ML- East Windsor

10/19/83

Brief for Π - Respondent - seeking judgment declaring that East Windsor Ordinance 1982-16 is null + void + enjoining enforcement of said ordinance to be affirmed.

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5144-82 T1

CENTEX HOMES OF NEW JERSEY, INC. a Corporation of the State of Nevada, Plaintiff-Respondent, v. THE MAYOR AND COUNCIL OF THE TOWNSHIP OF EAST WINDSOR, a Municipal Corporation, and the PLANNING BOARD OF THE TOWNHSIP OF EAST WINDSOR, Defendant-Appellant.	Civil Action On Appeal from Final Judgment of the Superior Court of New Jersey Law Division, Mercer County Sat Below: Levy, J.S.C.

BRIEF FOR PLAINTIFF-RESPONDENT

STERNS, HERBERT & WEINROTH, P.A.
186 West State Street
P. O. Box 1298
Trenton, New Jersey 08607
(609) 392-2100

Attorneys for Plaintiff-Respondent
Centex Homes of New Jersey, Inc.

FRANK J. PETRINO
Of Counsel

RICHARD M. HLUCHAN
On the Brief

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PRELIMINARY STATEMENT

In May 1981 Centex-New Jersey filed a thirteen (13) count Complaint in Lieu of Prerogative Writ (Docket No. L-51177-80 P.W.) ("1981 litigation") against the Township and the Planning Board of the Township of East Windsor seeking, inter alia, declaratory and injunctive relief invalidating East Windsor's zoning ordinance which prohibits reasonable density residential development of Centex-New Jersey's 600+- acre tract within the Township. The Complaint alleges that the zoning ordinance promotes an exclusionary no-growth land use policy in violation of, inter alia, the Municipal Land Use Law, N.J.S.A. 40:55D-1 et seq., the "taking without just compensation" clauses of both the United States and New Jersey Constitutions, and the Mt. Laurel doctrine. In October 1982 the court granted Centex-New Jersey's motion for leave to amend the Complaint to add three (3) additional counts and to name the East Windsor Municipal Utilities Authority as an additional defendant. The 1981 litigation is now in the midst of discovery proceedings.

In December 1982, the Township adopted Ordinance 1982-16, which included the Centex-New Jersey property within an "Agricultural Preservation Zone" in which single family dwellings are permitted, under limited circumstances, only on farms at a ratio of one dwelling per twenty acres of land. No other residential uses are permitted in this zone. The 1982 ordinance, moreover, provides that landowners in the Agricultural Preservation Zone may be granted a certain number of "Transferable Development Rights" in lieu of being permitted to

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develop their property in return for deed restricting the development of their land. Under the terms of the 1982 ordinance, such development rights may be transferred to developers of land located in another portion of the Township designated as the Residential Expansion for Agricultural Preservation (REAP) Zone. In fact, transfer of such development rights is absolutely essential under the ordinance in order to construct any residential dwelling in the REAP Zone upon lots smaller than one-half acre.

As a result of this rezoning, Centex filed a second Complaint in Lieu of Prerogative Writ (Docket No. L-6433-83 P.W.) ("1983 litigation") against the Township of East Windsor and the East Windsor Planning Board, alleging that Ordinance 1982-16 is invalid upon nine separate counts because, _inter alia_, it is _ultra vires_ under the Municipal Land Use Law.

Subsequently, Centex-New Jersey moved for summary judgment as to two of the counts of the Complaint in the 1983 litigation and the defendants cross-moved for summary judgment as to the same two counts plus one additional count. On May 13, 1983, the Honorable Paul G. Levy, J.S.C., granted summary judgment to Centex-New Jersey upon Count One of the Complaint, declaring that the 1982 zoning ordinance is _ultra vires_ pursuant to the Municipal Land Use Law and, therefore, the entire ordinance is invalid. The remaining motions for summary judgment in that action were dismissed as "moot." By way of remedy, Judge Levy reinstated the previously existing zoning ordinance, which remains the subject of the 1981 litigation.

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Also, on May 13, 1983, Judge Levy granted the motion of Centex-New Jersey for dismissal of various counterclaims filed by the Township in the 1983 litigation and denied the Township's motion to consolidate the 1981 litigation and the 1983 litigation "because the 1983 action has been terminated by the grant of summary judgment to plaintiff declaring the entire ordinance invalid" (T67 - 2 to 5). Orders memorializing all of Judge Levy's rulings on these motions were executed and filed on May 13, 1983.

On June 28, 1983, the Township Council and Planning Board filed the instant appeal, intending to appeal from the Orders entered by the Law Division on May 13, 1983, in the 1983 litigation. On August 11, 1983, the Township Council and Planning Board filed and served joint Briefs and Appendices in support of the relief sought on appeal.

Shortly thereafter, the parties to the 1983 litigation began to explore the possibility of whether the matters in dispute in that lawsuit could be amicably resolved. These discussions bore fruit and on September 21, 1983, the Township Council and Planning Board authorized their respective staffs to prepare the documents necessary to memorialize the settlement of the 1981 litigation. As part of the proposed settlement, it was agreed that (1) the Township and Planning Board would withdraw that portion of this appeal that dealt with the dismissal of its

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counterclaims in the 1983 litigation*; (2) that the outcome of the appeal in the 1983 litigation would have no effect on Centex-New Jersey and the terms of the settlement of the 1981 litigation; (3) and that Centex-New Jersey would continue to participate on appeal so as to aid the Township in obtaining a final determination as to the validity of Ordinance 1982-16, which decision will have an effect on the future use of transferrable development rights by East Windsor and other municipalities as part of an agricultural preservation effort.

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* On September 16, 1983, the attorney for the Township Council advised the Appellate Division by letter that the Appellants were contemplating such action.

PROCEDURAL HISTORY

Plaintiff-Respondent Centex Homes of New Jersey, Inc., ("Centex-New Jersey") filed a Complaint In Lieu of Prerogative Writ in this matter on January 28, 1983. (Da18). The Complaint, which contained ten counts, essentially sought a judicial declaration that Ordinance 1982-16 of the Township of East Windsor ("the East Windsor TDR ordinance") is null, void, and of no force or effect at law or equity. Named as defendants in this action were the Mayor and Council of the Township of East Windsor, and the Planning Board of the Township of East Windsor.

Centex-New Jersey subsequently moved for summary judgment as to Count I of the Complaint, seeking a declaration that the TDR ordinance is invalid and _ultra vires_ because East Windsor Township lacks any authority under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 _et seq._, to enact such an ordinance. See Affidavit in Support of Motion (Pa1). Moreover, Centex-New Jersey sought an injunction prohibiting defendants from in any way enforcing the TDR ordinance. Defendants cross-moved for summary judgment as to Counts 1, 2 and 9 of the Complaint, and Centex-New Jersey cross-moved for summary judgment as to Count 2.

On May 13, 1983, the Honorable Paul G. Levy, J.S.C. conducted a hearing on the pending motions (Da77 to Da110). At the conclusion of the hearing, the court issued an oral decision from the bench (Da110 to Da122), granting summary judgment in favor of Centex-New Jersey as to Count 1 and dismissing the other motions as moot. An Order to this effect was entered by the Court on that same day (Da75 to Da76).

Defendants thereafter filed a Notice of Appeal, (Da121) and various "amendments" thereto (Da130 to Da135) seeking to review the Court's judgment.

COUNTER-STATEMENT OF THE CASE

The facts underlying this matter are undisputed. Centex-New Jersey is the owner of 600± acres of land located south of the Borough of Hightstown in the Township of East Windsor, Mercer County, New Jersey. (Da19). On November 24, 1981, a draft of what became the East Windsor TDR ordinance was first discussed at a public meeting conducted by the defendants Mayor and Council of East Windsor and the East Windsor Planning Board. Designated as Ordinance 1982-16, the East Windsor TDR ordinance was introduced and passed on first reading at a regular meeting of the Township Council of East Windsor held on July 13, 1982. On November 11, 1982, the Township Council conducted a public hearing on the proposed ordinance.

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

Because Centex-New Jersey's property in East Windsor Township was the subject of Ordinance 1982-16, Centex-New Jersey, through legal counsel, filed numerous written objections to the ordinance and testified against it at the public hearings. On December 14, 1982, a petition directed to the Township Council, signed by the owners of approximately 40 percent of the land area

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affected by the proposed ordinance and "protesting" the adoption of the TDR ordinance, was filed with the Township Clerk. (Pa16). Pursuant to N.J.S.A. 40:55D-63, therefore, the ordinance could only be adopted by at least a two-thirds vote of the Township Council.

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On December 14, 1982, the East Windsor Township Council adopted Ordinance 1982-16 by a vote of 6-1. A true copy of the TDR ordinance as adopted by the Township Council is set forth in Defendant's appendix at Da 1 to Da 17. Pursuant to section 7 of the TDR ordinance (Da16), the ordinance was to be effective 20 days after its final passage and publication, or after January 3, 1983.

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The ostensible purpose of the TDR ordinance is to preserve agricultural land within East Windsor Township. (See East Windsor TDR Ordinance, §20-17.2000A) (Da2 to Da3). To that end, the TDR ordinance places approximately 3,000 acres of land in the south and southeastern portion of the Township in an agricultural preservation (AP) zone. The only permitted uses in the AP zone are agricultural, roadside produce stands, and farm dwellings. (Id. §20-17.3000A) (Da3). All the land in the AP zone west of the New Jersey Turnpike is designated in the State Development Guide Plan as a "growth area." The entire Centex-New Jersey tract is located west of the Turnpike and wholly within the AP zone.

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As a conditional use in the AP zone, single family dwellings are permitted, under limited circumstances, on farms at a ratio of one dwelling per 20 acres of land. (Id. §20-17.5000A)

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(Da4). No such single family dwellings are permitted on farms of less than 20 acres unless the owner of the property demonstrates that the land is not suitable for agricultural preservation. No other residential uses are permitted in the AP zone. (Id.)

Under the terms of the TDR ordinance, landowners in the AP zone may be granted a certain number of "development rights." (Id. §20-19.1000; -19.2000) (Da9 to Dall). A "development right" is defined by the ordinance as

> an interest in land which represents a certain right to use the land for residential or non-residential purposes. A development right may be transferred from one person to another and may be used in any location where use is authorized in accordance with the provisions of this ordinance. [Id. §20-17.1000A(c)] [Da 1].

Such development rights may be granted to AP zone landowners in lieu of being permitted to develop their property and in return for deed restricting development of the land. (Id. §20-19.5000) (Dall to Da12). The number of development rights awarded to each landowner is not determined or set forth in the TDR ordinance; the amount will ostensibly be determined at a subsequent time. (Id. §20-19.2000) (Da9 to Dall).

The TDR ordinance further provides that development rights awarded by the Township to landowners in the AP zone may be transferred by these landowners to developers of land located in another portion of the Township referred to in the ordinance as the Residential Expansion for Agricultural Preservation Zone (REAP zone). (Id. §20-18.1000) (Da7 to Da8). The portion of the Township designated as the REAP zone was, until 1976, zoned for agricultural use and most if not all of this land is still

actually farmed. The area was rezoned in 1976 for planned development. Approximately one-half of the land in the REAP zone is located in an area designated in the State Development Guide Plan as an "agricultural area."

The TDR ordinance concedes that "development rights" are being granted in recognition of the fact that prohibiting development within the AP zone will drastically reduce the value of land and cause economic hardship. (Id. §20-17.2000A) (Da2 to Da3). The granting of "development rights" is the admittedly experimental form of "compensation" the Township has deemed constitutionally sufficient to enable it to compel land owners in the AP zone to retain their land in "agricultural uses." (Id.).

The East Windsor TDR ordinance provides for the following uses in the REAP zone: agricultural, low density residential dwellings on lots with a minimum of two acres, and "planned development." (Id. §20-18.2000) (Da8). In addition, higher density residential development is permitted in the REAP zone provided that development rights are "transferred" for each residential unit according to the following table:

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

[Id. §20-18.2000(1)] [Da8].

The ordinance defines "transfer of a development right" as "the act of using a development right, where the ordinance mandates such use, in order for permission for development to be granted." [Id. §20-17.1000A(1)] (Da2). Thus, the ordinance contemplates that individuals who wish to develop residential units in the REAP zone at a density higher than one unit per two acres must first purchase development rights from landowners in the AP zone, and then turn them over to municipal officials in exchange for the appropriate development approvals in the REAP zone.

After consideration of Centex-New Jersey's motion for summary judgment, the Law Division concluded that

> 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. [Da113].

The court found that *N.J. Const.* (1947) Article IV, Section VI, ¶2, authorizes the Legislature to delegate to municipalities the power to zone, i.e., to adopt ordinances regulating the construction, nature and extend of use of buildings in specified districts, or regulating the nature and extent of the uses of land in specified districts (Da114). The legislative delegation of such authority is contained in the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1, *et seq.*, and

> any zoning ordinance must conform to these limits [contained in the MLUL] or it is void, because a municipality has no inherent power to adopt a zoning ordinance. [Da114 to Da115].

Having delineated the applicable parameters of its analysis, the court below examined the MLUL and properly determined that the Act "has no express reference to authorization of 'development rights' or the TDR concept" (Da115). The court rejected defendants' assertions that the general "intent and purpose" provisions of the MLUL [i.e., N.J.S.A. 40:55D-2(a), (e), (g), (i), and (j)] provide any implied authority for municipal adoption of TDR; rather, the court examined N.J.S.A. 40:55D-62 and -65, which contain the delegation of power to zone, and determined that no implied power to adopt TDR was present in these provisions. (Da115). Noting that TDR represents "a departure from traditional concepts of zoning and planning permitted by the Municipal Land Use Law," the court concluded that specific authority to enact TDR must be granted by the Legislature, and could not be implied. (Da117).

The sound underpinnings for this conclusion were clearly manifest. The Law Division acknowledged that two bills which would have expressly authorized TDR (i.e. A-3192 (1975) (Pa69) and A-1509 (1978) (Pa83) were never enacted by the Legislature (Da118). While it discounted the importance of these bills in analyzing the issue of TDR authority under the MLUL, the court nonetheless reasoned that "these proposed bills do indicate the complexity of the issue and the need for uniform regulation" respecting TDR on a state-wide basis, especially regarding the criteria for delineation of the preservation and transfer zones, and the criteria for determining how TDRs are to be assessed, taxed, sold, or exchanged. (Da118 to Da119). No such criteria, express or implied, could be gleaned from the MLUL.

Moreover, the court recognized that the East Windsor TDR ordinance conditioned high density development not upon traditional factors but upon "relinquishment of part of the fee ownership of property--the development right--and this requires uniform regulation" statewide. (Da119). In this vein, the court suggested an apt analogy:

> One need to 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_. [Da119].

Similarly, in order to be effective, TDR must be authorized by regulatory legislation. Otherwise, a TDR ordinance which "regulates the ownership of property rather than the physical use of land and structures" is unauthorized. (Da119).

The court expressly rejected defendants' contention that N.J.S.A. 40:48-2, the catch-all municipal police power statute, could somehow serve as the statutory basis for a municipal TDR ordinance (Da120). The court properly concluded that "the vehicle by which the Legislature granted such power [to regulate land use] is the Municipal Land Use Law and only that." Thus, N.J.S.A. 40:48-2 has no applicability here.

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In sum, the court below held that no authority had been delegated to municipalities empowering them to enact TDR ordinances. Accordingly, the East Windsor TDR ordinance was found to be <u>ultra vires</u> and thus invalid.

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In considering the appropriate remedy, the Law Division acknowledged that the East Windsor TDR ordinance contained a typical severability clause. However, it was clear to the court from an analysis of "the entire background of the enactment of Ordinance 1982-16...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." (Da121). Since TDR was found to be the "dominant purpose" of the ordinance and indeed "the significant inducement to adoption," and since no one provision of the ordinance was found to be "functionally independent" of any other, the court invalidated the entire East Windsor TDR ordinance under the rule of <u>Inganamort v. Fort Lee</u>, 72 N.J. 412 (1977) (Da121).

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ARGUMENT

POINT I

THE LAW DIVISION CORRECTLY CONCLUDED THAT EAST WINDSOR TOWNSHIP LACKS AUTHORITY UNDER THE MUNICIPAL LAND USE LAW TO ENACT A TDR ORDINANCE

A. Municipalities have no inherent power to regulate land use, but only such power as is delegated to them by the Legislature.

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

Since 1927, the limits of zoning authority which may properly be delegated to municipalities has been governed by the State Constitution. In that year, the New Jersey Constitution of 1844 was amended to authorize the Legislature to enact general laws under which:

> municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use . . . . [N.J. Const. (1844), Art. IV, §VI, ¶5].

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

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

> The Legislature may enact general laws under which municipalities, other than counties, may adopt zoning ordinances limiting and restricting to specified districts and regulating therein, buildings and structures, according to their construction, and the nature and extent of their use, and the nature and extent of the uses of land, and the exercise of such authority shall be deemed to be within the police power of the State. Such laws shall be subject to repeal or alteration by the Legislature. [N.J. Const. (1947), Art. IV, §VI, ¶2 (emphasis added)].

This provision delimits the scope of power which the Legislature is now authorized to delegate to municipalities. Clearly, the Legislature may constitutionally delegate to municipalities only that zoning authority necessary (1) to limit and restrict buildings/structures to specified districts, and regulate them

according to their construction and the nature and extent of their use, and (2) to regulate the nature and extent of the uses of land itself according to specified districts.* Moreover, the Legislature is expressly empowered to repeal or alter any delegation of zoning power at any time. N.J. Const. (1947), Art. IV, §VI, ¶2.

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

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

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

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

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

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

Defendants here point to Article IV, §VII, ¶2 of the State Constitution, which provides that

> The powers of...municipal corporations shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred, or essential thereto, and not inconsistent with or prohibited by this Constitution or bylaw ...

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

Finally, the zoning powers of municipalities, although liberally construed under Article IV, §VII, ¶2, are "not absolute." Rather, such "[m]unicipal powers are still derived from the Legislature." Sussex Woodlands, Inc. v. Tp. of West Milford, 109 N.J. Super. 432, 435 (Law Div. 1970). As the Supreme Court declared in Rockhill v. Chesterfield Tp., 23 N.J. 117, 125 (1957):

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

B. The MLUL contains the sum total of zoning authority delegated by the legislature to municipalities, and nowhere either expressly or impliedly authorizes the adoption of TDR ordinances.

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

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

Super. 589, 594 (Law Div. 1968). See generally, 6 McQuillan, Municipal Corporations (3d ed. 1969), 24.35 et seq.

The current enabling legislation which delegates zoning authority to municipalities is the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-1 et seq. Lusardi v. Curtis Point Prop. Owners Assn., 86 N.J. 217, 226 (1981); see Taxpayers Assn. of Weymouth Tp. v. Weymouth Tp., supra, 71 N.J. at 263 n. 4. Therefore, unless the East Windsor TDR ordinance is authorized by the terms of the MLUL, it must be ultra vires and void.

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

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

The MLUL was signed into law by the Governor on January 14, 1976, as L. 1975, Ch. 291, and became effective on August 1, 1976. Significantly, while the MLUL was pending enactment, a bill, A-3192 (Pa69), was introduced in the Assembly on February 27, 1975, for the express purpose of authorizing municipalities to enact TDR ordinances. Thus, the sponsor's statement to A-3192 specified:

> This bill would supplement the present laws concerning planning and zoning to permit municipalities to recognize the existence of development rights on certain properties within their boundaries and to establish a system by which such rights may be determined, allocated and transferred for use in another segment of the municipality. (emphasis added). (Pa82).

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

Even after the MLUL became effective, bills were introduced in the Legislature for the purpose of authorizing municipal TDR ordinances. For example, on June 19, 1978, A-1509, "an act concerning municipalities in relation to planning and zoning, and supplementing the 'Municipal Land Use Law' . . . " was introduced (Pa83). As acknowledged by the court below, this bill, known as the "Municipal Transfer of Development Rights Act" contained detailed provisions respecting the creation, transfer, and use of development rights and authorized municipalities to adopt appropriate ordinances implementing TDR. The statement accompanying the bill described its purpose as follows:

> This bill would permit, and establishes the procedure by which, municipalities may adopt transferable development rights (TDR) provisions within their zoning ordinances for the preservation of properties of historic, aesthetic, environmental and economic significance. [Pa102].

Clearly, the sponsors of A-1509, who wished to implement TDR in New Jersey, believed that no prior legislation (including the MLUL) had delegated TDR authority to municipalities, hence the need for a separate bill to spell out how TDR may be utilized in supplementation of the MLUL. Since the MLUL obviously provides no express authorization for municipal TDR ordinances, and since no bill providing such authorization has yet been enacted*, New Jersey's municipalities quite simply lack any authority to adopt such ordinances.

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

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* Two TDR bills, S-3334 (introduced May 23, 1983) (Pa103) and S-3431 (introduced June 16, 1983) (Pa125) are pending in the current session of the Legislature. Both would amend the MLUL to expressly authorize the municipal adoption of TDR ordinances.

recommended that the Legislature include a provision which would

> Provide for the possibility of "re-use"of State bond funds through municipal or county purchase of transferable development rights, combined with subsequent re-sale of those rights for use in other parts of the community, followed by subsequent re-use of the sale proceeds for purchase of additional rights. [Pa56].

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

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

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> * * *

> 3. Provide flexibility for local programs such as TDR under which municipalities can buy rights from farmers with State funds and then, if they wish, re-sell them in areas of the municipality targeted for intensive residential or industrial/commercial development (thus creating more funds with which to buy other development easements). [Pa59 to Pa60].

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The Legislature, however, rejected East Windsor's request that authority to utilize TDR be delegated. See Section 25 of P.L. 1983, Ch. 32*.

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Defendants' attempt to argue that the "purpose and intent" section of the MLUL (N.J.S.A. 40:55D-2) provides the

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* Moreover, P.L. 1983, Ch. 32 arguably pre-empts East Windsor's authority to enact a TDR ordinance. That Act is designed to preserve agriculture by establishing county (not municipal) programs, voluntary in nature, under which development of agricultural land may be restricted for a maximum of eight years.

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(Continued on next page)

implied authority to enact a TDR ordinance was properly rejected by the court below. That statute merely provides in relevant part that it is the intent and purpose of this Act:

* * *

> (e) to promote the establishement of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the enviornment; 10

* * *

> (g) to provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens; 20

(footnote continued from previous page)

The Act provides for the purchase of development easements to preserve farmlands, but such easements may not be sold or transferred subsequently. (By contrast, TDRs are deed restrictions in perpetuity which must be transferred to be utilized). 30

Significantly, §29 of P.L. 1983, Ch. 32 provides:

> Nothing herein contained shall be construed to prohibit the creation of a municipally approved program or other farmland preservation program, the purchase of development easements, or the extension of any other benefit herein provided as land, and to owners thereof, in the pinelands area as defined pursuant to section 3 of P.L. 1979, c. 111 (C. 13:18A-3). 40

Thus, §29 indicates that Pinelands municipalities are <u>not</u> pre-empted from adopting certain agricultural preservation programs. This must mean that non-Pinelands towns, such as East Windsor, are limited to utilizing the farm preservation techniques set forth in P.L. 1983, Ch. 32, which, of course, nowhere authorizes TDR. Thus, the recent Act pre-empts the East Windsor TDR ordinance. 50

and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

* * *

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

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

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However, defendants are simply wrong in asserting that the above-quoted portion of N.J.S.A. 40:55D-2 imbues the Township of East Windsor with any substantive zoning powers. This is so for a number of reasons.

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Firstly, N.J.S.A. 40:55D-2 on its face provides no substantive zoning powers. Rather, the statute merely contains a recital of the factors which induced the Legislature to adopt the MLUL as well as a listing of the types of land use concerns which are expected to be addressed pursuant to the Law at the municipal level. In short, N.J.S.A. 40:55D-2 merely provides a listing of the types of subjects which municipal zoning ordinances should address. Such municipal zoning ordinances, however, must conform in all respects to N.J.S.A. 40:55D-62, which contains the specific delegation from the State to municipalities of the "power to zone." Under this provision, as will be discussed in detail _infra_, ordinances must relate "to the nature and extent of the uses of land and of buildings and structures thereon," and

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or kind of buildings or other structures or uses of land, including planned unit development, planned unit residential development and residential cluster...." Nowhere, of course, does the "power to zone" statute anywhere empower a municipality to enact a TDR ordinance. 10

Next, defendants have offered a classic "end justifies the means" argument to bolster its position that TDR is appropriate so long as, for example, it is designed to promote preservation of agricultural lands. This argument, however, completely misses the fundamental point that municipal zoning power must always be "exercised <u>within statutory limits</u>, <u>and</u> for legitimate zoning purposes." <u>Morris v. Postma</u>, 41 N.J. 354, 359 (1964) (emphasis added). In the present case, agricultural preservation may be a "legitimate zoning purpose" because N.J.S.A. 40:55D-2(g) so specifies. Because the "power to zone" provision does not expressly or implicitly authorize TDR, however, a TDR ordinance is clearly outside that statutory limits of the MLUL. 20 30

Therefore, the lower court correctly determined that TDR is unavailable as a device to be used by a municipality even for the authorized purpose of preserving agricultural lands. Unless both the goal to be achieved <u>and</u> the means to achieve it are authorized by the MLUL, it is clear that a municipality lacks the requisite delegated authority to act. 40

The New Jersey cases are legion in which zoning ordinances have been invalidated as unauthorized by enabling legislation, notwithstanding an undisputed beneficial 50

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

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

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

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

public interest and is conduct that should be encouraged, the court nonetheless opined that

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

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The court adopted the view that "to permit municipalities the right to impose payment of taxes as a prerequisite to subdivision approval would be to give a strained interpretation to the Municipal Planning Act . . . ." Id. at 437. The court found that "regulatory ordinances are intended for the purpose of reasonably controlling the physical development of subdivision property" and that "planning conditions are limited to control over physical improvements to subdivisions . . . ." Id. at 437-438. Since no specific statute authorized the municipality to compel the payment of taxes as a condition of subdivision approval, the court invalidated the ordinance, notwithstanding its obvious beneficial objective, on the basis that municipalities lack "power to impose a tax payment condition under the guise of an act [i.e., zoning enabling legislation] which does not authorize this condition." 109 N.J. Super. at 441.

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In a similar vein is Levitt and Sons, Inc. v. Tp. of Freehold, 120 N.J. Super. 595 (Law Div. 1972), in which a municipality withheld subdivision approval on the basis that the developer had demonstrated incompetence in an adjacent municipality. No statute authorized the municipality to take

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such action. Citing with approval the statement in 3 Anderson, American Law of Zoning, (1968), §19.24 at 443-444 that "a condition for approval may be imposed only if it is authorized by statute," the court held that:

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

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Just as in Dressner, Sussex Woodlands and Levitt, the goals which East Windsor is attempting to further are arguably worthy and in the public interest. But these cases make clear that worthy goals alone cannot validate a zoning ordinance; unless enabling legislation specifically authorizes a zoning ordinance to address such goals, they may not be addressed as part of such an ordinance.* Unless and until the Legislature acts, however, the East Windsor TDR ordinance is unauthorized by the MLUL.

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The Legislative Counsel to the New Jersey Legislature recently opined that municipal TDR ordinances are neither expressly nor impliedly authorized by the MLUL (Pa44). In response to an inquiry from a state senator as to "whether the

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

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municipal adoption of a transferable development rights ordinance is authorized under state law and whether a municipality needs this legislative authorization in order to adopt a transferable development rights ordinance," the Legislative Counsel concluded that

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> ...until such time as specific enabling legislation is enacted, a transferable development rights ordinance adopted by a municipality is likely to be successfully challenged in court as ultra vires of the provisions of the Municipal Land Use Law. (Pa50).

Essentially, the Legislative Counsel performs many of the same functions for his clients, the members of the Legislative branch of state government, as the Attorney General performs for his clients, the members of the executive branch of the state government. Indeed, the statutory functions of the Legislative Counsel include the obligation to furnish legal advice to legislators relating to "the subject matter and legal effect of the statutes..." See N.J.S.A. 52:11-60 and -61. Accordingly, this opinion of the Legislative Counsel, which was provided to the Law Division below (Pa41), may be considered as "strongly persuasive" by this Court. Evans-Aristocrat Industries, Inc. v. North, 140 N.J. Super. 226, 222-230 (App. Div. 1976, affirmed, 75 N.J. 84 (1977); Clark v. Degnan, 163 N.J. Super. 344, 371 (Law Div. 1978), modified on other grounds and affirmed, 83 N.J. 393 (1980).

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In the face of these settled legal principles, defendants nonetheless unabashedly resort to the desperate argument that TDR may be utilized notwithstanding the lack of any

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statutory authority, express or implied. In support of their position, defendants point to various cases, none of which involved TDR, in which courts found implied authority to adopt the zoning provision there at issue (Db30 to Db31). The cases cited by defendants are clearly inapposite.

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

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

insufficient to satisfy the constitutional obligation of the Mt. Laurel doctrine. Rather, the Supreme Court made clear in Mt. Laurel II that municipalities have the duty "affirmatively to provide a realistic opportunity for the construction of [their] fair share of lower income housing." Id. at 259-260. Among the affirmative measures which the court will require municipalities to adopt in order to meet their constitutional responsibility are inclusionary zoning devices such as incentive zoning, mandatory set-asides, and deed restrictions for low/moderate income housing. Id. at 265-274.

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

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

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municipalities to adopt extraordinary affirmative devices designed to achieve precisely that result.

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

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

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* This issue was raised by Count 6 of Centex-New Jersey's Complaint (Da31), but was not addressed by the Law Division because the case was decided on other grounds.

land users." Id. at 277. The court found that zoning for senior citizens' housing involves special use qualities and characteristics which justify the conclusion that uses based on this classification are cognizable within the municipal zoning power. Id. at 278. The court did note, however, that "zoning ordinances which bear too tenuous a relationship to land use will be stricken as exceeding powers delegated to the municipalities by the enabling act." Id. at 276.

Importantly, the ordinance in Weymouth was at least related to the use of land and additionally furthered an important social purpose, i.e., provision of housing for senior citizens. By contrast, the East Windsor TDR program is not really related to, nor does it regulate, the physical use of land or buildings. Rather, it goes far beyond such regulation by requiring, as a condition of obtaining approval for construction of single family residential dwellings on lots less than two acres, that ownership and title to agricultural land be radically altered. Clearly, the Weymouth case provides no support for defendants' TDR Ordinance.

The case of Chrinko v. South Brunswick Twp. Planning Board, 77 N.J. Super. 594 (Law Div. 1963) also provides little solace to defendants. In that case, the Law Division upheld a local ordinance which provided an option to developers for cluster or density zoning, even though the state zoning enabling legislation then in place did not "in so many words empower municipalities to provide [such] an option...." 77 N.J. Super. at 601. The court upheld the ordinance on the basis that this

technique satisfied the substantive statutory criterion of uniform regulation of land throughout each district because the option was available to all developers within the zoning district.

The Chrinko case is of limited utility to defendants here. First of all, both the Supreme Court and the Appellate Division have questioned the Chrinko holding, stating that the issue of pre-MLUL municipal power to adopt cluster zoning is an open question. So. Burl. Cty. NAACP v. Mt. Laurel Tp., 67 N.J. 151, 165 n. 4 (1975); Niccollai v. Planning Bd. of Tp. of Wayne, 148 N.J. Super. 150, 157 (App. Div. 1977). Moreover, subsequent to the Law Division's decision, cluster and density zoning were expressly authorized by the Municipal Planned Unit Development Act of 1967, formerly N.J.S.A. 40:55-54 et seq. Additionally, the current MLUL expressly authorizes cluster and density zoning. See, e.g., N.J.S.A. 40:55D-62(a); -65(c). TDR, of course, still lacks the benefit of any such statutory authorization. Moreover, Chrinko does not in even a limited way lend any support to defendants' claim that a municipality may create or modify property rights without explicit statutory authorization, let alone require that such rights be surrendered as a condition of local development approval.

In sum, while preservation of agricultural land may be an appropriate goal specified in the Municipal Land Use Law, every conceivable means to achieve that goal is not authorized to be employed by municipalities. Rather, they may only utilize those zoning devices which the Legislature has specifically

authorized by delegating zoning authority to the municipalities. As the Supreme Court of New Jersey stated in Taxpayers Assoc. of Weymouth Twp., supra, 71 N.J. at 276, "admittedly, zoning is not a panacea for all social, cultural and economic ills especially where they are unrelated to the use of land." The East Windsor TDR Ordinance, which virtually compels individuals who wish to develop in the REAP zone to approach third parties in the agricultural zone and transfer title to an interest in land, is not justified merely by the admirable goal of preserving agricultural land.

C. N.J.S.A. 40:55D-62, the "power to zone" statute, only authorizes municipalities to regulate the nature and extent of uses of land and buildings, and nowhere authorizes adoption of TDR.

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

> ...shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate uses of land. The regulations in the zoning ordinances shall be uniform throughout each district for each class or kind of buildings or other structures or uses of land, including planned unit development, planned unit residential development and

> residential cluster, but the regulations in one district may differ from those in other districts. [N.J.S.A. 40:55D-62 (emphasis added)].

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

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These provisions of the MLUL obviously give municipal officials wide discretion in determining what uses are suitable for delineated districts. Lusardi v. Curtis Point Prop. Owners Assn., supra, 86 N.J. at 227. East Windsor, however, has gone far beyond mere regulation of the use of land. East Windsor's TDR ordinance has created two districts, Agricultural Preservation (AP) and the Residential Expansion for Agricultural Preservation (REAP). The AP zone is to be preserved in substantially its present state; the only permitted uses are agricultural or agriculturally-related. The permitted uses in the REAP zone include agriculture, single family residential dwellings on large (two acre) lots and planned unit developments. In both the AP and REAP zones higher density residential housing is a conditional use, but the "condition" is unrelated to "land use" at all. Rather, the condition is that title to a portion of the fee interest in real property in the AP zone (i.e. "development rights") must be relinquished in order to develop at a higher density in the AP zone or must be purchased by the owner of land in the REAP zone to enable him to develop his REAP zone parcel at a higher density. In short, the

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municipality ultimately realizes its land use goals not through direct regulation of the use of land, but by compelling a developer to deed restrict the use of AP land forever as a condition precedent to permission to construct residential dwellings on REAP land. Such a process goes far beyond the regulation of land uses authorized by N.J.S.A. 40:55D-62 and -65.

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

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

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

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Other courts have echoed the view that municipal zoning authority is limited to regulation only of physical use of land

and structures and may not be extended to affect ownership or title to property. *Plaza Joint Venture v. Atlantic City*, 174 N.J. Super. 231, 242 (App. Div. 1980); *Hampshire House Sponsor Corp. v. Fort Lee*, 172 N.J. Super. 426, 431 (Law Div. 1979); *Maplewood Village Tenants Assn. v. Maplewood*, 116 N.J. Super. 372 (Ch. Div. 1971); *Tp. of Washington v. Cent. Bergen Comm. Health*, 156 N.J. Super. 388, 417 (Law Div. 1978).

By contrast, the Law Division properly found below that the East Windsor TDR ordinance goes far beyond mere regulation of the physical use of land and structures: it requires, as a condition of obtaining approval for construction of single family residential dwellings on lots less than two acres, that ownership and title to AP land be radically altered. East Windsor thus is really attempting to regulate title to land (*i.e.*, stripping the development potential of land from the owner's fee interest) as well as ownership (*i.e.* the development rights are eventually deeded to the municipality when a developer exchanges them for increased density). Under the above-cited cases, the MLUL may not be employed to affect title and ownership in this manner.

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

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

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

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

On the other hand, the court determined that

> The zoning power in its proper exercise, is not operative upon the alienability of land, whatever the size of the parcel transferred, but is concerned solely with the manner in which its owner seeks to utilize it. [Id., emphasis added].

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

> ...the scope of municipal zoning authority must be measured in the light of both traditional conceptions of the zoning function and allied legislative enactments. The Planning Act, through its regulation of subdivisions, provides the sole governmental restraint on transferability in this area; testamentary dispositions are expressly excluded from its sweep, thus evincing a

> policy determination not to interfere with such transfers except as specified. [Id. at 129].

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

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Whereas in Metzdorf the municipality attempted, by zoning ordinance, to prohibit a transfer of title to land, in the instant case East Windsor seeks to require such transfer of title as a condition precedent to permission to construct single family housing. In both situations, the municipality clearly is attempting to affect the alienability of land and transfer of title thereto under the guise of zoning authority. Since, under Metzdorf, a municipality clearly lacks power to block a transfer of title which may be inconsistent with its zoning ordinance, it should be obvious here that municipalities also lack the power to affirmatively compel the transfer of title to interests in land as the price for development approvals.

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The East Windsor ordinance plainly goes beyond mere regulation of land use to the extent that it virtually compels the transfer of development rights, and it is ludicrous for defendants to contend otherwise (Db41). Defendants' assertion that a TDR, like other "government regulations [which] affect the use and enjoyment of land", "do not constitute encumbrances to land title" is absurd in light of East Windsor's requirement that

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* Subsequent to the Metzdorf decision, the MLUL was supplemented to expressly exempt testamentary dispositions from municipal power to regulate subdivisions. See, N.J.S.A. 40:55D-7.

land be deed restricted in order to sever a TDR. (Db45). Moreover, East Windsor takes the ridiculous position that creation of TDRs is "no different than if, pursuant to a rezoning, the development rights of these parcels were similarly increased or decreased." (Db45). The obvious difference is that zoning is not accomplished by deed restrictions in perpetuity, which is precisely what a TDR is. A more obvious restriction upon title to real property is difficult to imagine. The Law Division below recognized that the East Windsor TDR scheme was designed not to preserve farm land by zoning regulations, but by regulation of title through deed restrictions, which is simply not authorized by the MLUL.

D. TDR Ordinances are prohibited by MLUL provisions which limit municipal exactions from developers.

The East Windsor TDR Ordinance is implicitly based upon two premises: (1) that agricultural land cannot be preserved by use of traditional zoning mechanisms; and (2) that East Windsor Township itself is either unwilling or unable to fund the acquisition of agricultural land in order to preserve it. As such, the East Windsor TDR Ordinance is designed, under the guise of zoning authority, to compel residential land developers to fund the preservation of agricultural land as a condition of constructing housing elsewhere in the Township. Presumably, the developer's cost of purchasing TDRs will be passed on to future homeowners in the form of higher prices. The result is that the entire cost of farmland preservation, which is supposed to

benefit the "public interest," will be borne not by the public at large but only by a relatively small class of future homeowners.

Viewed from this perspective, TDR is nothing more than a process whereby a municipality requires a developer to finance by means of exactions public benefits or improvements unrelated to his proposed development, and the need for which are not generated by his proposed development. New Jersey courts have been loathe to countenance such exactions.

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For example, in West Park Ave. v. Ocean Township, 48 N.J. 122 (1966), the Supreme Court rejected a municipal attempt to finance an increased level of "services which traditionally have been supported by general taxation" by subjecting new homes to a charge in addition to the general tax rate. West Park Ave. concerned an exaction against new homes to pay increased educational costs, but the court's reasoning applies equally well to the cost of preserving agricultural land or other open space:

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> As to education, for example, the vacant land has contributed for years to the cost of existing educational facilities, and that land and the dwellings to be erected will continue to contribute with all other real property to the payment of bonds issued for the existing facilities and to cost of renovating or replacing those facilities. Hence, there would be an imbalance if new construction alone were to bear the capital cost of new schools while being also charged with the capital costs of schools serving other portions of the school district. [48 N.J. at 126-127].

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West Park Ave. thus held that absent an express delegation of authority from the Legislature commiting such authority to municipal governments, "it is clear that the

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municipality could not have lawfully exacted the charges here involved." Id. at 127. The basic rule which has evolved is that even when such statutory authority to require exactions is present, a developer may only be compelled to assume a cost "which bears a rational nexus to the needs created by, and benefits conferred upon the subdivision" proposed by him. Brazer v. Borough of Mountainside, 55 N.J. 456, 465-466 (1970); Longridge Builders, Inc. v. Planning Board of Princeton Township, 52 N.J. 348, 350 (1968).

In the present case, it is clear that the East Windsor TDR Ordinance constitutes an illegal exaction against property owners such as Centex-New Jersey because there is simply no statutory authority for such a TDR system. Moreover, requiring a developer to expend its own funds in order to "preserve" agricultural land (through the purchase of TDRs) as the condition to construct high density residential housing is absolutely lacking in any reasonable basis. There is no rational nexus between the preservation of agriculture in one portion of East Windsor Township and the development of residential housing in another. Clearly, the costs of agricultural preservation which the Township wishes to impose upon residential developers have no direct relationship to the needs created by or the benefits conferred upon such developments.

Additionally, to the extent that it operates as an exaction, the East Windsor TDR Ordinance is expressly prohibited by the MLUL. N.J.S.A. 40:55D-42 delimits the costs which a municipality may exact from a developer for improvements located

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outside the limits of his development but generated or made necessary by that development. In relevant part, the statute reads as follows:

> The governing body may by ordinance adopt regulations requiring a developer, as a condition for approval of a subdivision or site plan, to pay his pro-rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor, located outside the property limits of the subdivision or development but necessitated or required by construction or improvements within such subdivision or development. [N.J.S.A. 40:55D-42].

In no way can this statute be construed to require a developer to pay the costs of preserving agricultural land on one site in order to construct residential housing upon another site. Obviously, preservation of agricultural land is not "necessitated or required by construction or improvements within" the REAP zone as delineated by the Township. And in any event, the above-quoted statute makes it clear that exactions may be required of a developer only for such "reasonable and necessary" items such as street improvements, water, sewerage and drainage facilities, and easements therefor. The East Windsor TDR Ordinance clearly exceeds the exaction authority which has been delegated to municipalities by the Legislature.

Another portion of the MLUL, N.J.S.A. 40:55D-43(a), provides that a municipality may, in the context of permitting a planned unit development, planned unit residential development, or residential cluster, accept the dedication of land or any interest therein for public use and maintenance as open space. However, the statute specifically provides that

> ...the ordinance shall not require, as a condition of the approval of a planned development, that land proposed to be set aside for common open space be dedicated or made available to public use. [N.J.S.A. 40:55D-43(a)].

Thus, under the above-quoted language, East Windsor Township lacks the authority to require a developer such as Centex-New Jersey to dedicate part of its own property as open space in conjunction with any proposed residential development. Clearly, then, East Windsor surely cannot require a developer to purchase development rights and thereby set aside other property as agricultural land as a condition of approval for developing its own property. Yet, this is precisely the effect of the East Windsor TDR Ordinance.

Plainly, the MLUL has not given municipalities the authority to require any dedications of land or interests therein as a condition of the approval of residential development. Nor do municipalities have authority to exact from a developer the costs of any off-site improvements except those necessitated or required by the particular developer's construction. The East Windsor TDR Ordinance, however, requires dedication of an interest in land as a condition for development approval, and requires the developer to fund such dedication through purchase of TDRs. Accordingly, the East Windsor TDR Ordinance is clearly barred by N.J.S.A. 40:55D-42 and -43(a).

E. N.J.S.A. 40:48-2, the catch-all police power statute, does not authorize municipalities to adopt TDR Ordinances.

Perhaps recognizing that the MLUL provides no support for their position, defendants alternately contend that N.J.S.A. 40:48-2 provides a reservoir of power which may be used to supplement the municipality's zoning power. N.J.S.A. 40:48-2 reads:

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

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The lower court properly rejected the applicability of this statute to the instant case. (Da120).

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

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

Defendants' position regarding N.J.S.A. 40:48-2 makes no sense whatsoever. If the use of TDR in zoning is not expressly or implicitly authorized by the MLUL, its use clearly cannot be authorized by a combination of the MLUL and a catch-all statute which contains an extremely broad and rather vague grant of essentially residual powers.

In addition, N.J.S.A. 40:48-2 only grants a municipality authority relating to "matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability." Summer v. Teaneck, 53 N.J. 548, 552-553 (1969); Wagner v. Mayor and Municipal Council of City of Newark, 24 N.J. 467, 478 (1957). For example, a municipality cannot legislate upon the subject of wills or title to real property. Summer v. Teaneck, supra, 53 N.J. at 553. Where title to real property is concerned, municipal action would not be useful because needs with respect to real property do not vary locally in their nature or intensity. Id. Indeed, diverse local decisions in this area could be mischievous and even intolerable. For this reason, a municipality may not legislate under N.J.S.A. 40:48-2 upon an aspect of a subject "inherently in need of uniform treatment." In re Public Service Electric and Gas Co., 35 N.J. 358, 371 (1961).

As the Law Division found below (Da120), the East Windsor TDR Ordinance is clearly a municipal attempt to preserve agriculture by regulating title to real property. It does so by requiring that the development potential of land be severed from property in the agricultural district (which land is then restricted by deed only to agricultural uses) as a condition for more intense development of land located within the REAP zone. In short, the municipality has purported, by ordinance, to create and recognize the existence of a "new" interest in real property (*i.e.*, a severable development right) and has required that title to such a development right pass as the condition for residential development approval in the REAP zone. Clearly, East Windsor has improperly attempted to regulate an area of title to real property which is inherently in need of uniform state-wide treatment. Accordingly, N.J.S.A. 40:48-2 cannot serve as the enabling legislation underlying the East Windsor TDR Ordinance.

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F. By its very nature, TDR may only be enacted at the local level pursuant to uniform, statewide standards which presently do not exist in New Jersey.

The lower court's review of A-1509 (Pa83), the proposed TDR bill which the Legislature failed to enact, indicated the self-evident need for statewide enabling legislation before municipalities may enact TDR ordinances. The bill first provides uniform procedures for undertaking preliminary TDR feasibility studies, with specific provisions for public input, before the municipal governing body considers whether to adopt a TDR ordinance. (§5-10). Moreover, the bill provides specific

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guidance as to the procedure for adoption of such an ordinance (§12), and the criteria for delineating the preservation (§13) and transfer (§14) zones. Most importantly, the bill provides uniform provisions governing the issuance and apportionment of development rights certificates (§17-18), the manner in which they may be transferred (§19), and the method by which such rights are to be taxed, assessed for purposes of valuation, and sold or exchanged (§21).

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Uniform treatment of such rights for purposes of taxation, assessment, and sale or exchange is necessary as a matter of essential fairness, if not as a matter of constitutional mandate.* The Law Division thus found that absent such statewide enabling legislation, the East Windsor TDR ordinance fails to properly address such aspects of TDR, especially assessment and taxation, let alone provide a fair, uniform statewide approach.

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The lower court's examination demonstrates that the entire TDR concept is complex and a drastic departure from traditional notions of zoning and real property principles. As

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

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

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

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such, TDR does not lend itself to piecemeal treatment by each of New Jersey's 567 municipalities. One can easily imagine the chaotic situation that would result if each municipality were free to enact its own TDR system without any uniform, mandatory, state-imposed provisions. Surely, there is no indication that the Legislature intended to sanction such chaos. Like other aspects of land use and property law, TDR cries out for the enactment of mandatory guiding principles in the form of enabling legislation at the state level. Absent such legislation, there is clearly no authority for adoption of ordinances such as East Windsor's.*

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

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* Defendants refer to the Pinelands Protection Act, N.J.S.A. 13:18A-8(d)(1), which, they allege, permits adoption of TDR without any reference to title and tax assessment implications. (Db46). This statute only authorizes the Pinelands Commission to "consider and detail the application" of TDR as part of its planning process. No court has yet addressed the authority of the Pinelands Commission to adopt and implement TDR. It should be noted that this issue was neither raised nor considered in Matlack v. Bd. of Chosen Freeholders of Burlington Cty., ______ ______ N.J. Super. ______ (Law Div., Docket No. L-67582-81 P.W. decided Dec. 6, 1982), a case which concerned other aspects of the Pinelands Development Credit program. And, in any event, the Pinelands legislation is unique to that region, and is completely inapplicable to East Windsor Township.

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

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

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

Inv. Co. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S. 2d 5, 350 N.E. 2d 381 (N.Y. Ct. App. 1976), app. dism., 429 U.S. 990, 97 S. Ct. 515, 50 L. Ed. 2d 602 (1976) and Penn Central Transp. Co. v. City of New York, 42 N.Y. 2d 324, 397 N.Y.S. 2d 914, 366 N.E. 2d 1271 (1977), aff'd, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978)] both analyzed the concept on Fifth and Fourteenth Amendment "taking without just compensation" grounds. Neither case analyzed the issue of whether the TDR ordinances were authorized by enabling legislation.* Both cases involved TDR ordinances adopted by the City of New York.

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Significantly, however, Judge Breitel, the author of the decisions by the Court of Appeals of New York (that State's highest court) in both French and Penn Central, later acknowledged the general need for TDR enabling legislation and indicated that the lack of enabling legislation was not an issue in those cases because of the unique and extensive "home rule" powers enjoyed by the City of New York under the New York State Constitution. At a conference on transferable development rights sponsored by the National Conference of State Legislatures and the New Jersey Law Revision and Legislative Services Commission

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* In addition, notwithstanding defendants' misreading (Db35 to DB36) of Dufour v. Montgomery County Council, Dkt. No. L-56964 (Md. Cir. Ct., Montgomery County, decided Jan. 20, 1983), the case simply does not anywhere discuss the issue of whether enabling legislation is necessary to enact TDR Ordinances. Rather, the primary focus of the Maryland court's opinion is upon the issue of TDR as a "taking without just compensation." To like effect, see City of Hollywood v. Hollywood, Inc., 432 So.2d. 1332 (Fla. Dist. Ct. App. 1983). Thus, neither of these cases contribute anything to an analysis of the issue sub judice.

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held on September 30, 1977, Judge Breitel was asked by a New Jersey attorney whether "there is the need for specific enabling authority for municipalities to adopt TDR ordinances." (Transcript of proceedings, p.105). (Pa65). In response, Judge Breitel indicated that in New York:

> "We have strong home rule provisions in our state Constitution and, by statute, for the municipalities. Then, in the case of New York City, it has always had extremely broad home rule powers and in this area too. So nobody ever made any attack on the lack of power of the City to adopt legislation of that kind [i.e. a TDR ordinance]." (Transcript of proceedings at p.108). (Pa67 to Pa68).

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

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

> "I think legislation is not only desirable, but I would go further and I think probably it is necessary. You want to get some guidelines down, some ways of handling this. . . . and I think there ought to be enabling legislation, which is something more than just saying you can do it. I think it would help also in any attack on the concept--judicial attack--in that you have a legislative expression of policy by such a statute that it is a desirable thing from a social, economic and land use point of view. [Transcript of proceedings at p.107] [Pa67].

As such, although no court has yet addressed the need

for enabling legislation authorizing TDR, it is clear that such legislation is desirable, if not absolutely necessary. TDR is complex and novel, and thus requires uniform statewide legislation in order to function efficiently and equitably. Absent such enabling legislation, as the law Division noted below, TDR is simply impermissible, if not unworkable.

POINT II

THE LAW DIVISION CORRECTLY CONCLUDED THAT THE SEVERABILITY CLAUSE OF THE EAST WINDSOR TDR ORDINANCE IS NO BAR TO INVALIDATION OF THE ENTIRE ORDINANCE.

Centex-New Jersey urged below that, by way of remedy, the East Windsor TDR Ordinance should be invalidated in its entirety and the Township ordered to rezone the area to a valid and appropriate use within ninety days under court supervision. Such a procedure is authorized by virtue of the Supreme Court decisions in Petlin Associates, Inc. v. Township of Dover, 64 N.J. 327 (1974) and Morris County Land v. Parsippany-Troy Hills Twp., 40 N.J. 539, 559 (1963). The Law Division did invalidate the entire ordinance, but instead of ordering the Township to adopt new zoning it merely reinstated the prior ordinance. Defendants now contend that under the severability clause of the TDR ordinance only those portions which specifically relate to TDR should have been stricken and the remainder of the ordinance allowed to stand. Nowhere, however, have defendants identified which provisions should survive and which should not. Accordingly, the Law Division properly decided to invalidate the entire ordinance.

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

> The essential inquiry is whether the law-making body designed that the enactment should stand or fall as a unitary whole. It is not enough that the act be severable in fact; its severability in the event of partial invalidity must also have been within the legislative intention. It is a question of interpretation

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> and of legislative intent whether the particular provision is so interwoven with the invalid clauses that it cannot stand alone.

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

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

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

In Inganamort v. Borough of Fort Lee, 72 N.J. 412 (1977), the Supreme Court indicated that a severability clause will only be enforced "where the invalid portion [of the ordinance] is independent and the remaining portion forms a

complete act within itself." 72 N.J. at 423. In conducting its examination, the Supreme Court considers the "dominant purpose" of the ordinance as a whole, whether the invalid portion of the ordinance is "functionally independent of the rest of the ordinance," and whether "the purpose of the enactment would be fully carried out without the severed portion." Id. Moreover, the court considers whether "the invalid section served as a principal or significant inducement to passage" of the ordinance and whether "the enactment would have been passed without the invalid section." Id. at 424. If it is clear that the invalidated portion of the ordinance served as the principal inducement for passage of the entire ordinance, and that the ordinance would not have been passed without that provision, the proper course is to invalidate the entire ordinance notwithstanding the existence of a severability clause.

In the instant case, the Law Division appropriately found that the TDR provisions of the East Windsor Ordinance served as the principal inducement for its passage. (Da121). Indeed, defendants admit that TDR is the centerpiece of the ordinance, and without TDR the primary goals of the ordinance (i.e., to preserve agricultural land and to provide intensive housing development in the REAP zone) cannot be achieved. This is highlighted in the portion of defendants' brief entitled "Making the Plan Work" (Db10 to Db17) in which it is indicated that a traditional zoning ordinance merely creating a zone for agricultural uses did not represent a permanent solution to the problem of preserving agriculture as a land use, and that only with the use of TDR could the "Plan" work. With respect to the

REAP zone, defendants describe the uses available as a matter of right as "reasonable but not intensely attractive to developers" (Db18); with the use of TDR, however, a "real incentive" for development of the REAP zone is created (Db19). Only through the use of TDR, defendants concede, will substantial development proceed in the REAP zone and will the goals of agricultural preservation be met, thereby "complet[ing] the circle" (Db20).

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

For these reasons, the Law Division properly concluded, based on Inganamort, that the entire East Windsor TDR Ordinance should be invalidated notwithstanding the existence of a severability clause.

CONCLUSION

For the foregoing reasons, the Judgment of the Superior Court, Law Division, declaring that East Windsor Ordinance 1982-16 is null and void, and enjoining the enforcement of said Ordinance, should be affirmed. 10

Respectfully submitted,

STERNS, HERBERT & WEINROTH, P.A.
Attorneys for Plaintiff-Respondent

By: 20
Frank J. Petrino

Frank J. Petrino
Of Counsel

Richard M. Hluchan
On The Brief

Dated: October 19, 1983 30

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