

~~Appeal~~

Order denying appeal by Δ from an order for summary judgment invalidating Δ 's municipal ordinance 1982-16 on the ground that its enactment exceeded Δ 's powers under NJ Municipal Land Use Law

• Order affirms lower ct's summary judgment

P 5

ULL 0007920

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-5144-82T1

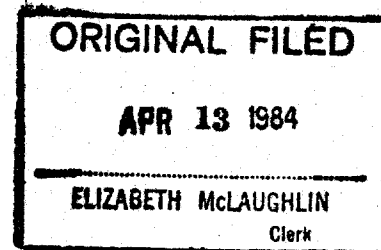
CENTEX HOMES OF NEW JERSEY, INC.,
a Corporation of the State of
Nevada,

Plaintiffs,

v.

THE MAYOR and COUNCIL OF THE
TOWNSHIP OF EAST WINDSOR, a
Municipal Corporation, and
THE PLANNING BOARD OF THE
TOWNSHIP OF EAST WINDSOR,

Defendants.



Argued March 20, 1984 -- Decided **APR 13 1984**

Before Judges Antell, Joelson and McElroy.

On appeal from Superior Court, Law Division,
Mercer County.

Janice Mironov argued the cause for appellant
Mayor and Council of the Township of East Windsor
(Newman, Herman, Saltman Levitt & Feinson, attorneys).

Gerald Muller argued the cause for appellant
Planning Board of the Township of East Windsor
(Miller, Porter & Muller, attorneys).

Thomas Norman argued the cause for Amicus Curiae
New Jersey Chapter of the American Planning
Association.

Richard M. Hluchan argued the cause for respondent
Centex Homes of New Jersey, Inc. (Sterns, Herbert
& Weinroth, attorneys; Frank J. Petrino, of counsel
and Mr. Hluchan on the brief).

Stewart M. Hutt argued the cause for Amicus Curiae
New Jersey Builders Association (Hutt, Berkow,
Hollander & Jankowski, attorneys; Mr. Hutt of counsel
and on the brief).

PER CURIAM.

This is an appeal by defendant from an order for summary judgment entered in the Law Division May 13, 1983 which invalidates defendant's Municipal Ordinance 1982-16 on the ground that its enactment exceeded defendant's powers under the New Jersey Municipal Land Use Law, N.J.S.A. 40:55D-62, 65. The controversy concerns the creation of two zoning classifications by the ordinance. One is the Agricultural Preservation Zone (AP); the other is the Residential Expansion for Agricultural Preservation Overlay Zone (REAP). The ordinance limits uses in the 3000 acre AP zone to agricultural and related activities and permits only one residential dwelling per 20 acres of land. In the REAP zone residential construction is permitted on two acre lots as of right and in certain cases, which will be hereinafter described and upon which this appeal focuses, the ordinance permits residential construction of greater density.

Under the ordinance, landowners in the AP zone are granted a specified number of "Transferable Development Rights" (TDRs). Such rights are defined by the ordinance as follows:

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.

TDRs are issued to the owners of farmland in lieu of being permitted to develop their property and in return for giving a recordable covenant against future non-agricultural use of the farmland. Thus, the ordinance authorizes the transfer of development rights from landowners in the AP zone to prospective land developers in the REAP zone who would then be allowed to build single family homes on lots of 1/5 to 1/2 acre in size, depending on the number of TDRs purchased and the particular district involved. Additionally, townhouses and garden apartments could also be built at a greater density. The declared objective of the ordinance is to preserve agricultural lands and zones by compensating the owners of farmlands for the loss of the right to develop their property. As the ordinance states, its intent is to protect the farmland "from encroachment by non-agricultural uses, structures, or activities while at the same time allowing the owners of agricultural lands to receive marketable property rights in exchange for placing those lands permanently into agricultural use at land prices consistent with such agricultural use."

In order for farmland owners within the AP zone to receive development rights certificates the ordinance obliges them to present to the township clerk an executed deed of covenants and restrictions together with an affidavit of title to the farmland for which the rights

are issued. Thereafter, the farmland owner is free to sell the rights at whatever price is agreed upon with a purchaser. Supposedly, land use density in the REAP zone is planned so that the cost of purchasing TDRs plus the cost of land will not exceed the market price of land zoned for high density development.

In granting plaintiff's motion for summary judgment the Law Division concluded that the ordinance is invalid "because it creates zones in East Windsor Township dependent upon transfer of development rights, a zoning concept not authorized by the legislature." In reaching this result the court held that the municipality's zoning powers are circumscribed by N.J.S.A. 40:55D-62 and 65, and while Ordinance 1982-16 reflected an imaginative and interesting attempt to further the aims of sound zoning policy the program therein promulgated lay beyond its statutory powers. We agree with the determination of the Law Division and affirm substantially for the reasons stated by Judge Levy in his oral opinion of May 13, 1983, invalidating Municipal Ordinance 1982-16 and reinstating the ordinance previously in effect.

The nub of defendant's argument appears to be that the zoning program enunciated by its ordinance is consistent with and furthers the goals of sound zoning as enumerated in N.J.S.A. 40:55D-2. The argument fails, however, for the reason that the high density uses made

permissible in the REAP zone do not reflect defendant's studied determination that the uses themselves will advance sound zoning policies within the municipality. The ordinance is not drawn solely "with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land" as required by N.J.S.A. 40:55D-62; instead, the uses permitted in the REAP zone are made to depend upon the entirely fortuitous circumstance of whether landowners in the AP zone are willing to relinquish their development rights and on the possibility that prospective developers and farmland owners will arrive at a selling price agreeable to both. Thus, the owners of land in one zone are empowered to determine the type and extent of development which may take place in another.

It is firmly settled that "municipalities 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). The factors operative in the determination of whether a use is permissible under defendant's ordinance are purely economic in nature and lie beyond the legislative grant of local authority "to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare," N.J.S.A. 40:55D-2.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

Elizabeth W. Langille

Not.