ML - East Windsor

8/10/83

Brief for Appellants Mayor and Council of Twp of East Windsor + Planning Board of East Windsor Ordinance 82-16

p 76

ML 000790 B

due 9/11.

ML000790B

CENTEX HOMES OF NEW JERSEY, INC., a Corporation of the State of Nevada, Plaintiffs, 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.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-5144-82 T1 CIVIL ACTION ON APPEAL FROM: SUPERIOR COURT OF NEW JERSEY LAW DIVISION: MERCER COUNTY SAT BELOW: HONORABLE PAUL G. LEVY

BRIEF FOR APPELLANTS MAYOR AND COUNCIL OF THE TOWNSHIP OF EAST WINDSOR AND PLANNING BOARD OF EAST WINDSOR ORDINANCE 82-16

MICHAEL A. PANE, ESQ.
307 North Main Street
Hightstown, New Jersey 08520

SCHWARTZ, TOBIA & STANZIALE
141 South Harrison Street
East Orange, New Jersey 07018

Attorneys for Defendants,
MAYOR AND COUNCIL OF THE TOWNSHIP OF
EAST WINDSOR AND THE
PLANNING BOARD OF EAST WINDSOR

MICHAEL A. PANE
Of Counsel and
On the Brief

GARY S. ROSENSWEIG
Of Counsel and
On the Brief

TABLE OF CONTENTS

CASES CITED

OFFICES
L A. PANE
NAL CORPORATION
TH MAIN STREET
NEW JERSEY 08520

OFFICES
L. A. PANE
AL CORPORATION
MAIN STREET
NEW JERSEY 08520

STATUTES CITED

OTHER AUTHORITIES

LAW OFFICES
CHAEL A. PANE
FESSIONAL CORPORATION
NORTH MAIN STREET
TOWN, NEW JERSEY 08520

LAW OFFICES
CHAEL A. PANE
FESSIONAL CORPORATION
NORTH MAIN STREET
TOWN, NEW JERSEY 08520

APPENDIX

PROCEDURAL HISTORY

The ordinance sub judice -- Ordinance 1982-16 (Da-1-17) -- was adopted by the East Windsor Township Council on 14th December, 1982.

The ordinance essentially does three (3) things:

1. Zones some 3,000 acres for agriculture and agricultural-related uses (i.e., Agricultural Preservation-AP) with limited residential use. This land was previously zoned for agriculture and 2-acre residential development. (See Statement of Facts, pp. 1-5).
2. Zones some 700 acres for intensive housing development, including substantial low and moderate income housing. This land was previously zoned for Planned Development with a minimum 400 acre requirement. (Statement of Facts, pp. 5-7).
3. Awards Development Rights (DR's) to the owner of land in the agricultural Preservation Zone. These rights must be used by builders in the 700 acre intensive housing development zone if they wish to build at high density (including densities in excess of ten (10)

units per acre). (See Statement of Facts, pp. 14-17).

On 28th January, 1983, Plaintiff filed a nine Count to complaint alleging, inter alia, that the ordinance was: ultra vires under the zoning powers granted to New Jersey municipalities (Count I); ultra vires as regulation of property (Count II); and impliedly pre-empted (Count IX).

On 22nd February, 1983, the Township filed an answer and counterclaim (Da 39 et seq.). Thereafter, Plaintiff Center moved for Summary Judgment as to Count I (Da 18 et seq.) and the Township cross-moved for Summary Judgment as to Counts I, II and IX.

On 13th May, 1983, the Hon. Paul G. Levy, JSC, rendered a decision as to the cross-motions on Count I and ruled the ordinance to be ultra vires under the Municipal Land Use Law (NJSA 40:550-1 et seq.). (Da 75). He did not reach Counts II and IX (T58, 14-15).

The Township filed a Notice of Appeal on 21st June, 1983 (Da 127) which notice was amended on July 7th (Da 130) and July 15th (Da 133).

The questions before the court on appeal are:

1. Did the Court below err in ruling that the use of a TDR program in a municipal land use ordinance was an ultra vires act?

2. Did the Court below err in deciding material issues of fact on a motion for summary judgment?

3. Did the Court below err in ruling that the TDR portion of Ordinance 1982-16 was ultra vires as a "Regulation of Ownership of Property"?

4. Did the Court below err in ruling TDR ultra vires based on the view that it was "Regulation of Ownership of Property" when the Court did not render an opinion on that Count of the complaint?

5. Did the Court below err in invalidating the entirety of Ordinance 1982-16 rather than restricting its ruling to that portion which the Court felt was ultra vires?

FACTUAL BACKGROUND

The Township of East Windsor is a 15-square mile municipality of some 24,000 inhabitants located at Exit 8 on the New Jersey Turnpike, approximately midway between New York and Philadelphia in the northeast corner of Mercer County. The Township forms a circle around the Borough of Hightstown. Essentially, development has occurred in the northern half of the Township. The area of the Township south of the Borough of Hightstown from U.S. 130 east to the Monmouth County line represents a virtually undeveloped area of some 3,700 acres. At all times since 1976, this vacant land has been zoned as follows:

> a. Seven hundred (700) as Planned Development. This area is immediately south of Twin Rivers, an existing PUD of 700 acres and 7,000 residents astride N.J. Route 33.
>
> b. three thousand (3,000) acres as Agricultural. This zone permitted agricultural uses and two (2) acre residential uses.

AGRICULTURAL PRESERVATION

In 1979, the Township adopted an update of its Master Plan. That plan placed a high priority on Agricultural Preservation and stated that the Township should: "encourage continuation of farming as a part of an agricultural related industrial base...(and) further explore such

emerging alternatives for agricultural preservation that will compliment the agricultural land use district herein advanced". (Da 152). This plan was favorably reviewed by the Mercer County Planning Board which said in particular:

> "...your Land Use Plan, as proposed, would certainly reflect the Board's thinking, particularly in the area of residential land use, as it appears that the total housing spectrum and needs have been considered.
>
> In the past, our Board has expressed concern as to the preservation of prime agricultural land within Mercer County. The Board, therefore, was happy to note that prime agricultural land is proposed as low density residential." (Da 161)

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

> Review immediately the PD (i.e., intensive devlopment districted) regulations as found in the zoning ordinance to insure that the requirements for the PD Zone are achieveable and realistic; and
>
> Review the areas presently zoned agricultural to determine if alternate low-density development regulations consistent with goals of continuing agriculture in those areas while preserving open spaces can be expanded beyond those presently available (Da 166)

Thereafter, the Township Council and Planning Board retained a planning consultant to work with the

Township planning staff to review policies as to agricultural preservation and the PD district.

The consultant's report emphasized the importance of preserving prime agricultural lands. (Da 170 et seq.)

As to how to preserve agriculture in East Windsor, the consultant concluded that traditional strategies purporting to preserve agriculture do not appear to do so. Large-lot zoning, for example, while employed in many municipalities, is often a 'holding action,' merely forestalling more intensive development for a time. Even if a substantial portion of the land zoned for 2-acre residences were actually to be built as zoned, the agricultural economy would be destroyed, since 2-acre homes do not preserve agriculture any better than 1/4 or 1/2 acre homes. They both break up the contiguous land areas necessary for farming. Cluster zoning, while more rational in theory, may also be a problem in practice because putting large tracts of residential development into agricultural areas brings two incompatible uses into proximity.

> Thus, the only realistic approach to preserving agriculture was to zone the land in such a way that modern agro-business could flourish in the zone. This meant developing land use regulations which:
>
> a. gave clear primacy to agriculture over competing forms of land use; and

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

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

Thus, as a result of intensive study for over a year (1981-1982), the Township had developed a long-time policy for preserving agriculture to implement the 1979 Master Plan. This policy -- zoning 3000 acres primarily for agriculture and related uses -- is embodied in Ordinance 1982-16, the ordinance currently under review by the Court. These zoning provisions are found in Sections 20-17.2000A, -17.3000A, -17.4000A and -17.5000A of the Ordinance. (Da 1-7) Briefly, these provisions create the following zone plan in the AP (Agricultural Preservation) Zone.

1. Permitted Uses

   a. Agriculture (no limit on type)

   b. Roadside stands

   c. Farm dwellings (no limit on numbers on any farm)

2. Conditional Uses

a. Any commercial or industrial use serving the needs of the agricultural community (farm equipment dealerships, feed and fertilizer stores, food processing or storage such as canneries, slaughter houses, etc.)

b. Non-farm single family dwellings

(1) one for each twenty (20) acres on large parcels (to be lots of one (1) acre or less);

(2) one for each acre on parcels are not suited for agriculture (to be clustered).

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

MEETING HOUSING NEEDS

The Township has historically been committed to recognizing and meeting its fair share of regional housing needs. The 1976 zoning ordinance and the 1979 Master Plan provided that these needs should be met through developing unused sites in developed areas (infill) and through development of the 700-acre PD zone south of Twin Rivers.

For a variety of reasons, no developer had yet come forward to develop the PD zone. Part of the Township's 1981 charge to its special planning consultant was to determine what could be done to improve the prospects of the PD's being built in the present economy. He concluded that the Township

should prepare a detailed, comprehensive plan for the PD zone -- a plan which showed housing types and location, infrastructure, etc., so that a developer could come in and buy a part of the PD area as opposed to the existing 400-acre requirement and develop same relatively quickly and cheaply. The advantages to the developer would be:

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

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

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

This recommendation is reflected in Subsection 20-18.2000f. of ordinance under challenge, which reads:

> "REAP Plan. Within 9 months of the adoption of this ordinance the Township shall adopt by ordinance an amendment to the Township official zoning map and capital improvement and utilities plan for

> the REAP zone. The amended zoning map and capital improvement and utilities plan shall, inter alia, set forth: -- the types of housing and other uses to be allowed within the zone and the locations for each of same; and -- the method by which such improvements will be financed, as well as detailed plans for financing off-tract improvements pursuant to N.J.S. 40:55D-42; and -- the method of apportioning obligations among developers to insure the construction of low and moderate income housing in the same proportion as would be constructed in a Planned Development District pursuant to Section 20-16.0301b of the Revised General Ordinances or as required by State laws." (emphasis added).

Thus did the Township seek to implement the recommendations of its planning expert in order to meet regional housing needs while at the same time preserving agricultural lands in the Township.

MAKING THE PLAN WORK

The Township was determined to make sure that both preservation and intensive development occurred as planned.

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

1. The "wealth or wipeout" syndrome, and

2. The eroding effect of increases in the speculative value of farmland.

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

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

any zoning regulatory scheme which tends to lessen the opportunity for maximum profit through land development.

The second problem is that farmland in urban New Jersey traditionally sells for more than its value as farmland -- no matter how it is zoned -- because it is believed to have a certain speculative value, based on possibilities for future zoning changes, no matter how remote. The effect of this phenomenon is:

1. Farmers are under great pressure to sell farmland to land speculators. At present, over two-thirds of the land in the 3000 acre Agricultural Preservation Zone of East Windsor is farmed by farmers who lease the land from non-farm owners. (DTB-249).
2. Virtually all of the agricultural leases in East Windsor today are one-year leases. (DTB, 247 , p.9) This obviously discourages long-term investment in soil enrichment, drainage tiles, etc. No farmer will make significant investments for a one-year lease.
3. New farmers cannot buy farmland. In Mercer County, for example, the average price per acre of farmland bought for continued agricultural use between 1976 through 1981 was $3,141.00. The average price per acre of farmlands bought for investment during that

same time period was $5,562.00 -- some 77% higher.*

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

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

> "The limited number of judicial decisions dealing with low density agricultural

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

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

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

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

One possible strategy (for agricultural preservation -- ed) is agricultural zoning, coupled with a tax policy that

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

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

Programs to protect land for its long-run resource value represent fundamental social decisions. Therefore, they should be developed in a comprehensive planning context, taking account of the community's needs for land for industry and commerce, and for residences for people of all social and income classes.

> Comprehensive growth management may rely on a variety of techniques, including the provision of transportation and other public facilities and the regulation of land use. A central technique is that of defining an urban growth boundary, within which urban development would be encouraged by providing the full complement of urban facilities and services and outside of which public policy would actively discourage or prevent development. The urban growth boundary clearly separates those areas in which agriculture is to be regarded as a long term use from those in which it is eventually to be replaced by urban activities. In so doing, it provides a consistent geographic and policy framework for specific efforts to protect agricultural land, and directs expectations of landowners and developers accordingly." Keene, op cit, p. 365.

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

> "Although strong state leadership is the ideal, local governments should not wait for the state to take the first step. Many strong local programs have already been undertaken in the absence of state

> action. The inherent deficiencies of independent, scattered local programs can be remedied when a state program is eventually enacted. But the farmland that would have been lost in the absence of any program can never be restored. Keene, op cit, p. 368.

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

DEVELOPMENT RIGHTS

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

In a sense, every zoning enactment awards or removes "development rights" that it confers or removes the right to use property in a given way and to a given intensity. This leaves some landowners enriched because of the "rights" conferred while others see no such benefit.* The Township has sought to develop a zoning technique that

*Thus, while the community benefits from zoning both from high density housing and agriculture, the owners of the land zones for high density achieve a high return on their land while the owners of land zoned for agriculture usually do not.

modifies the windfall effect and at the same time recognizes the natural expectations of owners of agricultural land to participate in the benefit of development -- even though their land continues to be used for agricultural purposes. While these landowners are not as a matter of legal right entitled to realize their expectation, it is clear that a program to preserve agriculture as a land use over the long-term demands realistic programs to facilitation long-term investment and use of land in agricultural production.

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

At the same time, land in the 700-acre intensive development zone (REAP) is zoned as follows: certain uses -- reasonable but not intensely attractive to developers (e.g., 2-acre residential) -- as a matter of right; but, more importantly, other uses, with high density development attractive to developers (e.g., over 10 units per acre), applicable if the developer has a required number of Development Rights. The density is planned so that the develop-

er's total land cost (REAP land plus DR's) will not exceed what his land cost would normally be for land zoned for high density -- if he could find such high density zoning elsewhere. Thus, the zoning creates a real incentive for a developer to purchase Development Rights or to build needed housing.

This, in turn, enables the owners of agricultural land to realize a "return" on their farmland while still owning and farming it.

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

The award of Development Rights is on a per acre basis based on quality of soil, drainage, etc. The procedure is quasi-judicial in nature. See Ord. 1982-16 Sec. 20-19.20000.

ISSUANCE

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

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

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

USE

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

1. Fast approvals, because uses, locations, infrastructure and low and moderate housing obligations are all established in the plan.
2. A developer can select a tract of a size and density suited to his requirements and abilities.
3. Densities within the REAP Zone will be set at such a sufficiently high level with DR's that purchasing the DR's and purchasing the REAP land together will still not exceed the normal range of land costs for land zoned at very high density.

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

POINT I

THE TRANSFERABLE DEVELOPMENT RIGHTS TECHNIQUE IS WITHIN THE LAND USE POWERS DELEGATED TO NEW JERSEY MUNICIPALITIES

Ordinance 82-16 seeks to achieve the purposes of agricultural land preservation and orderly urban development through the use of a variety of zoning techniques, including development rights transfer (TDR). The issue of Appellant's statutorily enabled authority to zone for these purposes is analytically distinct from that of its power to empower the TDR technique, among others, to achieve these purposes. Both types of authority are addressed below, however, because the unequivocal support evidenced both by the New Jersey Legislature and by the New Jersey Supreme Court for these purposes buttresses the Township's position, rooted in the Municipal Land Use Law (MLUL) N.J.S.A. 40:55D-65(a) and (b) as well as other legislative and judicial declarations, that New Jersey municipalities are indeed authorized to employ the development rights transfer technique in aid of these purposes. Appellant's principal claim is that, despite the absence of the phrase "transferable development rights" in the MLUL, New Jersey municipalities enjoy both express and implied authority to employ the TDR technique in conjunction with zoning for agricultural preservation and for orderly urban development;

this authority is founded on pertinent provisions of the MLUL, which itself implements the New Jersey Constitution, Art. 4 Sections 6(2) and 7(11). Residual support for this authority exists in N.J.S.A. 40:48-2 and in Southern Burlington County N.A.A.C.P. et al v. Township of Mount Laurel, et al. 92 N.J. 158 (1983) (Mount Laurel II).

A. The New Jersey Constitution and the MLUL

1. Express Authority For Ordinance 82-16

Article 4, Section 6, Paragraph 2 of the New Jersey Constitution provides:

> The Legislature may enact general laws under which municipalities...may adopt zoning ordinances limiting and restricted to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State...Art. 4, Section 7, Paragraph 11 adds:
>
> The provisions of this Constitution and of any law concerning municipal corporation ... shall be liberally construed in their favor. The powers of ... municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressed conferred, or essential thereto... (emphasis added.)

Pursuant to the first of these provisions, the New Jersey Legislature enacted the MLUL, which in addition to

the various substantive provisions outlined below, directed that the MLUL "being necessary for the welfare of the State and its inhabitants shall be considered liberally to effect the purposes thereof." N.J.S.A. 40:55D-92 (emphasis added).

N.J.S.A. 40:55D-2, the "purposes" section of the MLUL unequivocally vests substantive power in New Jersey municipalities to achieve the agricultural land preservation and orderly urban development objectives addressed in Ordinance 82-16. For the agricultural land preservation purpose, see Section 2(g) ("to provide sufficient space in appropriate locations for a variety of agricultural, residential recreational...uses and opens space, both public and private, according to their respective environmental requirements to...") (emphasis added); Section 2(j) ("to promote the conservation of open space and valuable natural resources and to prevent urban sprawl and degradation of the environment through the improper use of land") (emphasis added). For the orderly urban development purposes, see Sections 2(d), (f) and (i). Applicable to both purposes and, as noted below, to the TDR technique itself is Section 2(i) which authorizes municipalities "to promote a desirable visual environment through creative development techniques and good civic design and arrangements."

Recognition that New Jersey municipalities have indeed been endowed with the substantive powers to zone for agricultural and orderly development purposes is pervasive in various legislative enactments, legislative and executive departmental reports,* and New Jersey court decisions.

N.J.S.A. 40-55D-2g has been called a "consideration critical to the adopting of zoning plans and zoning ordinances" in Kinnelon v. South Gate Associates, 172 N.J. Super. 216 (A.D., 1980) and serves as a legislative recognition of the problems identified by the State in a number of reports on agriculture in New Jersey.**

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

> Clearly, New Jersey now favors preservation of farmland and open spaces over that of development for residential or commercial uses. Or even over uses which maximize municipal tax revenues.
>
> Indeed, much has been said of late, that the policy in this State should be to diminish the growth of residential building in our rural and semi-rural areas and encourage residence within our cities. Such a policy may well be

*See Grass Roots, N.J. DEP/Agriculture, October 31, 1980; see also National Agricultural Lands Study (U.S. Government, 1981).

**See also Pascack Ass'n Ltd. v. Mayor &Council of Washington Twp. 74 N.J. 470, 483 (1977); State v. CIB International, 83 N.J. 262, 271-272 (1980).

> implicit in an expansive view of the Farmland Assessment Act...
>
> The proofs show a great demand for farmland in this area. Local farmers actively bid against each other whenever farmlands become available. Cultivation here fills this demand.
>
> The benefits from continued farming are enormous. And this without detriment to the health, safety or welfare of the public. On the other hand, the evidence demonstrates that the only respect in which farming of this land is offensive is that it is not more economically lucrative to the Township. At p. 467.

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

Referring to certain purposes of zoning as set forth in the MLUL, the Court held "whether, how, and to what extent the purposes of the act, are effected is a decision reserved to each municipality, subject to judicial review at

which time the municipality's decision must be upheld unless found to be arbitrary or capricious." Id at p. 578.

Perhaps the most definitive statements concerning agriculture preservation are found in Mt. Laurel II. The Court recognized that municipalities have "the clear obligation to preserve open space and prime agriculture land..." Mt. Laurel II, p. 211. Operation of the Mt. Laurel doctrine "should not restrict other measures, including large-lot and open area zoning..." 220, The Court further observed:

> "There may be areas that fit the 'developing' description that it should not yield to "inevitable future residential, commercial and industrial demand and growth." (Emphasis added) ID. 224.
>
> "Those areas may contain prime agricultural land,..." Id. 224
>
> "The lessons of history are clear, even if rarely learned. One of those lessons is that unplanned growth has a price -- natural resources are destroyed, open spaces are dispoiled, agricultural land is rendered forever unproductive, and people settle without regard to the enormous cost of the public facilities needed to support them." Id., 236

In addition to endowing municipalities with the power to zone for these substantive purposes, the Legislature appreciated that municipalities required the concommitant grant of authority to employ reasonable zoning and planning techniques to implement these purposes. Along with

the aforementioned authority granted municipalities to promote a desirable visual environment through "creative development techniques," the Legislature enabled municipalities to

> (r)egulate the bulk, height, number of stories, orientation, and size of buildings and the other structure,...; the percentage of lot or development area that may be occupied by structures; lot sizes and dimensions; and for their purposes may specify floor area ratios and other ratios and regulatory techniques governing the intensity of land use and the provision of adequate light and air. N.J.S.A. 40:55D-65(b)

Whether considered as one of the "creative development techniques" envisaged but not expressly enumerated in Section 2(i) or, more squarely on point, one of the "other...regulatory techniques governing the intensity of land use", the TDR technique clearly is authorized by the MLUL. True, the Act does not refer to the technique by name. But that objection is specious because in the provisions in questions, the Legislature chose only to refer to a class or genus of techniques, while leaving it to the municipalities to select the specific technique or techniques that they believe offer the greatest assurance of securing the implementation of the substantive zoning purposes in question. Insofar as TDR is a species of the genus of techniques identified either in section 2(i) or

section 65(b) and does not violate any statutory or constitutional constraint, it clearly has been authorized by the Legislature. The technique's status as a "regulatory technique governing the intensity of land use" and/or as a "creative development technique" that promotes "good civic design and arrangements" and a "desirable visual environment" has already been established in this brief's earlier discussion of Ordinance 82-16's structure and operation. See supra. The only plausible statutory or constitutional constraint that Respondent claims the TDR technique may violate -- namely, that it impermissably regulates title -- turns out under analysis simply not to be called into play by Ordinance 82-16. See Point II infra.

Respondent's objection that the TDR technique is not authorized, in short, is misconceived. Its objection is actually targeted against the Legislature's entirely permissible choice to proceed in MLUL sections 2(i) and 65(b) by a generic rather than a specific delegation of municipal powers respecting zoning techniques available to municipalities to implement the Act's substantive purposes.

Recently, agricultural zoning was held to be authorized under the MLUL. Grand Land Co. v. Twp. of Bethlehem and Environmental Defense Fund, Inc., Superior Court, Law Division - Hunterdon County. Docket No. L-719-76

(Da 284 et seq.)

P.W. decided 4/15/83. Judge D'Annunzio found that the MLUL both by implication or by the MLUL's broad grant of authority authorized agricultural zoning ordinances:

> It is clear that the Legislature considers agricultural preservation to be an important legislative goal; that it will promote the general welfare. There is nothing in the MLUL or its legislative history to suggest that agricultural zoning, i.e., the creation of zoning districts in which agriculture is the dominant permitted use, is not authorized. Plaintiff has been unable to suggest any reason why a prohibition against agricultural zoning is implied by the MLUL or why an agricultural zoning ordinance which otherwise passes muster should not be within the broad grant of authority in the MLUL. At. p. 15. (Emphasis added))Da-298)

2. Implied Authority For Ordinance 82-16

Appellant's authorization to zone for agricultural preservation and orderly urban development purposes is nto addressed in this section because the basis for this authority is patent on the face of MLUL sections 2(g) and (j), and sections 2(d), (f), and (i), respectively. This section's focus instead is upon Appellant's implied authority to employ the TDR technique in aid of these purposes. The argument is founded on two propositions: first, the generous residum of implied municipal zoning powers recognized in New Jersey Constitution Art. 4, Section 7, Paragraph 11 and in MLUL, Section 92, have repeatedly served as a basis

for judicial approval of zoning techniques prior to the Legislature's express incorporation of them in state zoning enabling legislation; second, the factors cited by the courts in support of these approvals warrant similar treatment of the TDR technique.

Many significant zoning powers have been found to be within the broad grant of the municipal zoning power,* have been sustained by the Courts and were ultimately ratified by the State Legislature. Examples are as follows:

> Senior Citizen Housing - zoning based on age (52 or over). Taxpayers of Weymouth Township v. Weymouth, 71 N.J. 249 (1976). See N.J.S.A. 40:55D-65g.
>
> Cluster or Density Zoning. Sustained in Crinko v. South Brunswick Township, 77 N.J. Super. (LD. 1963). See also Nelson v. South Brunswick Tp. Planning, 84 N.J. Super. 265 (1964). See N.J.S.A. 40:55D-1.
>
> Site Plan Review. Upheld in Kozesnick v. Montgomery Twp. 24 N.J. 154, 186 (1957); Newark Milk & Cream Co. v. Parsippany Troy Hill Tp., 47 N.J. Super. 306, 332 (1957).
>
> "The absence of mechanical procedural provision is not fatal." See N.J.S.A. 40:55D-37, 38 and 39.
>
> Density Bonuses - Oakwood at Madison Inc. v. Madison Township, 72 N.J. 481 (1977). N.J.S.A. 40:55D

*"Enabling statutes delegating to municipalities the power to enact ordinances to promote the health, safety and general welfare in the context of land use regulation should be given an expansive interpretation." Weymouth, supra 80 N.J. at 21. See also In The Matter of Egg Harbor Associates, Supreme Court of N.J. (Slip opinion, 8/1/83 et p. 9.

Certificates of Occupancy - authority to require CO's may be implied. J.D. Land Corporation v. Allen, 114 N.J. Super. 503 (1971). See N.J.S.A. 40:55D-18.

Aesthetics - United Advertising Corporation v. Metuchen, 42 N.J. 1 (1964). See N.J.S.A. 40:55D-2i.

Regional Considerations - Duffcon v. Cresskill, N.J. 500 (1949). See N.J.S.A. 40:55D-2f.
Off tract Improvements - Divan Builders v. Wayne, 66 N.J.582 (1975). See N.J.S.A. 40:55D-42

The Appellate Division has recognized that "zoning cannot be static; it must look to the future and recognize changing conditions." Bartlett v. Middletown Township, 51 N.J. Super. 239, 262-263 (App. Div. 1958). The Court's words in that case are particularly instructive:

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

> Physical, economic and social conditions determine what may be the most appropriate use of particular property in a municipality. What is the most appropriate use also depends on the needs of the municipality, present and reasonable prospective, on the nature of the entire region where the municipality is located, and the use to which land in that region has been or may most advantageously be put. Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, 513 (1949) Vanderbilt, C.J.).
>
> Where a zoning ordinance may fairly be said to have as its objects the preservation of the character of the community, the maintenance of property values and the devotion of land throughout the municipality is to most appropriate use, such legislation finds ample justification under our State constitution and the Zoning Act, and is beyond attack. It may not be insisted that such ordinance provide the ultimate zoning pattern; all that is required is that the ordinance be reasonable in the light of existing conditions and planning problems. Should changed conditions in the future prove the zoning arrangement to be no longer reasonable or workable, it may be changed. Fischer v. Bedminster Tp., above, 11 N.J. 193 (1953) at 205 Pierro v. Baxendale, 20 N.J. 17, 29 (1955); Kozesnik v. Montgomery Tp., above, 24 N.J. at page 167.

The concept of changing techniques to carry out stated legislative purposes was addressed by Judge Furman in Chrinko v. South Brunswick Township Planning Board, 77 N.J. Super. 594 (Law Div. 1963), where the Court upheld a cluster zoning ordinance in the face of a lack of specific legisla-

tive authorization. The Court held "although the state zoning law does not in so many words enpower municipalities to provide an option to developers for cluster or density zoning, such an ordinance reasonably advances the legislative purposes of securing open spaces, preventing overcrowding and undue concentration of population and promoting the general welfare." (Id, p. 601). Judge Furman further stated that "cluster or density should meet judicial sanction as an implementation of the zoning and planning power to deal with a current and increasing problem, large subdivisions in previously rural communities." Id. p. 601.

~~Judge Furman further stated that "cluster or density should meet judicial sanction as an implementation of the zoning and planning power to deal with a current and increasing problem, large subdivisions in previously rural communities." Id. p. 601.~~

The ability of municipalities to shape and adopt appropriate responses to the "current and increasing problem" of dwindling agricultural lands is the essence of the sub judice. The Court below failed to recognize this well recognized broad view of the scope of the munizipal zoning power.

B. TDR As Cluster Zoning

As previously discussed above, cluster zoning

received judicial approval in Chrinko, supra. TDR is an extension of cluster zoning whose purpose is to preserve open space and to provide for and maintain overall area-wide densities by permitting more intensive densities within limited areas. TDR involves clustering between non-contiguous tracts of land; while clustering involves only one tract.*

In TDR, density is viewed on a municipality-wide basis in accordance with an approved Master Plan.* Our courts have already allowed density to be spaced over an entire district, Nicollai v. Planning Board of Wayne, 148 N.J. Super. 335 (1973). When TDR is viewed in this context, it is a form of density or cluster zoning expressly permitted by N.J.S.A. 40:55D-65(b) as a regulatory technique governing the intensity of land use'. . . Emphasis added.

C. Other TDR Programs Have Been Upheld Without Express Enabling Authority

1. New York City

New York City's TDR Program has been upheld as constitutional by both the New York Court of Appeals, the highest Court of that State and the U.S. Supreme Court. In Penn Central Transportation Co. vs. City of New York, 42

*For a discussion of the Chicago TDR Plan See Costonis, Space Adrift, Chap. 6.

N.Y.2d 324 (1977), aff'd, 438 U.S. 104 (1978), the New York Court of Appeals gave its unanimous approval of the City's landmark preservation law* which incorporated a TDR Program which allowed a property owner to transfer development rights from above a landmark to other sites in the vicinity. Id. at 1277. New York City's Law is based on a general enabling authority to protect and preserve building of special historical or aesthetic interest of value. N.Y. General Law 96-a.

Plaintiffs appealed the Court of Appeals' decision to the U.S. Supreme Court and, in June, 1978, the Court sustained the decision of the Court of Appeals upholding TDR as a zoning density control rejecting a multitude of legal challenges. Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978).

b. Maryland.

In a case decided by the Circuit Court for Montgomery County, Maryland on January 20, 1983 entitled Raymond A. Dufour, et al v. Montgomery County Council, the court upheld a challenge to Montgomery County Council's TDR Program which was adopted as part of a comprehensive rezon-

*A law permitting the transference of developmetn rights for historical preservation purposes was subsequently enacted in 1980. N.Y. General Law, 119aa et seq., L. 1980 Ch. 354, Section 9.

ing that affected 1/3 of the County's land. Montgomery County adopted zoning regulations affecting plaintiff's property which consisted of 548.4 acres by rezoning it to a density of 1 dwelling per 25 acres. Prior zoning had permitted 1 dwelling per each 1/2 acre and subsequently 1 dwelling for each 5 acres. In a comprehensive opinion, the Court dealt with a number of issues: (1) was there a taking; (2) the extent of the police power; (3) the value of development rights; (4) the absence of a receiving zone; and, (5) the absence of specific enabling authority.* The Court dealt with this case as a typical zoning case dealing first with the extent of the police power, holding "that the objectives of the ordinance are reasonably related to the public welfare and the accomplishment of legitimate State interests and that the means employed bear a real and substantial relation to the end sought to be achieved, without being arbitrary, capricious." Id. p.7.** In concluding that the ordinance was valid, the Court looked to

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

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

the following: (1) the rezoning follows and implements as adopted master plan for the preservation of agricultural and rural open space; (2) although Montgomery County is not generally thought of as an agricultural county, the County's agricultural industry was economically viable and contributed to the regional support of agriculture; (3) agriculture and open space preservation is in the public interest; (3) agriculture and open space preservation is in the public interest; (4) the preservation program was linked to a County-wide growth management plan; (5) development pressures were threatening and eroding the agriculture preservation area.*

D. Mount Laurel II

As discussed previously in this Point, Supra, the Supreme Court in Mount Laurel II has recognized the broad residuum of implied municipal zoning powers.

As stated by the Court:

> In New Jersey, it has traditionally been the judiciary, and not the Legislative that has remedied abuses of the zoning power of municipalities. Footnote 7, at page 213.

*The Court inferred that it was prepared to uphold the rezoning, even in the absence of a demonstrated need and legislative determination to preserve an agricultural industry, Id., Page 9, citing Agins v. Tiburon, 447 U.S. 225 (1980).

In large measure, the reason for such judicial intervention rests in the courts' recognition of these powers.

As has been pointed out in other sections of this Brief, the Courts have not been timid in finding necessary implied powers to act in furtherance of the general welfare and need. See Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, (1971) where the Supreme Court stated:

> It is elementary that substantive due process demands that zoning regulations, like all police power legislation, must be reasonably exercised -- the regulation must not be unreasonable, arbitrary or capricious, the means selected must have a real and substantial relation to the object sought to be attained, and the regulation or prescription must be reasonably calculated to meet the evil and not exceed the public need...

Precisely contrary to the views expressed by Judge Levy, New Jersey municipalities have had the broad generic powers to experiment with a variety of land use regulatory techniques, subject to court review. Mount Laurel I and II exemplify this point. Mount Laurel Township adopted as part of its zoning ordinance a variety of techniques (e.g. non-cumulative zoning, cluster zoning, age zoning, minimum and interior lot requirements) none of which are expressly authorized in the MLUL, or its predecessors with the effect of denying housing opportunities to the region's low and

moderate inocme persons. Rather than invalidating these techniques, Mount Laurel I and II expanded the list by adding others -- e.g. bonus zoning, mandatory set asides, etc. so that municipalities could meet their fair share obligations. The Court's objections applied to the effects of the techniques given the municipality's obligation to achieve low and moderate housing, rather than the techniques per se.

East Windsor Township has learned the lessons enunciated by Chief Justice Wilentz in Mount Laurel II. Ordinance 82-16 is East Windsor Township's response to insure that the Township is not condemned to relieve history.

In particular, the designation of some 3,000± acres within the Township which has been under active agricultural use for hundreds of years provides sufficient land for agricultural uses. Second, East Windsor Township's orientation in New Jersey astride major transportation corridors close to major urban areas, represents a most appropriate location for agricultural uses. Having and maintaining a viable agricultural segment of the economy in the "Garden State" certainly operates to meet the needs of all New Jersey citizens.

As to the intensive development zone, creation of

the REAP zone undoubtably furthers the goal of channelling growth into those areas of the Township in closest proximity to existing municipal services thereby preventing degradation of the environment. Further, the REAP zone itself provides for 10% low income and 15% moderate income housing in compliance with the township's Mt. Laurel obligations.

We submit, therefore, that ordinance 82-16 is a logical and lawful component of East Windsor Township's zoning ordinance under State enabling laws.

From any perspective, therefore, the essence of municipal regulation -- the very core of the police power -- involves the regulation of human behavior and property rights for the general health, safety and welfare. The measure of any regulation is not merely rhetorical; rather, it is a balance of need and lawful purpose against the real human effect and consequences of the regulation. In such a balance, the use of Ordinance 82-16 to further valid statutory public goals is both proper and reasonable.

POINT II

Ordinance 82-16 Does Not Regulate Title

The claim that Ordinance 82-16, through its employment of the TDR technique, regulates title to privately owned real estate by, e.g., creating a new type of "estate" in land is the principal ground advanced by Judge Levy and by Respondents to support the conclusion that Ordinance 82-16 falls beyond the scope of Petitioner's delegated zoning powers. Endorsing the concept advanced in Respondent's brief below, Judge Levy asserted.*

> 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. (Da 119)

In the content of Ordinance 82-16, a development right represents a right to use land. Particularly, development rights represent entitlements, or privileges granted under a zoning ordinance. The "interest" referred to in Ordinance 82-16 is a governmental right granted for the use of land. In this regard, it is similar to other governmentally created privileges, such as zoning permits, and other municipal licenses, which represent significant and valuable

*Although the Court below declared that it was only deciding the ultra vires issue; (ie., Count I), the Court ruled on this issue - Count II - as well.

proprietary interests of which can be bought, sold, assigned or transferred from one party to another.* Professor John J. Costonis, author of Space Adrift has written:

> Development rights ... are simply a governmental license to build a defined amount of floor area as measured by the amount of lot area that has been constructively "transferred" to the project site. "The Chicago Plan", 85 Harvard Law Review No. 3, January 1972.

And further,

> Stated another way, transfer programs do not create new space; they merely redistribute space that has already been authorized. Space Adrift at p. 32.

The claim simply misconceives the functioning of the TDR technique. It confuses the sphere of private real property law, which deals with the creation and transfer of estates in real property by and among the holders of these estates, with the sphere of public planning and zoning law, which, insofar as is pertinent to the TDR technique, deals with public (governmental) regulation under the police power of the permissible intensity of land use by the holders of the various estates in land recognized in Anglo-American private real property law.

*See Newport Associates, Inc. v. Solow, 332 N.Y.S.2d 617 (1972) sustained the transfer and use of unused air rights from one parcel to another.

This section advances three propositions, each premises upon this fundamental distinction. First, public regulation of the creation, allocation, and employment of development rights is as old as and indeed constitutes the very essence of zoning itself. Accordingly, development rights are not an interest in land in the private real property law sense in which an estate in land may be so labelled. Instead, they are publicly created entitlements to employ land within a framework of bulk, height, area, use and related controls which ultimately determine the "intensity of land use" which MLUL Section 65(b) expressly authorizes municipalities to regulate.

Second, the only "novelty" imported into traditional Euclidian zoning law by the TDR technique is that development rights may now be used on land ("transferor" lot). Hardly original to the TDR technique, however, this innovation is shared by all zoning techniques, e.g., zoning lot merger, cluster zoning, PUD zoning based upon the principle of "density zoning". Under that principle, the unit of development control is not the individual lot but a larger area,* and the density that, under traditional

*See Nicollai v. Planning Board of Wayne, 148 N.J. Super. 150 (1973) -- density may be spread over an entire district.

zoning, would have had to have been used on the individual lot -- or not at all -- may now be distributed over the larger area so long as no net increase results in area-wide density.

Third, the employment of recorded covenants and the impacts upon the economic value of transferor and transferee lots that can be anticipated under Ordinance 82-16 are not materially different from those that regularly occur under traditional zoning. Hence, although it may be helpful, the adoption of an uniform state law to address these features are not a necessary precondition to municipal employment of the TDR technique. The use of recorded covenants in conjunction with traditional forms of zoning is commonplace. With respect to the market implications of the TDR technique, the intensity of bulk or use, i.e., the development rights, allocated to a particular parcel has always been a dominant factor in controlling its economic value, a fact well-attested to by the behavior of buyers and sellers in private land markets and by public taxing authorities. That the increased (or decreased) density derives from development rights that were initially allocated to a transferor lot but subsequently shifted to a transferee lot in no way justifies characterizing these development rights as an "estate" in land. On the contrary, it simply indi-

cates that whatever "estate" in land, e.g., fee simple absolute, long-term groundlease, etc., is held by the owner of the transferee parcel now enjoys a governmental entitlement to be built to a greater intensity of use, bulk, etc. than it enjoyed prior to the transfer. Concommitantly, the greater density allocated to the transferor lot, must now be reduced by the same quantum of development rights as those transferred from it to the transferee lot. The position of either holder is no different than it, pursuant to a rezoning, the development rights of these parcels were similarly increased or decreased. It would be absurd to claim that such rezoning creates a "new estate" in either parcel. Why then should the intensity of use adjustment effected by the TDR technique be said to do so?

While governmental regulations affect the use and enjoyment of land ownership, they are not estates in land, and, in fact, do not constitute encumbrances to land title; whereas, such things as dower rights, encumbrances to land title; whereas, such things as dower rights, restrictive covenants, easements, and tax liens do constitute infringements on title, governmental regulations do not constitute encumbrances. See N.J.S.A. 40:4-5; Fahmie v. Wulster, 81 N.J. 391 (1979); Josefowicz v. Porter, 32 N.J. Super. 585 (1954). In Josefowicz, the Appellate Division held:

> "a restriction imposed by legislative or municipal authority is not generally considered such an encumbrance as may be availed by the vendor to avoid his agreement of purchase. At p. 590.

Moreover, zoning ordinances are not the only types of municipal regulation of private property -- municipal health codes, property maintenance codes and rent control ordinances* may have a significant effect on the use and enjoyment of property. Yet, they are not considered to be a regulation of or an encumbrance on title.

The Court below also was of the strong view that uniform TDR legislation was required because of tax, title and assessment implications. In this regard, the Court overlooked the Pinelands Protection Act (N.J.S.A. 13:18A-1 et seq.) which permits the transfer of development rights as part of the Pinelands Comprehensive Management Plan without any reference to title and tax assessment implications, N.J.S.A. 13:18A-8d(1). This clearly shows that the New Jersey Legislature has found that TDR does not require uniform rules or directives; rather, they will leave such matters to be dealt with by each municipal assessor under Title 54.

---

*Upheld under N.J.S.A. 40:48-2 without specific enabling authority. Ingannamort v. Borough of Fort Lee, 62 N.J. 522 (1973), see particularly p. 538.

Similarly, a New York State historic preservation statute also permits (adopted after the Penn Central case) the transfer of development rights for historic preservation purposes, leaves local taxation impacts to local officials and is silent on title questions. N.Y.S., L. 1980, ch. 354, 9 eff. August 22, 1980.

Finally, the case heavily relied on by the Court below, Bridge Park v. Borough of Highland Park, 113 N.J. Super. 219 (1971), has been seriously questioned by the Supreme Court in Taxpayers Assn. v. Weymouth Tp., 80 N.J. 6 (1976) and was severely limited in Bonner Properties v. Franklin Tp. Planning Board, 185 N.J. Super. 553 (1982).

Bridge Park involved a local ordinance that prevented the conversion of existing garden apartments into condominiums. The Court found that this constituted the regulation of ownership rather than the use land and held the ordinance to be beyond the local zoning power.

Bridge Park has been distinguished by the Supreme Court in Weymouth, 80 N.J. 6 (1976) where the Court (1) questioned whether Bridge Park was correctly decided and (2) stated that the Bridge Park Ordinance "merely affected the location of title -- a result which bears no relation to the functions of zoning." p. 37. In Weymouth the Court upheld a municipal ordinance which limited the use of mobile homes

within a trailer park to families where the head of the household was 52 years or older reversing an Appellate Division judgment which cited Bridge Park invalidated the ordinance on the principal ground that the age instruction does not regulate the use of land. 125 N.J. Super. 380-81. Moreover, at the time the Supreme Court decided the Weymouth case, the Zoning Statute, N.J.S.A. 40:55-32, did not expressly provide for senior citizen zoning. The Court stressed that the Weymouth ordinance "clearly promoted the general welfare and hence falls well within the purview of the zoning enabling act. P. 37.

In Bonner Properties, Inc., Judge Meredith sustained a planning board action denying final approval to a developer of 334 condominium townshouses on the ground that the common elements of the project would be owned by a nonprofit homeowners association, rather than each condominium owner holding an undivided interest in the common elements. Bonner at p. 560. Plaintiffs argued that the Bridge Park holding prevented the municipality from regulating the form of ownership. Id, 565.

In Bonner, the Court held ... it remains true that Mt. Laurel implicitly overruled the holding of Bridge Park that the zoning power, as a matter of law, cannot be employed to regulate ownership of land or the identity of its

occupants. Bonner at 567. What survives of Bridge Park is the principal that a municipality may not enact an ordinance that "merely affect(s) the location of title (to land) ... that is, without furthering any legitimate municipal purpose. Id at 568.

Ordinance 82-16 neither regulates ownership nor title; rather, it regulates and affects the use and intensity to which lands may be used within East Windsor and as such is a proper exercise of the zoning power.

THE COURT BELOW ERRED IN NOT SUSTAINING ORDINANCE 1982-16 AS A VALID ENACTMENT UNDER N.J.S.A. 40:48-2

While the Trial Court did mention N.J.S.A. 40:48-2, the Court's opinion did not analyze the extent to which N.J.S.A. 40:48-2 represents further authority for sustaining Ordinance 1982-16 (T65, 4-6).

All New Jersey municipalities are vested with specifically enumerated powers and with broad police powers pursuant to N.J.S.A. 40:48-2. Historically, our courts have "... expressly rejected a narrow view of N.J.S.A. 40:48-2" and "...consistently held the statute is itself a reservoir of police power." Adams Newark Theatre Co. v. City of Newark, 22 N.J. 472 (1956), affirmed, 354 U.S. 931, 77 Supreme Court 1395, Il. Ed.2d 1533 (1957); Kennedy v. City of Newark, 29 N.J. 178 (1959); Moyant v. Paramus, 30 N.J. 528 (1959); Summer v. Teaneck, supra, 53 N.J. 548; New Jersey Builders Assn. v. Mayor of East Brunswick Twp., 60 N.J. 222 (1972); Inganamort v. Borough of Fort Lee, 62 N.J. 522 (1973) at 536.

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

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

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

In the present case, the Township knows that development pressures drive up the price of prime agricultural land beyond its current value as zoned. This reflects some irrational speculative value predicated upon assumed future development. The most carefully considered and implemented master plan thus becomes subject to the vagaries of fearful landowners and rising economic expectations. Conversion of prime farmland to housing development is not an orderly and planned sequence. Rather, it leapfrogs as the owners of the land succumb, for whatever reason, to the lure of a quick profit at the expense of the community as a whole.

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

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

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

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

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

As to authority to use general police power even if specific zoning enabling legislation is available, see also Larson v. Mayor and Council of Spring Lake Heights, 99 N.J. Super. 365 (Law Div. 1968).

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

In previous sections this brief discusses the Court's finding of Ordinance 1982-16's being ultra vires because the transfer of development rights is not, in the Court's view, authorized by the MLUL (Da - 118). The Court also bases its view on its perception of the need for state-wide uniformity (Da - 118), even though this decision was made on summary judgment without any factual testimony before the Court as to the need for such uniformity.

It is therefore appropriate to review some of the language in leading cases under N.J.S.A. 40:48-2 on these issues. In Inganamort, supra, the Supreme Court faced a municipal regulation which significantly affected traditional notions of property rights -- rent control -- and which was not authorized by any state statue.

The Court addressed:

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

housing shortage." Inganamort, supra, at 527.

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

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

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

> "It is of no constitutional moment that local decisions will mean diversity of treatment within the State. Diversity is an inevitable incident of home rule, for home rule exists to permit each municipality to act or not to act or to act in a way it believes will best meet the local need." West Morris Regional Board of Education v. Sills, 58 N.J. 464, 477 (1971) cert. denied 404 U.S. 986, S. Ct. 450, 30L. Ed 2d 370 (1971); Two Guys from Harrison Inc. v. Furman, 32 N.J. 199, 231-232 (1960); Jamouneau v. Harner, 16 N.J. 500, 517-521 (1954) cert. denied, 349 U.S. 094, 75 S. Ct. 580, 99L. Ed. 1241 (1955); In Re Cleveland, 52 N.J.L. 555, 608-609 E.A. 1888).
>
> . . .
>
> "(That) The ordinance imposes restraints which the State law does not, does not spell out a conflict between state and local law. On the contrary the absence of a statutory restraint is the very occasion

for municipal initiative." Id. at 538. (Emphasis added).

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

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

> "it is not enough that the Legislature has legislated upon the subject, for the question is whether the Legislature intended its action to preclude the

exercise of the delegated police power..." Summer at 584. (Emphasis added).

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

The Township submits that our analysis of Ordinance 1982-16 should lead to the conclusion that the Township had authority to enact same under the MLUL and, to the extent that any question exists as to that point, there is ample authority under N.J.S.A. 40:48-2 to enact a regulation which partakes of both the zoning power specifically and of the general police power.

POINT IV

THE TRIAL COURT ERRED IN INVALIDATING THE ENTIRETY OF ORDINANCE 1982-16 RATHER THAN SIMPLY THAT PORTION WHICH WAS IN ITS VIEW ULTRA VIRES

> "...where the provisions of an ordinance are separable and it may fairly be presumed that the municipal legislative body would have enacted one part without the other, the whole ordinance will not be declared void because of the invalidity, such as the unconstitutionality or unreasonableness, of a part". 56 Am Jur 2d, Municipal Corporations. Sec 372.

In the present case, the Township Council, after a year of study, had determined that 2-acre residential zoning in the agricultural district was not appropriate to preserving agriculture. (Statement of Facts, pp. 2-4). They therefore adopted new agricultural use regulations for the district which would eliminate wide-spread 2-acre zoning, and, thus, better preserve agriculture (Statement of Facts, p. 5).

It was the clear intent of the Township in adopting AP zone regulations in Ordinance 1982-16 to change the land use pattern in the zone from AG-2-acre to one in which agriculture predominated.

Section 20-19.6020.4d of the ordinance (Da 13) even says that every five years after enactment the Township will study the economic viability of agriculture to be sure

that the agricultural uses allowed in the AP zone still afford landowners a reasonable use of their land.

Thus, it is clear that the agricultural use regulations promulgated for the AP zone in Ordinance 1982-16 were intended by the Township Council:

1. to change use in the zone and eliminate 2-acre zoning; and
2. to constitute without TDR a reasonable use of land in the zone; and
3. in futuro to be reviewed regularly to insure that in the AP zone agricultural uses continued to be a reasonable zone use of the land independent of the TDR program.

At the same time, to enhance the permanence of the AP zoning in a realistic sense, the Township enacted that portion of Ordinance 1982-16 allowing the transfer of development rights. There is no question that the two are related; but TDR was designed only to further the purposes of AP zoning.

The use of TDR was an accessory to the enactment of the AP zone-not the cause of the enactment.

The Court below, nevertheless, invalidated the entire ordinance because, in the Court's view, the enactment of the ordinance 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." (T66, 5-11).

The Township submits that the Court below did not apply the proper criteria in reaching that judgment.

> "Indeed, it has been said that whenever a statute contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of the court so to declare and to maintain the act insofar as it is valid. The tendency of the courts is to apply the principle with increasing liberality."
>
> "The rules as to partial unconstitutionality apply with the same force to county and city ordinances and city charters as to legislative acts generally." 16 Am Jur 2d, Constitutional Law. Sec 260.

Under New Jersey law on Severability, as set forth several years ago in Inganamort v. Fort Lee, 72 N.J. 412 (1977), the valid portion of a partially invalid act must be severable. Inganamort, at 422. Abrahams v. Civil Service Comm., 65 N.J. 61 (1974). The fact that Ordinance 1982-16 contained a severability clause creates a presumption in favor of severability even if it does not settle the issue. Dallenbach Sand Co. v. Mayor and Council of South Brunswick, 90 N.J. Super 218 (App. Div., 1966). Mr. Softee v. Mayor

and Council of Hoboken, 77 N.J. Super 354 (Law Div., 1962).

> As the Supreme Court stated in Inganamort at 422-3:
>
> "...the legislative intent must be determined on the basis of whether the objectionable feature of the statute can be excised without substantial impairment of the principal object of the statute... Courts will enforce severability where the invalid portion is independent and the remaining portion forms a complete act within itself."(citations omitted).

In Ordinance 1982-16, the title itself shows that the ordinance has several purposes:

> AN ORDINANCE AMENDING AND SUPPLEMENTING CHAPTER XX (ZONING) OF THE REVISED GENERAL ORDINANCES AND ESTABLISHING AGRICULTURAL PRESERVATION ZONES AND ALLOWING FOR THE TRANSFER OF DEVELOPMENT RIGHTS FROM SUCH ZONES INTO ZONES DESIGNATED FOR REGIONAL AND INTENSIVE GROWTH

The three purposes were:

1. to create an agricultural preservation zone in which agricultural uses would predominate;
2. to allow the transfer of development rights so as to stimulate housing growth elsewhere in the Township; and
3. Thus, to take development pressure off the AP zone on a permanent basis.

There is no question that AP zoning and TDR are related, but the relationship is critical: TDR was created only to enhance AP zoning. Without TDR, AP zoning is still valid and clearly reflects the intent of the Township; the public concern is the preservation of farmland -- not the issuance of development rights.

While the Court below may have felt compelled to rule that TDR was ultra vires, it should have ruled that the zone changes in the agricultural (AP) zone represented a basic and fundamental zoning decision. TDR was created to serve the AP and REAP zones-not, as the Court held, vice versa. Even without the use of TDR the enactment of AP zone regulations was a separable, valid and clearly intended act of the Township Council.

Put another way, by invalidating the entirety of Ordinance 1982-16 the Court explicitly returned 2-acre zoning to the agricultural zone and thus put the Township in the position of having in place the very zoning which Ordinance 1982-16 eliminated because the Township felt it would not preserve agriculture in the zone.

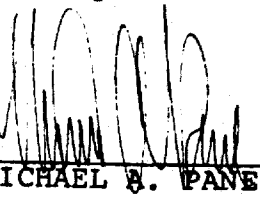
Since the AP zone regulations are a valid regulation of land use in this case -- and since their enactment was the clear intent of the Township -- the Court should not have invalidated the AP zone regulations. There was no constitu-

tional or judicial reason for doing so and the result was contrary to the clear intent of the Township's enactment.

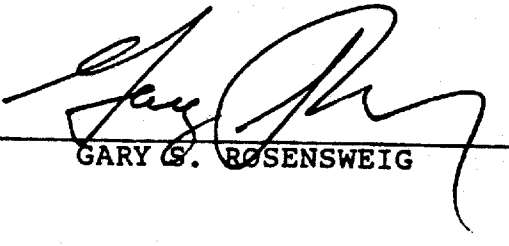
CONCLUSION

In the foregoing reasons, it is respectfully submitted that the opinion and order of the Court below be reversed and that ordinance 82-16 be sustained as a valid enactment.

Respectfully submitted,



MICHAEL A. PANE, ESQ.



GARY G. ROSENSWEIG

Dated: August 10, 1983