging that ordinance; right?

MR. PANE: That's correct.

THE COURT: And then what happens, that goes to trial. A, it's upheld, then you're where you are. B, it's invalidated, and you're just further down the track from today to start a period running for preparation of a new ordinance.

MR. PANE: Your Honor, that is true, On the other hand, I think that the passage of time is not only negative in dimension. For example, there was some question on the part of some people as to whether or not two-acre zoning was valid as a basic legal principle.

THE COURT: How do you feel about that? Can you support the existing zoning, the prior zoning ordinance under Mount Laurel?

MR. PANE: I think Mount Laurel cleared that point up rather well. The issue of two-acre zoning, I think, is a lot clearer than it was. But getting back to the discussion of the agricultural aspect, it seems to me that agricultural zoning is within our power. If it is, then we should be allowed this reasonable expansion

on that power, so that we can do something to make the plan really work, to give it some life, some viability, some realism, and as we put it out in our brief -- and I think it's critical -- the power which we can use to do this is not just zoning power. There's no doubt that we can, also, do this under 40:48-2. In the area of rent control, for instance, it has created billions of dollars worth of property regulation by source of municipalities. The agricultural preservation ordinance, really, can be viewed as partaking of both zoning and police power, use of economic regulation to further the zone plan, to make the thing work better and last longer. Certainly, the fact that it partakes of both, is not negative, but, rather, something that the courts have long commented positively on as Justice Pashman did years ago in Springfield v. Quick Chek.

It seems to me that we are dealing here with a novel question, but, once again, I think if we use the recent Mount Laurel decision as a guide, we can see that there's a fast evolution in the law. We can see that the Supreme Court is telling municipalities that their zoning powers in the public interest must be used creatively, and that they should be striving to achieve significant public goals.

Now, there's some discussion as to whether this is

regulation of property, whether it is pure zoning, or whether it has socioeconomic consequences. I think Mount Laurel has swept away a great many of those labels and left us with a clear mandate that we must legislate zoning to achieve needed public ends.

Now, Centex says that we're dealing in Mount Laurel with constitutional issues, and that this doesn't rise to that level. Well, I think that we've got to say that, first of all, before 1975, there was some question as to whether Mount Laurel was, itself, a constitutional question. More importantly, the Constitution of New Jersey deals with A, the public welfare in a general sense; B, the preservation of agriculture; C, the right to zone; D, the rights of local government to legislate original programs to serve its inhabitants. As Mansfield and Sweet v. West Orange said, The power of local goverment to legislate reaches all great public needs. Thus, it seems to us that the preservation of valuable farmland and natural resources by local government has constitutional overtones and immense importance and immediacy to us in East Windsor, and, thus, the ordinance should be upheld as a legitimate exercise of zoning and police power.

THE COURT: Okay, before we move into anything else, do you want to reply?

MR. STERNS: If I may, very briefly, your Honor. I heard some things, which most respectfully, counsel, I simply cannot accept, and I would urge the court not to accept. First of all, with regard to the Mount Laurel decision, it is beyond doubt that the Mount Laurel decision would not uphold -- the Mount Laurel II decision would not uphold two-acre zoning in a growth area as the state development guide plan shows. The words are almost explicit there, and I'll be happy to bring them to the attention of your Honor.

THE COURT: Well, if that's true, wouldn't the prior lawsuit be subject to disposition by summary judgment?

MR. STERNS: It could very well, your Honor, except that the Mount Laurel opinion -- and going on to that Mount Laurel opinion -- allows for a municipality to do other things once it has satisfied its guide.

Now, in this particular case, the municipality says it's got a PUD. The fact that nobody has built and nobody can build on that PUD, might be a fact issue and a not summary judgment issue, because they'll say, See, we're putting houses here. It doesn't have to be in the growth areas as designated by the guide plan. It happens to be --

THE COURT: How long would it take to try that

issue.

MR. STERNS: I have to refer you to -- I would say that it would take some time. It would not be of great length.

THE COURT: A whole week? A whole week?

MR. STERNS: A week I would say.

MR. PETRINO: There may be other factors.

MR. STERNS: It will take less time, than it will to get him to commit us to how long it would take, I submit. About a week I'll say, a week, your Honor. But, I want to come back -- I think this is, you know, actually, the nub of where we're going. Everybody knows it. It's just below the surface, but on the surface remains the fact that we're here dealing with the question of whether the TDR ordinance is ultra vires or not. I want to rebut one thing, and that is this constant reference to the fact that this is an extension of the zoning power. It is not an extension of the zoning power. It creates a new type of ownership of land, which would require, among other things, on a very practical level, some uniformity for recording, some uniformity for searching. I would hold as reference for that, not only legislative intent -- although, I certainly disagree with what the legislative history shows -- but how about Justice Hall of the

New Jersey Supreme Court, and how about Justice Britell of the New York State Supreme Court, but, most particularly, Justice Hall? Both are cited in our brief and both saying that they would believe -- and Justice Hall, particularly, saying, I would believe that the TDR would need legislative enactment.

I, also, want to refer briefly, your Honor, to the matter of agricultural zoning. So, to leave that issue and just to wrap it up, the fact of the matter is that what they're seeking to do under guise of an extension of the Zoning Act, is to take another kind of police power and create another kind of property interest, which only the legislature can do. I believe those -- the feeling that that would need legislative authorization is best expressed by Justice Hall. I do want to read just this -- as your Honor suggested, but counsel disagreed from the Farm Bureau letter of December 14, '82 to the Mayor and Council of East Windsor, which is a part of the record, just this paragraph, which amply justifies the point made earlier. "The preservation zone, itself, has problems associated with it. It was estimated that only 50% of it is presently farmed with a balance having little potential for productive farm use. Of the area being farmed, approximately, one-third of that land has little, if any,

capability for producing a reasonable return on invested costs. Several farmers felt better yeilds are obtained in the REAP area than most anywhere in the preservation zone. Prior to final consideration of this site, the area proposed for preservation should be subject to a thorough review by an independent expert in agronomy, to assess both the physical and economic suitability of the site as an area dedicated for long-term farming purposes. Such a review should then be circulated among local farmers for their analysis and comments."

Now, the issue here is, of course, that Mount Laurel said that you should use creative means, but the creative means and the ingenuity are to produce housing, not to prohibit it, not to prolong and delay it, and that's why, again, I come down to the final analyses, your Honor, to the fact that we are no longer dealing with a single question of home rule, whereas they found in Mount Laurel. I remember Mount Laurel very disingenuously said, well, we have so many acres of the entire Burlington County -- and I don't remember if it was 2.5 percent or a smaller number -- but they had a minimal number of acres, and all we have to do is take our share of Burlington County. The fact that we're next to Camden, that we're next to a metropolitan area doesn't mean that we have to do anymore. We

can do the same thing as Bass River. I think that's the analogy that the court used. Well, here is a municipality trying to do the same thing and trying ingenuously to find ways to stop it, not to create housing, because there isn't any housing in that PUD zone, and there can't be a municipality where the state development guide plan says. This is along the turnpike. It's in a metropolitan area. There should be growth here, and the last thing I want to say is, we skip back from legalities to facts, and facts can be disputed, but it is absolutely untrue that this plaintiff has not made on numerous occasions offers and attempts to build low and moderate housing in the municipality. That can and, if necessary, will be documented, but this remains still a legal issue. It isn't quite in the context of Mount Laurel, except procedurally, because what we're doing here is meeting one of another long row of obstacles. You know, I think of Churchill. We'll fight them in the context. We'll fight them in the trenches. We'll fight them.

What is going to happen to this municipality if this is found to be ultra vires? They'll go back and do something else. They'll find another ordinance. They'll find another zoning ordinance if that -- time, time, eat up the developer. Raise the cost of the land

and raise the cost of the possibility of developing at low cost elements, and they have nothing to lose. Time is on their side. That's what Mount Laurel is about, and the substantive due process issue of Mount Laurel may not be before you today. They will be on another occasion, but the court management issues of Mount Laurel are most respectfully before you today, and this must be seen as another tactic in that line.

THE COURT: I'm sure you want to respond.

MR. PANE: First, your Honor, perhaps, as a factual point, it seems to me that in several places in the Mount Laurel decision, it indicates that a community has considerable latitude to plan for diversity once its satisfied its Mount Laurel obligations. For instance, at page 34, the court says, "Finally, once a community has satisfied its fair share obligation, the Mount Laurel doctrine will not restrict other measures, including large lot and open area zoning that would maintain its beauty and communal character." This is not a factual hearing today. We have indicated in our brief the steps we have taken. We have indicated in our brief that we, too, have been concerned about the failure of the PD zone to develop as planned, and one of the purposes of this ordinance was precisely to create a more attractive and more reasonable PD zone.

The appendices in the brief indicate that we have already taken steps to solicit the assistance of developers to provide for the intra-structure to do everything necessary to make that work because it is important to the community to see housing built. Our record of eighteen hundred approvals in the last year or so speaks for itself.

THE COURT: Alright, let's move on to the third set of motions. They deal with consolidation. I think it's your motion, Mr. Pane. Argument on consolidation?

MR. PANE: Your Honor, with all due respect, I think, perhaps, this motion could better be discussed after we had a decision in the motions that the court had just heard, because to some extent, I think, we and Centex share the view that the disposition of those motions should effectively determine what occurs in terms of consolidation at this point.

THE COURT: Well, let's talk about it in terms of the next set of motions, which deal with the amendments to the pleadings and the striking of the counterclaims on the new action. That's really what it's about; isn't it? Isn't that what the consolidation is about, whether these counterclaims go forward?

MR. PANE: Well, your Honor, the counterclaims are

in one case, as a matter of right. The defenses, of course, would have to be added by motion at this time, but it would seem to us that the most significant effect on the consolidation would be the treatment of the two major parts of the cases. Since the counterclaims are in one of the cases, whether they're consolidated or separate --

THE COURT: Well, suppose I strike this ordinance, doesn't that effectively deal with the 1983 cause of action? Then you've got to be able to amend your 1981 case to assert your counterclaim.

MR. PANE: Couldn't the court still retain jurisdiction over the counterclaims in a separate matter?

THE COURT: Why should I?

MR. PANE: Then the court could consolidate.

THE COURT: And if the basis of the litigation was to strike the ordinance as invalid, and if that succeeds, why should the tail wag the dog? Why should the counterclaims stay?

MR. PANE: Your Honor, it's clear from what we've submitted, that our view is that these items all are intimately related, and they should be tried on the same schedule and have the same kind of discovery procedures.

THE COURT: What about the validity of these

counterclaims as to whether or not they should be struck? There's a motion. I consider the fourth part of this, really, in two parts. There is a motion you filed allowing you to file an amended answer and counterclaim and a motion filed by Mr. Petrino to dismiss the counterclaims as premature or for failure to state a claim, and all of that would be important if there was no consolidation, because the first -- the 1983 docket case might be dismissed. So, what do you say about the -- I'll let them argue first on that. That's their motion to dismiss, unless you want to add anything to what Mr. Pane said, Mr. Rosensweig.

No? Okay.

MR. PETRINO: Which motion are we on, your Honor?

THE COURT: The motion dealing with the counterclaims as to the conspiracy.

MR. PETRINO: The motion to dismiss, as well. I think that's the easiest one, your Honor, but we have moved to dismiss or strike the counterclaims filed in the TDR lawsuit as well as oppose the motion for leave to file counterclaims in the original lawsuit and to file additional affirmative defenses. It's been briefed, and it's a long brief, and I won't dwell on that.

I have several comments, however. I believe, your

Honor, for the defendants to succeed on their motion for leave to amend -- and I'll address that first in my motion to add affirmative defenses of the counterclaims. The defendants, who have conducted discovery, must establish a prima facie case that the plaintiff's claims, as set forth in the original lawsuit, are baseless and that plaintiff knew its claims lacked merit and proceeded anyway. I think, your Honor, that the defendants have failed to meet this burden both in their draft pleadings and in the affidavits, which purport to support the allegations of the counterclaims. I think, your Honor, it's indisputable that Centex, New Jersey has set forth in the original zoning allegation meritorious claims. I think that the township's '71 master plan recommended that the Centex site was appropriate for medium density development, and that we submitted a proposal consistent with a master plan, and we followed the procedure suggested by the master plan.

THE COURT: Sure, but their counterclaims aren't that your procedures aren't meritorious, but rather that they are meretricious.

MR. PETRINO: Well, your Honor, for their counterclaim to have any substance, we'd have to be acting on -- with knowledge that we have a baseless claim. If we

have -- if we don't have a baseless claim, they have no counterclaim. We're entitled, last time I checked, to file a complaint to litigate municipal action, and if we have a colorable cause of action, then there is no substance to the defendant's counterclaim.

In terms of the good faith of plaintiff -- and not to dwell on the validity of our claims, because I think they are clear -- the plaintiff points to a November 22, '79 memo, which they'd like you to believe is an "admission" of the lack of meritorious claims. Rather, that contains nothing more than a restatement of Centex-New Jersey's public position. I said it publicly many times, that while the Master Plan Update's Land Use Plan appeared on paper to provide for growth, in reality it was not providing for growth. It was a theoretical growth plan, not a realistic growth plan. In fact, we filed a complaint on July 25, '79, months before that memo was written, and in the Fourth Count of that complaint, we say in Paragraphs 2, 6 and 9 the following:

"2. The Township is a developing municipality which must adjust its land use regulations so as to make realistically possible the development/construction of an appropriate variety and choice of housing for the people who live and wish to live within its borders."

Paragraph 6 provides that, "The Update's Land Use Plan suggest that certain Township lands be zoned for residential development, however, because of a lack of public sewers, merely zoning land in the Township for residential development will not make development of the needed new dwelling units realistically possible."

Paragraph 9 provides, "By failing to suggest a zoning scheme that can be realistically, and not just theoretically, meet the Township's present need and demand for new housing units, the Update and its Land Use Plan do not promote the general welfare and the Update is therefore invalid."

It is hard for me to believe that anyone can read that memo and with the knowledge of the allegations of the complaint and reach the conclusion that the defendant has reached. I think, your Honor, that viewed in the context of the public statements made by Centex prior to the November, '79 memo, this court would have to find that the affirmative defenses and counterclaims that the defendants seek to assert are baseless. We believe that they're brought as part of the township's particular efforts to prevent Centex from developing its site. We, also, see it as an attempt to divert this court's attention from the land use issues and

just another example of a way to justify a harassing discovery technique. We don't believe that the defenses and counterclaims are supported by fact. There has not even been a prima facie case established, and I think that it is necessary in this context for these counterclaims and affirmative defenses to be allowed, especially, since the township has conducted some discovery and has been given thousands of pages of documents to review. For the same reasons, your Honor, that the motion for leave should be denied, the motion to dismiss or strike, also -- our motion -- should be granted. Alternatively, if your Honor doesn't want to preclude the defendant from some time in the future, should they be successful in the '81 litigation, from pursuing this claim, we suggest and under the Penwag line of cases, that your Honor could dismiss these cases as premature.

I think it's clear from a reading of the counterclaims that what they are objecting to - what the township is objecting to is the litigation brought by Centex. If your Honor feels that it is not appropriate at this time to make the factual determination as to whether or not there's a colorable claim, I think the Penwag line of cases suggests how this court should proceed.

THE COURT: Skip for a minute to what I call motion 6. You want to extend discovery to September 9. You both agree to that; isn't that correct?

MR. PETRINO: Well, it was my motion, your Honor, and I -- there was no opposition, and I assume that's an agreement.

THE COURT: Well, if that's true, then, although, you argue that so far their counterclaims only deal with things like the Penwar decision dealt with and it should be tried after the case is over, why shouldn't they be allowed to list these affirmative defenses, continue with discovery, and if they find something that's fraudulent or worthwhile in discovery over the summer, be able to assert that as a defense to what is you are after? That doesn't give him the relief that one would get from this kind of lawsuit, but it still permits him to go ahead.

MR. PETRINO: Clearly, they will be permitted to continue discovery. The only problem with allowing the affirmative defenses to become part of the case now is that I don't believe there's anything in the affidavit submitted in support of the motion that suggested an affirmative defense of any merit. If, as a result of discovery --

THE COURT: But affirmatave defenses are different

than a counterclaim, because they don't seek relief. They seek to prevent a complaint, and, although, I don't mind giving you my summer telephone number, I can see that during the course of this discovery you are going to get to a point where they're asking questions and looking for documents with something, and you're going to say, no, we don't have to give you that.

MR. PETRINO: We already reached that point, your Honor.

THE COURT: If I rule that these aren't proper defenses. And, yeah, they might be able to find something over the summer using the full and free spirit of discovery. That would then permit them to move, if I grant your motion now, would permit them to move later to file a counterclaim.

MR. PETRINO: Your Honor, I have no problem as long as I can reserve the right to move to strike these defenses, so that they don't have to become part of a trial.

THE COURT: Okay. Now, do you want to respond to that?

MR. ROSENSWEIG: Your Honor, I think you put your finger on the issue. We want to stay in for discovery, and I think at the appropriate time, --

THE COURT: You mean you want to stay in for dis-

covery and not assert any affirmative defenses to any of the claims made and give up your claims for attorney's fee and damage under the Civil Rights Act?

MR. ROSENSWEIG: Of course not. What I'm saying is we want to have those held in, have the ability to utilize the free and liberal discovery rules, and if we don't prove our case, Mr. Petrino has his remedy.

MR. PETRINO: Your Honor, I made my statement. The context of your statement, that the counterclaims would not be allowed, I just want to make that clear for the record.

MR. PANE: There's been a misunderstanding. I assumed that the counterclaims would be allowed provisionally, so that discovery could proceed on them. Our position, your Honor, is as Mr. Rosensweig indicated, that we believe there is enough information in the documents provided to show that there is a possibility of a case. We, in good conscience, can't say that it's definite, but on the other hand, there's enough there, so that in our view we should be allowed to see if there is more. If there isn't, we're not going to be vociferous in opposing a motion to dismiss. We don't file superfluous claims.

THE COURT: I take it you admit that what you found so far isn't sufficient to support a counterclaim?

MR. PANE: We believe it is, but there is, certainly, dispute. To put it another way, your Honor, there's enough to support the counterclaim. Whether there is enough to have a finding in our favor ultimately after a full hearing on the merits, is another issue.

THE COURT: Okay, that brings us to my section 5, which is Mr. Goldshore's motion for summary judgment in favor of the Municipal Utilities Authority.

MR. GOLDSHORE: Your Honor, my motion presents the court with the opportunity to simplify this litigation by dismissing one of the parties that really has no place in it. I think if we return to a concept of fair play in these kinds of lawsuits, where developers sue municipalities, we find, of course, the township is a defendant, the planning board is a defendant, and now, the Municipal Utilities Authority, some two years after the filing of the original lawsuit, becomes, also, a defendant. Applying Mr. Petrino's logic, I think you could justify the Environmental Commission being a defendant in every dispute between a developer and a municipality if that Environmental Commission, during the process of the preliminary review, sends a letter saying, well, we have to be concerned about the environmental issues. Or, for that

matter, we could find in every developer versus municipality lawsuit, the Board of Health or the Building Department or the fire department or the plumbing agency.

The police department, the Board of Education, or any of a number of municipal entities that could comment on development proposals, in their earliest stages, of exercising the authority granted to those municipal agencies, are finding themselves as a result of carrying out their responsibilities pursuant to law as an additional defendant. I think in the interest of simplifying what is already a very complicated lawsuit, that we should give very careful attention to the attempt by the Municipal Utilities Authority to clarify and narrow the issues before this court. Very frankly, all the papers, all the documents that have been presented to the court show that at the earliest stages, the developer went first to the Department of Environmental Protection, said to the Department of Environmental Protection, How about approving this onsite sewage disposal system. It's going to discharge 300 to 600 thousand gallons a day of residental and commercial sewage into the ground water of East Windsor and in the vacinity of a subsurface water supply, but how about, MUA, approving this. When the Utilities

Authority became advised of that, the Utilities Authority said, one moment, give us an opportunity to comment on this, give us an opportunity to participate, don't rush the judgment on a development, on a proposal that could seriously impact on water quality. The developer came to the Utilities Authority and said, How about conceptual approval. Cut to its essence, what the developer was looking for was one approval that that developer could broker, could use as a leverage to get additional approvals, and the Utilities Authority did not grant that conceptual approval. Instead, we find that the Utilities Authority in the spirit of cooperation with the developer commissioned a hydrogeologic study. Phase 1 was completed and cost about $6000, which even in 1977 didn't buy a lot of hydrogeologic investigation. The result of that study, that was jointly commissioned and jointly supervised by the developer and the Utilities Authority, were inconclusive. An additional study was necessary.

We're in 1979, and the developer's engineer writes to the Utilities Authority, and he says, Put everything in a hold pattern. We're not going to try to broker our approval. We're not going to try to get our first approval from the Utilities Authority. We're going to proceed with getting zoning approval, and if your Honor

took note of the affidavit that Mr. Petrino submitted, essentially, they're copies of letters that I sent to Mr. Petrino during the course of his initial litigation with the municipality, when my client wasn't a party, and those letters clearly state that the practice, the consequenting of approvals should be zoning approvals first, then utility approvals. Don't come to the Utilities Authority with your idea, with your embryonic conception. Get Planning Board approval and, of course --

THE COURT: So, the Planning Board can turn down an developer because there is no sewer capability at site?

MR. GOLDSHORE: I don't think so, your Honor.

THE COURT: I have a case from the Appellate Division that said that was permissible in Lawrence Township.

MR. GOLDSHORE: I'm not familiar with all the facts in that case, but the Municipal Land Use Law at, I believe, Section 28 -- but could be 38 -- says that a major subdivision may be conditioned upon adequate sewage. It can't be denied.

When you come in with a complete application under the Municipal Land Use Law, that local Land Use agency, whether it's the Planning Board or Zoning Board, can

condition your land use approval on your getting the developer getting our approvals.

THE COURT: But don't they say that doesn't do them much good, because you are scheming with the township? So, even if they force the township to give them approval, they've got you there to make sure they don't get the sewer --

MR. GOLDSHORE: Well, they're saying that, and if you look at the letters that they submit in support of this, the bald allegations of conspiracy -- and, indeed, when you plead to conspiracy, which is the easiest thing to plead -- I mean, we could have --

THE COURT: The easiest thing to prove; isn't it?

MR. GOLDSHORE: I think there are a lot of things that are easier to prove than conspiracy. If anything was coordinated -- the review process in East Windsor, as it took place with respect to Centex, was the very antithesis of a conspiracy. What it was was a coordinated approval process, where the Utilitites Authority was adsising the Planning Board, as it is supposed to do under the Municipal Land Use Law, about the constraints that the environment places on a proposal such as this.

All we have -- the letters from the Chairman of the Utilities Authority to the Planning Board and

to the governing body indicate that -- they indicate that the concern is there, and there's no use denying that the Utilities Authority was concerned about at proposal that would discharge these huge amounts of residential sewage and, perhaps, industrial sewage into the subsurface soils in the vacinity of the Twin Rivers well. Certainly, the Authority was concerned about that, and it had the obligation to be concerned about that, but this isn't a case of conspiracy. All we have are the letters. They've always been available to the applicant, and in terms of conspiracy, it's not there and it can't be there, because what we have is an agreement to execute the statutory responsibilities of the Authority to assure that the environment or water supply is protected for all the residents.

We've always said to Centex, and in my recent letters to Mr. Petrino, that he's chosen to attach to his appendix -- I said, Get Zoning Board approval, and we will consider your application on the same footing as any other land owner. That's been the established policy of the Authority. What you try to do was to jump ahead in line, and you came forth with an innovative concept, and you told us to put it on hold in 1979. In terms of the conspiracy, the problem, too, is this is a very stale claim in terms of the 45-day

rule. Under Rule 4:69 of the Court Rules, 45 days. Okay, 90 days; extended. 90 days. A hundred and eighty days. No, in this case what the applicant has done, what the developer has done is he waited years to make a claim against the Authority, and I think one must assume that, if one reasons, is a tactic on behalf of Centex. Centex talks about municipal tactics, but let's look at their tactics. Their tactic is to bring in another municipal agency and cause that municipal agency to spend funds to defend themselves in what is, really, a time-barred, meritless claim where vague -- the vaguest allegations of conspiracy are made, but all we have are letters showing a legitimate concern by the Utilities Authority concerning the environment. Not only the letters that Mr. Petrino attached to his moving papers, but the letters that I've attached to my answer and to my moving papers show a legitimate concern for the environment, not a conspiracy.

THE COURT: Go ahead.

MR. PETRINO: Your Honor, Mr. Goldshore, on behalf of the MUA and his papers raises purely procedural issues. The problem with his brief is that he assumes that our claim is for the wrongful refusal to grant a conceptual approval. That's the basis of his argument,

and he makes the various procedural points in that context. Unfortunately, your Honor, that's -- unfortunately for him, fortunately for us, that's not our claim. Our claim is that the MUA, acting in concert with the Planning Board and the Council, has refused -- embark on a policy to refuse to extend sewer water lines in various portions of the municipality, so that those portions could not develope. Now, it's clear from a review of the pleadings, that that is the basis and thrust of our complaint, a complaint, by the way, or our counts of the complaint dealing with the MUA -- and by the way, your Honor, we have just begun to commence discovery on that claim. We do not have any discovery from the EWMUA as of this point in time. In my response to a request for admissions, specifically, paragraph 9, we clearly state, "that the subject matter of the Counts of the Amended Complaint directed against the EWMUA relate, in part, to the concerted and continuing efforts of the Township Council, Planning Board, and EWMUA to illegally control growth within the Township in direct violation of Plaintiff's constitutional rights."

It's not as Mr. Goldshore suggests, a claim based upon wrongful refusal to approval an application for conceptual approval to handle sewage on site.

THE COURT: Then what's the relationship of that to the fact that your engineer told him to put your plans on hold? How does that fit in?

MR. PETRINO: Well, in terms of Rule 4:69-6, it sits in in the sense that at that point, it became clear that, since sewer lines didn't exist and the water lines didn't exist in the area, and that there was a predisposition to deny Centex's request to build an onsite facility, that there was no reason to move ahead. It would have been a futile gesture, and under 4:69-6, the case law is clear that under that context, we're not obligated to move forward.

THE COURT: What indicates such a predisposition?

MR. PETRINO: What indicates? There was a letter, your Honor, and it's attached as Exhibit D to our brief in support of the motion to dismiss or strike the counterclaim, written by the Chairman of the EWMUA and submitted to the Acting Commissioner of DEP. The letter was written after DEP had informally reacted favorably to the Centex proposal, and we submit that, your Honor, this letter not only shows an effort on the part of the MUA to exert pressure on the DEP to discontinue its review, but, also, points out the fact that one of the major concerns of the EWMUA was not environmental,but was fiscal, economic, and that this

is consistent with our concept of the conspiracy between Council and the Planning Board. That one of the major reasons why Centex has not been able to obtain approvals in the East Windsor Township is a concern for the fiscal, rather than the land use impacts of the development.

It's clear from the testimony that was produced or educed before the Planning Board on a number of occasions, that this is an appropriate site for development. I don't want to get into, your Honor, all the specific factual contentions of this case, but what that letter shows is that the EWMUA, as well as the Council and Planning Board, people who received copies of that letter, along with the Sierra Club and all the local newspapers, were concerned not with land use issues, but fiscal impact.

Your Honor, we've addressed point-by-point why the procedural -- why the procedural arguments raised by Mr. Goldshore on behalf of the MUA must fail. I'm not going to go over those. I'm sure your Honor has read our brief.

MR. GOLDSHORE: Your Honor, with respect to the letter that Mr. Petrino refers to, it's clear that the bulk of that letter is concerned with environmental considerations. It's a June 2, 1977 letter, by the way,

at the earliest stages. This is at the time when Centex was trying the end-run approach to the DEP, and the issues raised by the Chairman there are impact on ground water supplies, deep well injection, recharge beds, a concern for industrial waste, the storm water runoff and ground water runoff concerns, the presence of potable water supply in the area, and other natural factors.

With respect to the economic arguments, certainly, Mr. Petrino misconstrues the obligations of Utilities if he does not think that Utilities must be mindful of the cost of any surface both to its rate payers and its bond holders. Its present rate payer and its future rate payers, and in consideration of economic considerations or a reflection on them is certainly proper by the Utilities Authority. But what we have, really, is an indication in 1979, in July of 1979 -- if there was a conspiracy, it ended in July of 1979 when, indeed, the applicat told us to go away. He said -- the applicant's engineer, on July 16, 1979 said, Put it in a hold position, MUA, until the status of this matter is resolved with the township. So, to the extent that there was any unholy alliance -- and I think the letters indicate exactly the opposite -- then that situation ended in 1979, and we refer to the rules

of court. The enlargement of the 45-day period within which to bring a prerogative writ matter, can be enlarged only when the interest of justice require. We referred the cases --

THE COURT: Don't they say you have a continuing violation?

MR. GOLDSHORE: Well, that assertion flies in the face of their advice to the MUA, which in 1979 was, go away. It's very difficult to envision --

THE COURT: Did they tell you in 1979 to stop planning sewer and water lines in that portion of the township or to stop considering planning of a particular treatment project on their property?

MR. GOLDSHORE: Well, the letters from the plaintiff's engineer is "that the Centex matter should be kept in a hold position."

THE COURT: What was the Centex matter?

MR. GOLDSHORE: The Centex matter included both the -- the Centex matter involved the provision of Utilities' service to the Centex property, whether, indeed, it was an onsite sewage disposal system or the provision of lines. Why would the Utilities Authority extend lines to a distant development when it's engineer said, put it in a hold position in 1979? I think the engineer's letter was clear. It was a direction

to go away. We're going to settle our land use matters with the municipality, and then we'll come back to you. This isn't a situation where a plaintiff was not represented by counsel at all stages in the proceeding. If there was a reason to take an appeal, it was in 1979. It wasn't in 1982.

MR. PETRINO: Your Honor, I think your Honor has eluded to the portion of the brief that I would mention, also, and that is that what we're talking about here is the obligation of the MUA that didn't end on July of '79 to make decisions with regard to where sewer lines should be built and extended. What we're seeking to enforce by way of mandate, not review of any action -- they certainly didn't take any action -- is our right to sewer and water.

THE COURT: Did you ask them for it?

MR. PETRINO: What?

THE COURT: Did you ever ask them for it?

MR. PETRINO: We're talking about their ongoing statutory obligation to provide sewer and water within their franchise area, within the area that they're authorized to serve.

THE COURT: Did you ever ask them to provide it to the area in the municipality in which you own property?

MR. PETRINO: We never submitted a letter to them to that effect, no, your Honor. We're talking about their continuing obligation, as similar to an obligation of the municipality under a Municipal Land Use Law, to continue to make decisions regarding where -- in this case -- a sewer-water line should be extended. That obligation didn't end in July of '79 when we stopped discussing with them a proposal for onsite treatment. They have that obligation. They had the obligation in August of '79. They have the obligation today to continue to ensure that they are meeting their statutory obligations to provide sewer and water to the people who live or wish to live within their franchise area.

THE COURT: Okay, we're take about a ten-minute break, and then I'll announce my decisions.

(At which time a recess was taken.)

THE COURT: Alright, I have prepared notes from which I will enter an oral opinion. I have copies of those notes for each of you and a set of orders for each of you. I will cover all the motions including from the beginning, since I've just received a copy of the brief submitted by the New Jersey Association of Professional Planners and have considered that.

First, the New Jersey Builders Association moves to

intervene as Amicus Curiae. This motion is denied. Although the requirements of Rule 1:13-9 has been fulfilled, the Builders Association filed a brief on the merits, which, I believe added nothing to assist the resolution of the matter, not that it contained nothing, but its arguments were the same on the issue with which it was concerned as that of the plaintiff's. Therefore, I believe everything has been amply covered by the plaintiff.

The New Jersey Association of Professional Planners, also, moved to intervene as Amicus Curiae. Apparently, the brief was filed here in the courthouse and was misplaced and was, apparently, filed on April 22. I have reviewed that brief, and I will discuss its contents during the course of my ruling on the motions for summary judgment with regard to the 1983 cause of action. The point of view expressed there is, basically, that a TDR concept is nothing more than a simple extension of cluster zoning, and its purpose is to preserve open space, including agricultural areas. That, basically, was argued this morning by Mr. Pane. Their arguments as Amicus Curiae are limited to whether TDR is permissible under the Municipal Land Use Law and without specific reference to the East Windsor ordinance. That particular issue has, I believe, been adequately briefed

and argued by the parties to this matter. There are some interesting arguments raised in this brief with regard to what property owners may do in terms of open space area in a cluster zoning ordinance, and that there are different ways that is handled by different municipalities. My problem with that is that, although that may be, I don't get enough out of that to change my mind as to what I see in terms of TDR as a basis. So, I'm going to deny that motion for two reasons. First, because I've, also, denied the motion for Amicus Curiae from the Builders Association, which was covered by the plaintiff, and I think this is, also, covered by the defendants as far as the Planners are concerned. Therefore, although I stated earlier this morning before Mr. Norman appeared here -- and he should enter his appearance on the record.

MR. NORMAN: Thomas Norman for the New Jersey Chapter of the American Planning Association on a motion for leave to appear as Amicus Curiae.

THE COURT: Although I said before that it was denied, because I received nothing, except a letter indicating that moving papers would be filed, I'll consider that they were filed, but that the motion is, also, denied.

Next is the group of motions dealing with the

validity of TDR as a concept. Plaintiff's move for summary judgment on Count 1 of the 1983 complaint, which is Docket L-6433-83. Defendant's cross-move for summary judgment. Then defendant's move for summary judgment on Counts 2 and 9 of that action, and plaintiff's cross-move for summary judgment on Count 2.

Ordinance 1982-16 is invalid because it creates zones in East Windsor Township dependent upon transfer of development rights, a zoning concept not authorized by the legislature. Having reached that conclusion, I think I need only deal with the motions for summary judgment and cross-motion for summary judgment on Count 1, and the motions with regard to Counts 2 and 9 need not be considered at this time. Summary judgment is granted to plaintiff on Count 1 of the complaint, and defendant's cross-motion for summary judgment on that count is denied. Similarly, defendant's motion to consolidate this action with the earlier action, Docket No. L.51177-80, is denied as is plaintiff's motion to dismiss the counterclaims filed in the instant action.

Summary judgment, of course, may only be granted when there are no material questions of fact to be decided. All parties agree that this matter is proper

for such disposition and a motion and cross-motion to that end have been filed. Undoubtedly, this is the proper procedure, as the parties argue that the ordinance is either valid or invalid on its face. See Brunetti v. New Milford, 68 N.J. 576 (1975); Morristown v. Hanover, 168 N.J. Super. 295 (App. Div. 1979); Bridge Park Co. v. Highland Park, 113 N.J. Super. 219 (App. Div. 1971). Can everybody hear? I don't want anybody to have come this far and not be able to hear what's going on. Okay.

The constitution provides that the legislature may delegate certain zoning powers to municipalities permitting them to adopt ordinances, which either regulate the construction, nature and extent of use of buildings in specified districts, or regulate the nature and extent of the uses of land in specified districts. See, N.J. Constitution (1947), Article IV, Section VI, paragraph 2. The legislature delegated such zoning authority in the Municipal Land Use Law. See, N.J.S.A. 40:55D-62, which repeats the terms of the constitution: "The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon." Any zoning ordinance must conform to those limits or it is void, because a municipality has no inherent

power to adopt a zoning ordinance. See, Dresner v. Correra, 69 N.J. 237 at 241 (1976) and Rockhill v. Chesterfield Township, 23 N.J. 117 at 125 (1957).

To begin with, the language of the enabling act has no express reference to or authoriztion of "development rights" or the TDR concept. One must look to N.J.S.A. 40:55D-62 and 65 as the source of the municipality's power, rather than N.J.S.A. 40:55D-2, which sets forth the "intent and purpose" of the Municipal Land Use Law. Defendants argue that the latter section is the basis for the implied authority of East Windsor Township to enact the ordinance in question. Subsections (a), (e), (g), (i) and (j) demonstrate the legislative concern with preservation of agricultural land and stand for the proposition that such a concern or purpose may be the basis for an ordinance creating a zone for agricultural uses. But the power to create such a zone and to restrict land, herein, to such uses comes from sections 62 and 65, rather than from section 2. An examination of the effect of this ordinance will demonstrate that East Windsor Township has, herein, exceeded its power to zone.

In order to preserve agricultural land, the ordinance creates an AP (agricultural preservation) zone which includes approximately 3000 acres in the south-

eastern and southern parts of the township. Permitted uses are limited to agricultural, roadside produce stands and farm dwellings. Conditional use provisions permit single-family dwellings on farms at a ratio of one per 20 acres and on smaller farms if the land is not suitable for agricultural preservation. Plaintiff owns some 600 acres in this zone, all of which is designated as "growth area" in the State Development Guide Area. An owner of land in that zone may be granted some "development rights" for which he gives the township a recordable covenant against future nonagricultural use of the farmland. The ordinance defines a development right as "an interest in land which represents a certain right to use the land for residential or nonresidential purposes."

Such development rights may then be transferred by such landowners to developers of land in another portion of the township. That other land, consisting of, approximately, 700 acres, is in the REAP (residential expansion for agricultural preservation) zone. Permitted uses in that zone are agricultural, single-family dwellings on two-acre lots and planned development. Higher density development for single-family residences, townhouses, or garden apartments is permitted if development rights are transferred according to

schedule. Thus, landowners desiring to develop residential units in the REAP zone of any significant density must purchase development rights from landowners in the AP zone and surrender them to the municipality in order to obtain approval of the desired higher density development.

This court is to decide whether the Municipal Land Use Law authorizes municipalities to adopt zoning laws creating a preservation zone, providing for separation of development rights from land ownership in that zone, and permitting development of land in a receiving zone conditioned on purchase and transfer of such rights. I think it does not when the ordinance involves a departure from traditional concepts of zoning and planning permitted by the Municipal Land Use Law. The legislative development of N.J.S.A. 40:55D-65 demonstrates that changes in the traditional concepts are made by the legislature, rather than by the municipalities. If specific authority was provided for such mundane matters as creation of flood plain area, requiring taxes to be paid prior to subdivision approval, permitting planned developments and zoning for senior citizen community housing, it is clearly necessary for this propcsed zoning, which impacts on title interests and taxation problems so seriously that statewide uniform regulation

is required. Ordinance 1982-16 of East Windsor Township is an ordinance, which departs from the accepted concepts of zoning and planning, no matter how literally construed.

Plaintiffs argue that the two bills were introduced by legislators to regulate the concept of transfer of development rights, and they claim that this indicates the legislature's intent to exclude such authority from the Municipal Land Use Law. That is not persuasive authority for such an argument, but these proposed bills do indicate the complexity of the issue and the need for uniform regulation. See, A-3192 (1975) and A-1509 (1978). Certainly, after the decision by the Supreme Court in South Burlington County NAACP v. Mt. Laurel Township, 92 N.J. 158 (1983), the State Development Guide Plan (May 1980) has become a very important document for Mount Laurel type disputes, and the other causes of action related to the instant case has such disputes at issue. The extant fact question of whether the AP and REAP zones were located in a manner inconsistent with that plan indicates the need for uniform regulation of the criteria for delineating the preservation and transfer zones in a TDR plan. Such regulation was proposed by A-1509 (1978), as was a scheme for determining how development rights were to be assessed,

taxed and sold or exhanged.

Under this ordinance, the conditional uses of higher density residential development are not conditioned on traditional land uses. Instead, they are conditioned on relinquishment of part of the fee ownership of property -- the development right -- and this requires uniform regulation. One need only look to the development of condominium ownership and remember the multitude of planning and zoning applications for condominium developments. The result was a regulatory statute: N.J.S.A. 46:8B-1 et seq. Probably more directly on point is Bridge Park Company v. Highland Park, 113 N.J. Super. 212 (Appellate Division 1971), where the zoning ordinance defined a garden apartment as a building or series of buildings under single ownership. The municipality did this in order to exclude horizontal property regimes and condominiums, but the court held that the enabling act then in force (N.J.S.A. 40:55-30) did not permit a municipality to use a zoning ordinance "to regulate the ownership of buildings or the types of tenancies permitted." In the matter at bar, East Windsor Township has enacted an ordinance which regulates the ownership of property rather than the physical use of land and structures. See, also, Metzdorf v. Kumson, 67 N.J. Super. 121 (Appellate Division 1961),

where the zoning ordinance was invalidated because it prohibited transfer of title to land by specific devise.

Defendants argue that this ordinance is sustainable as an exercise of the ordinary police power of the municipality pursuant to N.J.S.A. 40:48-2. However, as noted at the start, the constitution only permits the legislature to empower a municipality to regulate land use within its borders, and the vehicle by which the legislature granted such power is the Municipal Land Use Law and only that. There is no doubt that Ordinance 1982-16 fulfills many of the worthy purposes of zoning legislation, but that it does so without any statutory power to achieve such purposes. The Planning Association argued the same thing, I think, in their brief, I think, when they stated that there are valid purposes of zoning to be achieved by this particular technique. And as I've just said, I agree that the concept is worthy and should be certainly considered as a possible pool in land use development and growth in this state, but, I believe, that because of the other implications of taxation and title questions, that this has to be addressed on the uniform basis by the legislature.

Finally, there is the issue of remedy -- that is,

what happens when summary judgment is granted to plaintiff? The ordinance contains a severability clause, and defendants rely on that to protect all parts of the ordinance not specifically related to TDR. The entire background of the enactment of Ordinance 1982-16 shows that it was a unitary plan to adopt the TDR concept, and that the zones created were only created to fit into the overall TDR scheme. This is the dominant purpose of the ordinance, no one part is functionally independent of another, and TDR was the significant inducement to adoption. Thus, by the rule of Inganamort v. Fort Lee, 72 N.J. 412 (1977), the entire ordinance is invalid notwithstanding the existence of a severability clause.

Plaintiff says the next step is for the court to order the township to rezone the area within 90 days and submit the new ordinance to judicial review. There is nothing to demonstrate any substantial legal problems with the prior ordinance, except as it is challenged in the related matter of Docket No. L-51177-80. The land in question is not unzoned. Cf., Petlin Associates, Inc. v. Dover, 64 N.J. 327 (1974); Morris County Land v. Parsippany-Troy Hills, 40 N.J. 539 (1963). I'll talk more about this when I get into the question of the defenses and the counterclaims.

Defendants then move to consolidate the two actions. This motion is denied, because the 1983 action has been terminated by the grant of summary judgment to plaintiff declaring the entire ordinance invalid.

That leads us directly to defendants' motion to file amended answer and counterclaim in the 1981 case, which has the 1980 docket number. This motion is granted in part and denied in part. That is, the defendants may amend their answer and assert the affirmative defenses set forth in the proposed "Amendment to Answers", but they may not file the proposed counterclaim.

Defendants state that the essence of their counterclaim is that plaintiff and/or its officers, agents and employees desired to turn a loss into a substantial profit by tortiously threatening and seeking to coerce the township into rezoning plaintiff's property. They claim the plaintiff committed fraud, violated the civil rights of the township and its inhabitants and, filed a baseless lawsuit (meaning the instant 1983 case). The basis of these claims is a series of internal memoranda from plaintiff's files indicating litigation strategy which this court finds to be ordinary and usual in prerogative writ cases involving

rezoning requests by land developers. That is, presentation of a worst case plan or one legally noxious is often done by developers to convince the municipal authorities that the proferred plan should be approved.

In general, the counterclaim sounds as if it was a complaint for malicious use of process. All parties acknowledge that such a claim may not be brought by counterclaim, but must await termination of the underlying action. See, Penwag Property Co. v. Landau, 76 N.J. 595 (1978). Defendants argue that such is not the true nature of their counterclaims, but they seek redress for conspiracy, harassment and other tortious conduct. It seems to me, however, that the defendants are merely trying to rename a rose, and the familiar cliche is pertinent. Such claims will be permitted as affirmative defenses, and if they are established, they may support an action for malicious prosecution in the future. Since nothing on the fact of the Centex memoranda, when read in context, indicates unusual or bad faith action by the plaintiff, the claims are facially insufficient. Howerver, because I will grant additional time to complete pretrial discovery until September 9, 1983, defendants may seek further support for the presentation of these claims as affirmative defenses at trial or for the renewal of this motion.

There's another motion that relates to this, in which plaintiff moves to dismiss counterclaims filed in the 1983 action. I'll grant this motion because the counterclaims have been considered and dismissed in connection with the earlier filed action.

Now, as to trial and whether or not these affirmative defenses may be struck or the counterclaims successfully added, I think that we should consider trying what plaintiffs call a Mount Laurel issue on the two-acre zoning claim and the use or non-use of the PD zone. Your discovery will be over right after Labor Day. What I'd like you to do is contact me as soon as the -- well, we're in session the day after Labor Day. I was going to say the new term, but the new term begins July 1 this year, and we should set up a status conference in the way of a pretrial conference. I'd like you to be prepared at that time to tell me how long its going to take to try the case, how many witnesses you're going to have and have suggestions for breaking the litigation up, so that we don't try it all at once. But that if this is an issue that would be the predominant issue, that would then require, if the plaintiffs prevail, a new ordinance, or if the defendants prevail, the plaintiffs will have to do whatever steps they deem necessary. That will be, basically, dispositive

of -- I don't know, tactics or where you stand and let you each move off to another step outside of the court. I think we should consider trying to break that issue out of litigation, and that would, also, impact on the MUA.

Now, the next set of motions deal with the MUA's motion for summary judgment in the 1981 action, and in this instance, East Windsor MUA moves for summary judgment claiming: (1) there is no legally cognizable dispute because Centex never made a complete application and it requested a stay of the preliminary application it had been processing; (2) the claim for a violation of the federal civil rights act (42 U.S.C.A. section 1983) is barred by a two-year statute of limitations; (3) no notice of claim was filed as required by the Tort Claims Act (N.J.S.A. 59:8-8) and EWMUA is immune from liability thereunder for its licensing and permitting activities; (4) the preregative writs claims were not brought within the time limit permitted by Rule 4:69-6; and (5) Centex failed to exhaust administrative remedies as required by Rule 4:69-5.

Centex replies by arguing: (1) the Tort Claims Act does not apply to a damage claim under the federal civil rights act or to an action seeking injunctive or declaratory relief; (2) the proper statute of limitations

is six years or two years from discovery of the cause of action; (3) the complaint was amended timely under Rule 4:69; and (4) it is not required to exhaust administrative remedies because there are important constitutional issues raised in this matter and because such exhaustion would be futile.

As we all know, summary judgment will be denied if there is a genuine issue as to a material fact as long as the statute of limitations has not been violated. It will, also, be denied if discovery is incomplete, if discovery would lead to revelation of such issues of fact. The gist of the amendments to the complaint, which added East Windsor MUA as a defendant is the claim that it, the governing body and the planning board "acted in concert to formulate an exclusionary land use plan for the Township that utilized the lack of sewer plant and line capacity as a key element to prevent or limit development in East Windsor Township." Count 14 seeks damages under the federal civil rights act for the alleged conspiracy. As such, the notice of claim and immunity provisions of the Tort Claims Act do not apply. See, Gipson v. Bass River, 82 Federal Rules Decision 122 (District of New Jersey 1979); T & M Homes, Inc. v. Township of Mansfield, 162 N.J. Super. 497 (Law Division 1978); Lloyd v. Stone Harbor,

179 N.J. Super. 496 (Chancery Division 1981). Counts 15 and 16 ask the court to require East Windsor MUA to approve the extension of its water and sewer lines to plaintiff's property, so plaintiff may develop its land. Since no relief by way of damages is sought in these two counts, the Tort Claims procedures would not apply. N.J.S.A. 59 :1-4. I conclude that neither the notice provisions, nor the immunity provisions of the Tort Claims Act impact on claims under the federal civil rights act.

As to the applicable statute of limitations, the rule requires reference to the most appropriate state law. See, Johnson v. Railway Express Agency, 421 U.S. 454 at 462 (1978). The nature of the conduct plaintiff complains of is a conspiracy to prevent it from developing its land -- a tortious injury to real property. As such, N.J.S.A. 2A:14-1 is directly applicable and its six-year period of limitations governs. Compare, Gipson v. Bass River, supra.

The 45-day limitation of Rule 4:69-6 cannot fairly apply to this situation. As plaintiff points out, nothing is being done by EWMUA regarding plaintiff's property, so the doctrine of continuing wrong is pertinent. But more than that, the interaction of a utilities authority with other local administrative bodies

is obvious and necessary in any large scale land development today. If plaintiff can prove the existence of a conspiracy, all conspirators would be liable if the conspiracy involved a deprivation of due process of law or equal protection of law under the U.S. Constitution. Along those lines, there's a case called Lawrence Wood Sales Corp. v. Lawrence Township Planning Board and the Township of Lawrence. I believe it's an unreported opinion of the Appellate Division, decided February 10, 1983, in which Lawrence Township land development ordinance allowed subdivisions where public sewage and water facilities were available, and if there was individual sewage, facilities had to have, at least, 60,000 square feet. Plaintiff applied for some approval and was rejected because he was unable to give assurance that the public sewage facilities would be available, and the plaintiff said that, although this can be required on an application for final subdivision approval, it can require it on a preliminary application. The court referred to part of the Municipal Land Use Law, 40:55D-38(b)(3), which provided that an ordinance requiring approval by the planning board of either subdivisions or site plans or both, shall include provisions insuring sewage facilities and other utilities necessary for essential

services to residents and occupants. So, they have this in their ordinance, and they required a subdivision applicant to give them written assurance, which, obviously, they couldn't do. The trial judge, which was me, found that sewage facilities were neither available, nor planned because there was a letter from the local sewage authority which clearly stated that such a project was not contemplated, and the Appellate Division upheld that.

Now, that's different than this case, because that's an application for a subdivision approval. But it stands for the possibility of the validity of the plaintiff's action that Utilities Authority is an important agency in any land use or land development on a large scale today. So, there may be a valid cause of action here. There may not be. I don't want the Utilities Authority to spend any more time in the litigation than necessary.

Centex will undoubtedly have to comply with applicable administrative regulations if it prevails against the municipality, and the usual relief would be a remand for further proceedings in accordance with the court's rulings on the substantive issues. Then both the state DEP and EWMUA would be involved with plaintiff's plans. But because of the nature of

the overall complaint, alleging a conspiracy by three municipal bodies, it would be uneconomic to dismiss the claim against the East Windsor MUA now and require another action if plaintiff prevails against the township and the planning board, but has problems with the utilities authority. Therefore, although the application by Centex to East Windsor MUA was voluntarily place "on hold", East Windsor MUA might be liable for participating in an illegal conspiracy against plaintiff, and its administrative or regulatory actions involving plaintiff's property might be evidential as to plaintiff's main claims for declaratory or injunctive relief. So, for those reasons it would stay in this action so all matters can be resolved expeditiously. I would encourage that the MUA to fully participate with everybody else during the next three months of the discovery with an eye towards moving again to dismiss the complaint in September or to be placed at our pretrial conference in a status of just a "bystander." It may be that this particular claim should stand aside and another issue be tried first, and that other issue might lead to no further need for litigation. The expenses that the MUA is undergoing are strickly legal, and I think that for the time being, the MUA should stay in the case.

In conclusion, the motion for summary judgment here by the East Windsor MUA must be denied because there are material issues of fact to be resolved. It, also, appears that further discover is needed concerning the basis for the conspiracy claim, and that, too, requires a denial of the motion.

The sixth area of dispute is not a dispute, and that is plaintiff's motion to extend discovery until September 9, 1983. This motion is granted as no opposition is offered.

Now, I have for you sets of orders that cover each of these motions and sets of my notes on which this oral opinion was based. I assume, too, if you are going to seek any type of interlocutory relief, you might need this transcript, but 97 percent of what I said is in these notes, and I think that could get you off to a start there. Otherwise, I don't want you to delay the discovery, even though you are moving on to the Appellate Division for an interlocutory relief because there isn't going to be any action from the Appellate Division this summer, other than to grant or deny the motion for relief of interlocutory appeal. That should not stop the discovery. This matter has been going on for quite some time. Several times, both sides advised me that you were close to

resolving your differences and that didn't work out. But I think we're right close to getting to a decision on whether something should be done about the original lawsuit. It may be that that won't be tried in this court. The Supreme Court has been surveying, as you all know, people involved in various types of litigation after soliciting the bar to advised it of possible Mount Laurel disputes, as well as the bench. This case was one of those in which, I believe, you were all -- at least, the lead counsel were contacted by the Chief Justice's law clerk, as I was, and I assume they are doing this around the State, and there will be a new assignment order coming out of the Supreme Court to start the new term, the July assignment order, and that may, although it may not, designate three judges as Mount Laurel judges. If it does, when we meet in September, if we decide there are Mount Laurel issues and that they are preliminary and should be tried first, it will be assigned to whichever judge has Mercer County in its region. Nobody knows who they are, what the regions will be, or anything about that at the present time. Okay.

MR. ROSENSWEIG: In your opinion, you indicated that the property was not unzoned. In the order you made no mention of it. Is it your Honor's ruling that

the prior ordinance is still in effect?

THE COURT: Yes.

MR. ROSENSWEIG: Should that say so in the order?

THE COURT: Probably. Let's just change the order.

MR. ROSENSWEIG: Okay.

THE COURT: Do you have any idea what the number of the other ordinance is?

MR. ROSENSWEIG: I have the ordinance booklet.

MR. PETRINO: 1918-13, but --

MR. ROSENSWEIG: Let me look.

THE COURT: Is there a name for it?

MR. PANE: I assume it could be referred to as the existing township zoning ordinance section. I mean, their codifies, Gary, will have the sections in particular.

THE COURT: Would you call it a zoning ordinance?

MR. PANE: Chapter 20 of the Revised General Ordinance of Zoning.

THE COURT: Does it have a name?

MR. ROSENSWEIG: Agricultural district?

THE COURT: No, no. The old ordinance.

MR. PANE: The old ordinance, the township zoning ordinance.

THE COURT: East Windsor.

MR. ROSENSWEIG: Right, Chapter 20.

MR. PANE: Chapter 20 of the General Revised --

THE COURT: The zoning ordinance.

MR. PANE: Simply say Chapter 20 of the General Revised Ordinance of Zoning as they existed.

THE COURT: How about, the previously existing zoning ordinance will control development in the township?

MR. ROSENSWEIG: Known as Chapter 20-17.

THE COURT: Is that alright? The previously existing zoning ordinance will control development in the township.

MR. PANE: Yes.

THE COURT: Well, if you will take the copy of the order that you have and turn to page 2, add to paragraph 2 of this order at the very end, after the word "effect," put a comma, and it says, "The previously existing zoning ordinance -- "

MR. PANE: "shall"?

THE COURT: "will control development in the township," and that should cover it. You want to write me a 12-page brief as to what two words I should add?

MR. PANE: Perhaps control is best.

MR. ROSENSWEIG: Shall be applicable?

MR. PANE: Shall be enforced and effect?

THE COURT: Leave it as control. You know what it means.

MR. PANE: Alright.

THE COURT: Youre the township lawyer. You tell them what to do.

(At which time the matter was concluded.)

* * *

C E R T I F I C A T E

I, ANNE C. NEMETH, being a Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of the proceedings as taken stenographically by me at the time, place and on the date hereinbefore set forth.

Anne C. Nemeth
ANNE C. NEMETH, C.S.R.

May 25, 1983
DATE