

ML

Cranbury

5-Jan-1975

Real Estate Purchase Option
between Charles Sullivan, et al. (Optionors)
and Joseph Morris and Robert Morris
(Optionees), Premises: Lots 36 and 23
⊕ Exhibits

pgs = 84

ML 000836 ~~2~~ 2

REAL ESTATE PURCHASE OPTION

BETWEEN

Charles Sullivan, Jacob Freedman,
Vivian Freedman and The Estate of
David S. Freedman,
Optionors

and

Joseph Morris and Robert Morris,
Optionees

Premises: Lots 36 and 23, Tax Map,
Township of Cranbury

REAL ESTATE PURCHASE OPTION

March

THIS AGREEMENT, made this day of 1979
by and between CHARLES SULLIVAN, JACOB FREEDMAN, VIVIAN
FREEDMAN and THE ESTATE OF DAVID S. FREEDMAN, Deceased, having
a mailing address in care of Frank J. Rubin, Esquire, 101
Bayard Street, P. O. Box 311, New Brunswick, New Jersey 08903,
hereinafter called "Optionors"; and JOSEPH MORRIS and ROBERT
MORRIS, or their assign(s), having a mailing address at Suite
104, 2125 Center Avenue, Fort Lee, New Jersey 07024, hereinafter
called "Optionee";

WITNESSETH:

WHEREAS, the parties hereto have previously entered
into an option agreement dated January 7, 1975; and

WHEREAS, the parties have agreed to renegotiate a new
option agreement as set forth in this agreement;

NOW, THEREFORE, IT IS AGREED AS FOLLOWS:

ARTICLE 1:

1.01: Optionors, in consideration of the mutual
covenants and agreements herein contained, hereby give,
grant, and convey to the Optionee the right and option to
purchase, subject to the terms and conditions hereinafter
set forth, the following described premises, hereinafter
called the "Property":

ALL those certain lots, tracts or parcels of
land, situate, lying and being in the Township of
Cranbury, County of Middlesex, and State of New Jersey,

consisting of approximately one hundred (100) acres of land lying between New Jersey State Highway Route #130 and Hightstown-Cranbury Road (Main Street). Said lands and premises are shown as Lots 36 and 23 in Block 18 of Sheet 3 of the Official Tax Assessment Map of the Township of Cranbury, a copy of said Sheet 3 being annexed hereto as Schedule A, Property being outlined thereon in red. There are also annexed to this agreement two descriptions, marked as Schedule B, which descriptions are taken from deeds to the Optionors, one from Unexcelled Chemical Corporation dated January 25, 1966, and recorded January 31, 1966 in Deed Book 2530, page 344, and the other from Oscar Y. Danser and Evelyn C. Danser, his wife, dated May 11, 1967, and recorded May 18, 1967, in Deed Book 2580, page 526 in the Middlesex County records, and which are believed to cover Property. Said Schedules A and B are made a part of this agreement by reference thereto.

ARTICLE 2. Term:

2.01: The term of the option herein granted shall be for a period of four (4) years commencing and ending _____, hereinafter called option term except as same may be extended as provided herein. Only upon compliance with Articles 4.02 and 4.03 shall there be an extension of the option term in order to allow the existing or pending litigation to proceed to a conclusion; provided further, however, in no event shall optionee have any right to exercise any option or extension thereof beyond the sixth anniversary date of this option.

ARTICLE 3: PURCHASE PRICE

3.01 The purchase price to be paid by Optionee to Optionors for the Property shall be computed as follows upon the exercise of this option:

The purchase price shall be prorated at the

rate of Ten Thousand and No/100 (\$10,000.00) Dollars per acre or any part thereof and based on the total acreage as described herein and as an accurate survey will reflect. If the option is exercised in the fifth year of this agreement, the purchase price shall be at the rate of Ten Thousand Five Hundred and No/100 (\$10,500.00) Dollars per acre. If the option is exercised during the sixth year, the purchase price shall be at the rate of Eleven Thousand Five Hundred (\$11,500.00) Dollars per acre.

3.02 (A): As consideration for this option, Optionee guarantees to Optionor that taxes and insurance costs arising out of maintenance of the premises while owned by Optionee, during this option, shall not be paid by Optionor.

The premises, or a substantial part thereof, are rented to farmers. In order to continue the status as farmland assessment, the parties shall exercise their best efforts to so continue the current status as farmland. In the event that the present farmer should discontinue as tenant or should be replaced, Optionor shall have the first right to secure a farmer on notice to Optionee. Optionee shall have the right to secure a farmer to continue the farmland assessment status with Optionor's consent.

Insurance shall be maintained at current level. Any change shall be with the consent of Optionee.

If there is any deficiency between the amount paid by the farmer on the premises and the amount owed for taxes and insurance while the premises are in a farmland

assessment status, such deficiency shall be paid by Optionee. Upon submission of a bill by Optinor, Optionee shall have two weeks to pay such bill.

(B) At closing, upon delivery of deed, by cash, bank or certified check, fifteen (15%) percent of the purchase price.

(C) At closing, by execution and delivery of a purchase money note and mortgage given to Optionors from Optionee in the form and content as set forth in paragraph 3.04 hereof, representing eighty-five (85%) percent of the purchase price.

3.03: The purchase price referred to in paragraphs 3.01 and 3.02 shall be apportioned according to the actual acres or fraction thereof in accordance with an accurate survey of the Property.

3.04: The purchase money note and mortgage referred to in Article 3.01 above shall be prepared by the attorney for the Optinors, at the cost and expense of Optionee, who shall also pay the fees for recording same. Said purchase money note and mortgage shall be prepared in accordance with the following:

(A) The purchase money note and mortgage shall be prepared on the printed forms of All-State Office Supply Company (Broad Form), except that paragraph 2(a), 2(d), and 2(e) and the references to same in paragraph 3 are to be deleted and paragraph 4(c) shall be deleted. Said mortgage shall also contain a provision permitting the Optionee to demolish the existing dwelling and out-buildings on the property.

(B) The maturity date of the mortgage shall be seven (7) years from the date of closing.

(C) The principal amount of the mortgage shall be paid at the termination of said mortgage.

(D) The interest rate shall be seven and one-half (7½%) percent per annum and interest only shall be payable quarter-annually.

(E) Said note and mortgage shall contain thirty (30) day default clauses.

(F) In the event Optionee exercises his option pursuant to Article 7.01, then in respect to releases, the Optionee shall be entitled to have ten (10) acres excluded from the lien of the mortgage if final subdivision approval for same has been obtained prior to closing or shall be entitled to release of ten (10) acres therefrom without additional consideration if same are included in the description of mortgaged premises. All roads paved or to be paved shall be included in any release without payment of 125% release clause as provided herein.

1. Thereafter, releases of portions of the mortgaged premises may be obtained by Optionee upon payment of 125% of the acreage cost as provided in this agreement for each acre or portion thereof to be released.

2. Release may be obtained only for portions of the mortgaged premises for which final subdivision approval or final site plan approval has been obtained.

3. Each request for a release shall be

accompanied by a metes and bounds description or lot and block description or designation referring to the filed map of that portion of mortgaged premises to be released, prepared by Optionee's surveyor, together with a map or survey upon which is delineated the portion of mortgaged premises to be released.

4. Each such release shall be prepared by Optionor's attorney, at the cost and expense of the Optionee, who shall also pay the fees for the recording of same.

ARTICLE 4: SUBMISSION AND APPROVAL OF APPLICATION:

4.01: After the execution of this agreement, Optionee shall within one year from date hereof make a presentation before the Planning Board and/or Board of Adjustment and/or Governing Body of Cranbury Township for purposes of a development contemplated by Optionee.

4.02: Optionee agrees to proceed at his own cost and expense diligently in the preparation and filing of plans and applications, attendance to obtaining hearing dates, and attendance at said hearings; and further agrees, in the event there is an appeal from any governmental action, to perfect the necessary administrative and judicial determination as may be provided in this agreement.

4.03: (A) This agreement and the obligations of Optionors contained herein shall remain in full force and effect only so long as the Optionee continues to comply with the conditions set forth in paragraph 4.01 and 4.02.

(B) In the event Optionee desires during the

pendency of the applications or litigation described in paragraph 4.02 not to proceed with such applications or litigation, he shall notify the Optionors in writing.

ARTICLE 5: ENTRY, POSSESSION:

5.01: Optionee shall have the right to enter the Property after the execution of this option for the limited purpose of doing such survey and engineering work and to conduct such tests as may be necessary and appropriate in connection with the requirements for the preparation of the applications as set forth in Article 4.

5.02: Optionee hereby indemnifies and agrees to save Optionors harmless from any and all loss or liability whatsoever (including reasonable attorney's fees) on account of claims of injury to persons or property arising out of the exercise by Optionee of his rights under this article.

5.03: Optionee agrees that, in the event that this option is terminated or is not exercised, or if Optionee does not close title after the within option has been exercised, Optionee shall forthwith remove his men, equipment, and materials from the Property and shall restore the Property to its former condition prior to the exercise by Optionee of any of his rights hereunder.

5.04: Possession of the Property shall be delivered to Optionee upon the closing of title.

ARTICLE 6: CLOSING:

7.01 In the event this option is exercised pursuan

to the terms of this agreement, closing of title shall take place within nine months thereafter. Optionee shall make diligent application for such building permit within ten (10) days after the granting of local approvals. However, if this option is exercised during the fifth and/or sixth year, then closing shall take place within 90 days after the exercise of this option.

6.02: Closing of title shall take place at the offices of Rubin, Lerner and Rubin, Esqs., 101 Bayard Street, New Brunswick, New Jersey, 08903, on the aforesaid closing date. At such closing, Optionors shall deliver to Optionee a deed of bargain and sale, covenants against the grantors, together with an appropriate affidavit of title.

6.03: At said closing, real estate taxes shall be adjusted, apportioned and allowed as of the date of closing of title. New Jersey realty transfer fees shall be paid by Optionors at closing.

6.04: In the event this option is exercised and title closes, then Optionors shall be responsible only for assessments for municipal improvements which have been confirmed prior to date hereof, and for unconfirmed assessments of improvements if said municipal improvements have been completed prior to said date. All other improvements and assessments, whether confirmed or unconfirmed, and whether said improvements have been authorized or commenced prior to said date and whether any assessment for same is confirmed prior to the date of closing shall be the responsibility of Optionee.

ARTICLE 7. REAL ESTATE COMMISSION:

7.01: Optionee represents to the Optionors, which representation shall survive the closing of title hereunder, that they have dealt with no real estate brokers for the within transaction, and that no real estate commission is due to any real estate broker.

ARTICLE 8. LIMITATION OF OPTIONOR'S LIABILITY:

8.01: Optionors are selling the Property to Optionee without making any representations whatsoever in relation to this transaction including any representations in respect of their title, the quantity of acreage contained within the Property, the character or quality of the land being sold and its fitness for any particular use or any representation as to the uses to which it may be put under applicable governmental regulations. Accordingly, Optionors shall have no liability under this agreement in the event that closing of title does not take place for any reason other than a willful refusal of Optionors to close title under circumstances where Optionee is ready, willing, and able to close title in accordance with this agreement.

ARTICLE 9. ASSIGNABILITY:

9.01: At any time after the filing of the Plan with the proper municipal authority as set forth in Article 4 hereof, Optionee shall have the right to assign this agreement

to either a corporation of which they are the majority stockholders, or to a partnership of which they are principals, by furnishing written notice of same, together with a copy of the assignment wherein the assignee assumes all of the obligations of this agreement.

ARTICLE 10. TITLE:

10.01: The title to be conveyed by Optionors shall be good and marketable and such as will be insurable, subject to the following exceptions:

- (A) The standard printed title insurance policy exceptions, conditions, and stipulations;
- (B) Restrictions and easements recorded and unrecorded;
- (C) Such facts as an accurate survey and inspection of the Property would disclose;
- (D) Zoning ordinances and all other applicable governmental regulations affecting the Property and its use;
- (E) Lien for unpaid real estate taxes not yet due and owing.

ARTICLE 11. GENERAL CONDITIONS:

11.01 As to any default of Optionee under this agreement, Optionors agree that, prior to the exercising of their rights in respect thereof, they shall give Optionee notice of any such default and shall give notice no sooner than thirty

(30) days prior to the date upon which they intend to exercise their rights on account of such default, and Optionee shall have the right, for a period of thiety (30) days after the giving of such notice, to cure said default.

11.02: In the event that this agreement is terminated or in the event that the option herein granted is not exercised or in the event that notwithstanding that the Option has been exercised, closing of title does not take place, then and in any of said events, Optionee herein shall deliver over to Optionors, without cost, copies of any and all surveys, engineering studies, or other work papers or plans developed or used in connection with the preparation of the applications or in connection with the consummation of this agreement.

11.03: All notices hereunder or in connection herewith shall be in writing and sent by United States registered or certified mail, postage prepaid, return receipt requested, as follows: if sent to the Optionors, in duplicate with one copy to their legal representative, Frank J. Rubin, Esq., at his address as hereinabove set forth, and if sent to the Optionee, in duplicate with one copy to his address hereinabove set forth and one copy to Frank J. Rubin, Esq., at his address as hereinabove set forth.

11.04: The article headings or captions set forth in this agreement are for the convenience of the parties only, and do not form any part hereof, and are not to be considered a part of this agreement for purposes of interpretation or otherwise.

11.05: It is understood and agreed that this agreement is entered into after full investigation, and the Optionee is not relying upon any statement or representation made by the Optionors. This agreement may not be changed or terminated orally by either party. It may be amended only by a written agreement executed by both parties hereto.

11.06: This agreement shall not be recorded in the Middlesex County Clerk's Office or in any other office of public record where same may cloud Optionors' title.

11.07: Optionees' responsibility for payment of taxes shall also include reimbursement to Optionors for "roll back" tax assessment imposed on the property, if any, limited, however, to Ten Thousand and No/100 Dollars (\$10,000.00) toward the payment of rollback taxes.

11.08: Any prior written or oral agreements between the parties named herein or their predecessors are declared null and void and shall have no effect on the agreement entered into herein.

11.09: This agreement shall inure to the benefit of and be binding upon the respective parties hereto, their heirs, successors and assigns.

11.10: At the expiration of this option, Optionee shall have the right of first refusal as to any subsequent offer made to acquire the within described premises. All subsequent offers must be responded to within sixty days by Optionee.

If said offer is not accepted within said time, then Optionor shall be free to accept such subsequent offer.

11.11: All rights in either party hereto arising out of the option dated January 5, 1975 are hereby terminated except that seller/Optionor has the right to obtain all monies heretofore paid as its sole and exclusive property.

IN WITNESS WHEREOF, the parties have hereunto set their hands and seals the day and year first above written.

WITNESS:

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

THE ESTATE OF DAVID S. FREEDMAN

By: [Signature] L.S.
Frank J. Rubin, Co-executor

By: [Signature] L.S.
Vivian H. Freedman, Co-executor

By: [Signature] L.S.
Vivian H. Freedman, Individually

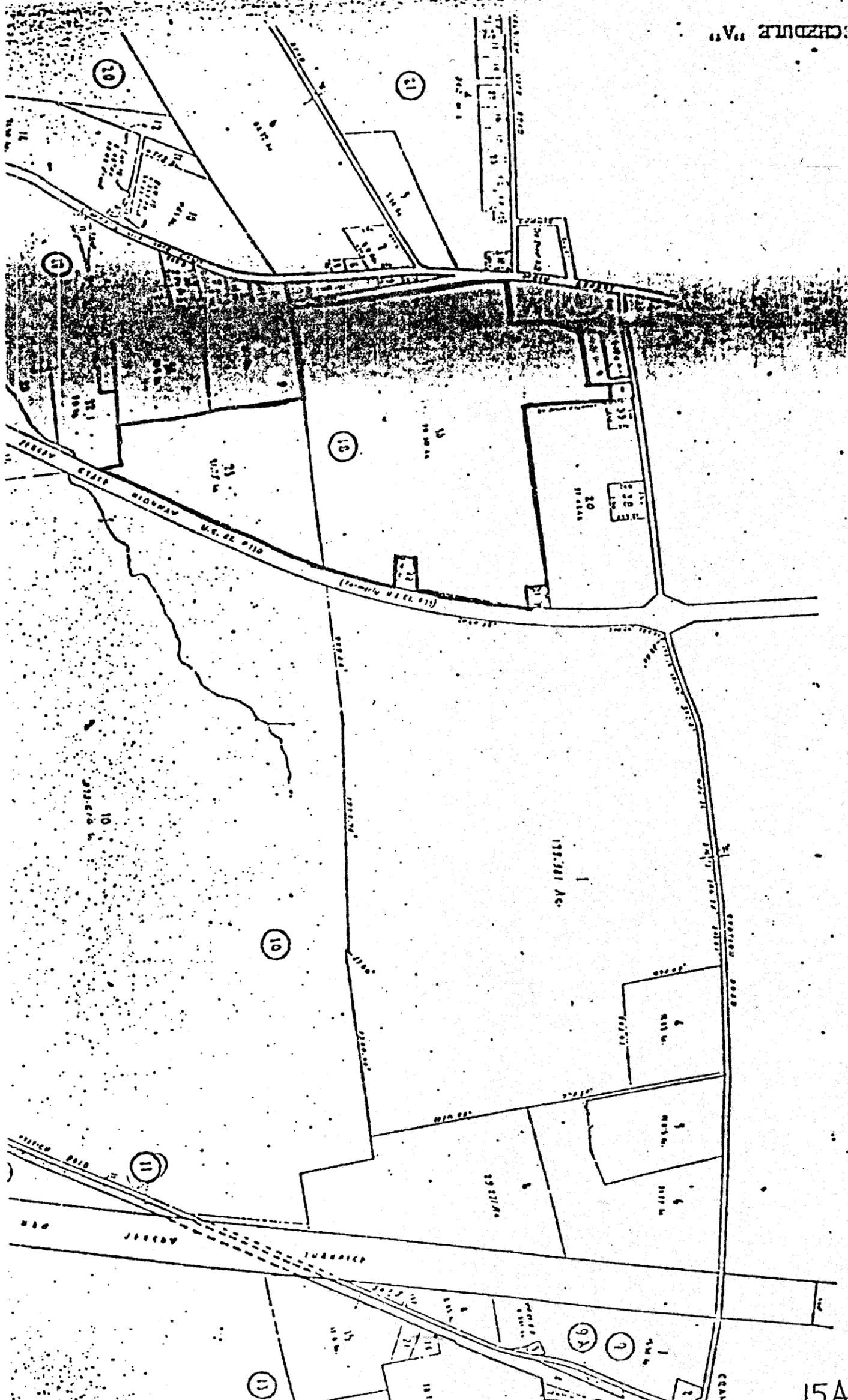
By: [Signature] L.S.
Charles Sullivan

By: [Signature] L.S.
Jacob Freedman

By: [Signature] L.S.
Joseph D. Morris

By: [Signature] L.S.
Robert Morris

SCHEDULE "A"



to the place of Beginning. Containing five hundred (9.85) strict measure.

thereout the following parcels: (1) Parcel of 0.23 acres conveyed to Alford Brown by deed bearing date June 12, 1857 and recorded in Deed Book 75 page 276; (2) Parcel of 0.23 acres conveyed to James Conover by deed bearing date June 12, 1857 and recorded in Deed Book 75 page 278; (3) Parcel of 0.23 acres conveyed to Elwood Mount by deed bearing date February 16, 1860 and recorded in Deed Book 83 page 29; (4) Parcel of 0.20 acres conveyed to Nelson L. Forman by deed bearing date April 1, 1862 and recorded in Deed Book 89 page 65; (5) Parcel of 0.20 acres more or less conveyed to Esther M. Lucas by deed bearing date March 23, 1870 and recorded in Deed Book 289 page 91; (6) Parcel of 0.20 acres more or less conveyed to Esther M. Lucas by deed bearing date March 31, 1862 and recorded in Deed Book 106 page 408.

Excepting thereout and therefrom the following:

Lot consisting of .70 acres conveyed to Potato Products, Inc, by deed dated January 7, 1950, and recorded in the Middlesex County Clerk's Office in Book 1476 of Deeds at page 182.

Tract consisting of .51 acres conveyed to Walter Greczyn by deed dated June 15, 1950 and recorded in the Middlesex County Clerk's Office in Book 1499 of Deeds at page 424.

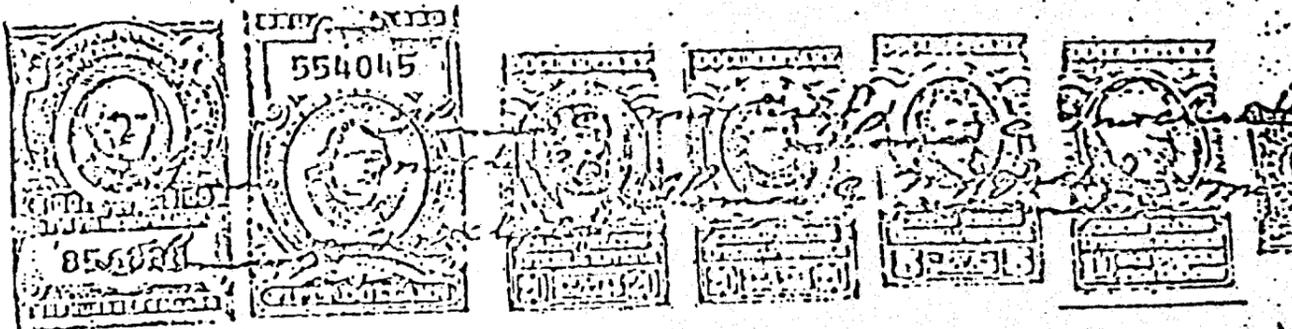
Parcel of .269/more or less conveyed to Francis Winckhofer by deed dated February 7, 1947 and recorded in the Deed Book 1332, page 566.

Parcel of 1.05 acres more or less conveyed to Robert W. Stahl and Audrey D. Stahl, his wife, by deed dated March 4, 1957 and recorded in Deed Book 1950 at page 590.

Parcel of .50 acres more or less conveyed to William Meyer by deed dated February, 1960 recorded in Deed Book 2160 at page 294.

Being part of the same land and premises conveyed to Oscar Y. Danser and Evelyn C. Danser, husband and wife, by deed from Clendon Danser and Hannah Danser Perrine, Executors of the Last Will and Testament of William C. Danser, deceased, said deed being dated December 13, 1943 and recorded in the Middlesex County Clerk's Office in Book 1249 of Deeds at page 575.

SCHEDULE "B" - Page 3



AME 2580 PAGE 527

16A

residing or located at East Ward Street,
in the Borough of Hightstown in the County
of Mercer and State of New Jersey herein designated as the Grantor

And
DAVID S. FREEDMAN

residing or located at Landing Lane, New Brunswick, New Jersey,
in the City of New Brunswick, in the County
of Middlesex and State of New Jersey herein designated as the Grantee

Witnesseth: That in consideration of
ONE (\$1.00) DOLLAR and other good and valuable consideration
the Grantor do grant and convey, unto the Grantee, his heirs and assigns

All those lots or parcels of land and premises, situate, lying and being in
Township of Cranbury in
County of Middlesex and State of New Jersey, more particularly described as follows

FIRST TRACT: Beginning at the southwest corner of land now belonging
to Ella S. Butcher, formerly the land of Susan Perrine, and on the
Easterly edge of the road leading from Hightstown to Cranbury and
known as State Highway Route #1 said road having been formerly known
as South Amboy Turnpike Road, and running from thence (1) as the
formerly pointed South seventy-eight degrees and thirty minutes (78°)
East along the lines of land belonging to the said Butcher, Estate
James H. Conover, deceased, formerly the land of James Forman, John
Chamberlin, forty-two (42) chains and eighty-seven (87) links to the
line of lands now belonging to Gideon Applegate, formerly the land
Aaron Bennett, deceased; thence (2) along said Applegate line South
seven degrees (7°) west twenty-three (23) chains and forty-four (44)
links to a stone in the line of lands now belonging to William Courteney,
thence (3) along the lines of land now belonging to said Courteney,
Schuyler, Edward Malan, North seventy-eight degrees and thirty minutes
(78° 30') West forty-three (43) chains and forty-seven (47) links to
aforementioned State Highway; thence (4) along the easterly edge of
North eight degrees and thirty minutes (8° 30') East twenty-three
chains and fifty-four (54) links to the place of Beginning. Contain
one hundred (100) acres of land more or less. ()

Excepting thereout and therefrom approximately four and four hundred
twenty-four thousandths (4.424) acres of land conveyed by William C.
Danser et ux to the State of New Jersey under date of November 19,
by deed recorded in the Middlesex County Clerk's Office in Book 110
of Deeds for said County on page 12. ()

Also excepting thereout and therefrom approximately twenty-one and
ninety-five hundredths (21.95) acres of land conveyed by William C.
Danser et ux to Adrian Van Ravesteyn under date of November 1, 1930
deed recorded in the Middlesex County Clerk's Office in Book 1102
of Deeds for said County on page 363.

SECOND TRACT: Beginning in the middle of the road leading from Cranbury
to the Camden and Amboy Railroad and corner to Harriet Cole lot; thence
(1) running on the middle of said road south seventy-nine degrees and
twenty minutes (79° 20') East six (6) chains and eighty-eight (88)

SCHEDULE "B" - PAGE 2 110

the 25th day of January, in the year of our Lord
One Thousand Nine Hundred and Sixty-six.

Between UNEXCELLED CHEMICAL CORPORATION, a New York Corporation,
having its principal office at 375 Park Avenue

In the Borough of Manhattan, City and County of New York
and State of New York party of the first part;

And DAVID FREEMAN residing at 89 Morris Street, New Brunswick

In the County of Middlesex
and State of New Jersey party of the second part;

Witnesseth, That the said party of the first part, for and in consideration of One Hundred (\$100) Dollars and other valuable considerations lawful money of the United States of America, to it in hand well and truly paid by the said party of the second part, at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, and the said party of the first part being therewith fully satisfied, contented and paid, has given, granted, bargained, sold, aliened, released, enfeoffed, conveyed and confirmed and by these presents do give, grant, bargain, sell, alien, release, enfeoff, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever.

All that certain lot tract or parcel of land and premises, hereinafter particularly described, situate, lying and being in the Township of Cranbury County of Middlesex and State of New Jersey, bounded and described as follows:
BEGINNING at a point on a curve in the Northwesterly line of U.S. Highway Route #130, where the same is intersected by the Southwesterly line of lands of Oscar Danser; thence running (1) Southwesterly along the said Northwesterly line of U.S. Highway Route #130, curving to the right with a radius of Fifty-six Hundred Sixty-nine and Sixty-five one-hundredths (5669.65') feet, an arc length of Five Hundred Seventy-six and Fifty-five one-hundredths (576.55') feet to a point of tangent (the chord of said arc having a bearing of South Forty-three degrees Ten minutes Thirteen seconds West (S. 43° 10' 13" W) and a length of Five Hundred Seventy-six and Three tenths (576.3') feet; thence (2) South Forty-six degrees Five minutes East (S. 46° 05' E) still along the Northwesterly line of U.S. Highway Route #130, a distance of Fifty-eight minutes East (S. 46° 05' E) still along the Northwesterly line of U.S. Highway Route #130, a distance of Ninety-six and Sixty-seven one-hundredths (96.67') feet; thence (3) North Seventy-two degrees Thirty-nine minutes East (N. 72° 39' E) still along said last mentioned lands, Two Hundred Seventy-one and Twenty-five one-hundredths (271.25') feet; thence (4) North Thirteen degrees Seven minutes Fifteen seconds East (N. 13° 07' 15" E) along lands of Edward H. Tucker and along lands of the Estate of Edward Malan, Twelve Hundred Ninety-four and Nineteen one-hundredths (1294.19') feet to a point in the line of lands of Oscar Danser; thence (5) South Seventy-three degrees Thirty-seven minutes Thirty seconds East (S. 73° 37' 30" E), Eleven Hundred Six and Sixty-nine one-hundredths (1106.69') feet to the place of BEGINNING. Containing Twenty-one and Seven Hundred Fifty-one one-thousandths (21.7) Acres of land.

ASSEMBLY, No. 3192

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 27, 1975

By Assemblywoman TOTARO and Assemblyman WOODSON

Referred to Committee on Municipal Government

AN ACT concerning municipalities in relation to planning and zoning and supplementing chapter 55 of Title 40 of the Revised Statutes.

1 BE IT ENACTED by the Senate and General Assembly of the State
2 of New Jersey:

ARTICLE I

1 1. This act shall be known and may be cited as the "Municipal
2 Development Rights Act."

1 2. The Legislature hereby finds that the rate, extent, expense
2 and results of the physical development of New Jersey in recent
3 years have finally forced a recognition of the physical facts of New
4 Jersey life and of the inherent relationship which exists between
5 physical development and those physical facts; that among the
6 most important such physical facts are those concerning New
7 Jersey's size (forty-sixth in the Nation, in terms of land area),
8 population (more than 8,000,000), population density (more than
9 950 per square mile; first in the Nation), population distribution
10 (89% classified "urban"; 11% classified "rural"), geography
11 (130 miles of coastline, most of which possesses physical beauty or
12 economic value, or both), and land use (more than 1,000,000 acres
13 of land actively devoted to agriculture in 1975, approximately
14 10,000 acres of which each year is being sold for development and
15 for other than agricultural uses); that the period is long past
16 when uncontrolled, unplanned, unregulated and unrelated physical
17 development could be undertaken without regard for the afore-
18 said physical facts, and at no cost to the health, happiness, safety
19 and general welfare of the citizens of this State; that while physical
20 redevelopment is constantly necessary to renew and restore
21 declining and deteriorating areas of New Jersey, great care must
22 be exercised in undertaking new physical development which may

23 result in the destruction and permanent loss of natural assets,
24 structural amenities and those special, distinctive, and often irre-
25 placeable features which have contributed both to New Jersey's
26 history and to its recognition as the Garden State; that the 567
27 local units of municipal government in New Jersey experience not
28 only the greatest, most immediate and direct pressure for new
29 physical development, but also all the most adverse effects of that
30 development; that the State Government has an obligation to pro-
31 vide municipal governments with adequate and appropriate statu-
32 tory tools whereby these local units, acting within the statutory
33 framework and pursuant to guidelines provided by the State, may
34 respond to the pressures for, and the burdens imposed by, physical
35 development with sound, rational and comprehensive planning
36 techniques; that these techniques must recognize that the right to
37 own land is separate from the right to develop that land and that
38 a development right may become, under the proper circumstances,
39 a valuable negotiable instrument; that such techniques would per-
40 mit municipalities to set aside portions of publicly and privately
41 owned improved and unimproved land in permanent preservation
42 zones where new physical development would be prohibited, and
43 require such municipalities to establish other zones where the
44 right to develop the land permanently preserved may be trans-
45 ferred in the marketplace through the sale and exercise of certifi-
46 cates of development rights; and that the exercise by municipalities
47 of the authority to permanently preserve land and transfer the
48 right to develop therefrom pursuant to such a State law, within a
49 framework provided by statute and pursuant to guidelines pro-
50 vided by the State, is within the police power of the State and
51 necessary to insure the public health, happiness, safety and general
52 welfare of both present and future generations.

1 3. The Legislature declares as a matter of public policy that the
2 preservation by municipalities of certain lands, both improved and
3 unimproved, the prohibition of physical development of lands so
4 preserved, and the transfer of the right to develop such preserved
5 land to other land specifically designated to receive such develop-
6 ment, is a public necessity and is required in the interests of the
7 citizens of this State now and in the future.

1 4. As used in this act unless the context clearly indicates other-
2 wise:

3 a. "Aesthetic and historic qualities" means those qualities pos-
4 sessed by any building, set of buildings, site, district or zone which,
5 by virtue of its architectural significance, role in an historic event

6 or general appearance, represents a unique quality or feature
6a in the municipality;

7 b. "Agricultural use" means substantially undeveloped land
8 devoted to the production of plants and animals useful to man,
9 including but not limited to: forages and sod crops; grains and
10 feed crops; dairy animals and dairy products; poultry and poultry
11 products; livestock, including the breeding and grazing of any or
12 all of such animals; bees and apiary products; fur animals; trees
13 and forest products; fruits of all kinds; vegetables; nursery, floral,
14 ornamental and greenhouse products; and other similar uses and
15 activities;

16 c. "Aquifer recharge area" means an area where rainfall infil-
17 trates the ground to porous, waterbearing rock formations for
18 retention in underground pools or aquifers;

19 d. "Assessed value" means the taxable value of property as
20 established pursuant to the provisions of chapter 4 of Title 54 of
21 the Revised Statutes for purposes of taxation;

22 e. "Board of adjustment" means the municipal zoning board
23 of adjustment established pursuant to R. S. 40:55-30 et seq.;

24 f. "Capital facilities" means any substantial physical improve-
25 ment built or constructed by the municipality to provide necessary
26 services for an extended period, including, but-not limited to;
27 streets, roads, highways and other transportation facilities;
28 schools; police, fire and rescue facilities; health facilities; sewer,
29 water and solid waste systems;

30 g. "Certificate of development right" means the document in-
31 dicating the existence of a development right;

32 h. "Compatible use" means two or more uses of land not in
33 conflict with each other individually or as combined;

34 i. "Density" means the average number of persons, families
35 or residential dwelling units per unit of area in the case of resi-
36 dential use; and the average number of square feet per unit of
37 area, in the case of industrial, commercial, or any other use;

38 j. "Developability" means the capability of a parcel or parcels
39 of land to accommodate the uses intended or proposed for it at the
40 density intended or proposed for it, based on its topography, exist-
41 ing use, physical composition, desirability and availability;

42 k. "Development potential" means the possible development of
43 a parcel or site based on its developability and the market in which
44 it exists;

45 l. "Development right" means the right to develop land as set
46 forth in sections 12 through 22 of this act;

4

47 m. "Economic feature" means an economic aspect of the use
48 of a parcel of land which is significant to the economic viability
49 of the municipality;

50 n. "Exercise of development right" means the submission of a
51 development right to the designated municipal official in conjunc-
52 tion with an application for development approval in the transfer
53 zone;

54 o. "Farmland" means land being used for agricultural purposes
55 or substantially undeveloped land included in the categories of
56 Class I, Class II and Class III soil classifications of the Soil Con-
57 servation Service of the United States Department of Agriculture;

58 p. "Flood plain" means land subject to regulation pursuant to
59 P. L. 1962, c. 19 (C. 58:16A-50 et seq.), as amended and supple-
60 mented;

61 q. "Governing body" means the chief legislative body of the
62 municipality;

63 r. "Improvement" means any building, structure or construction
64 on the land, including, but not limited to: houses, stores, ware-
65 houses, factories, churches, schools, barns or other similar struc-
66 tures, recreational or amusement facilities, parking facilities,
67 fences, gates, walls, outhouses, pumps, gravestones, works of art,
68 improved or unimproved streets, alleys, roads, paths, or sidewalks,
69 light fixtures or any other object constituting a physical betterment
70 of real property or any part of such betterment;

71 s. "Land of steep slope" means land of a slope of not less than
72 25%;

73 t. "Market value" means the price property and improved
74 property would command in the open market for such property
75 and improvements;

76 u. "Marsh" means low, spongy land generally saturated with
77 moisture and having persistent poor natural drainage. Marsh
78 shall also include the term "swamp";

79 v. "Master plan" means the master plan of the municipality
80 prepared and adopted pursuant to P. L. 1953, c. 433 (C. 40:55-1.1
81 et seq.);

82 w. "Municipality" means any city, borough, town, township or
83 village of any size or class in the State of New Jersey;

84 x. "Planning board" means the municipal planning board es-
85 tablished pursuant to P. L. 1953, c. 433 (C. 40:55-1.1 et seq.);

86 y. "Preservation zone" means the district or area in which de-
87 velopment is discontinued and has such features as are provided
88 in section 13 of this act;

- 89 z. "Recreation or park land" means land whose primary use
90 or purpose is recreational;
- 91 aa. "Tax map" means the approved map prepared pursuant
92 to P. L. 1956, c. 48 (C. 40:50-9 et seq.);
- 93 bb. "Transfer zone" means the district or area to which devel-
94 opment rights generated by the preservation zone may be trans-
95 ferred and in which increased development is permitted to occur
96 in connection with the possession of such development rights, and
97 which has such features and characteristics as are provided in
98 section 14 of this act;
- 99 cc. "Use" means the specific purpose for which land is zoned
100 designed or occupied;
- 101 dd. "Woodland" means substantially undeveloped land consist-
102 ing primarily of trees and capable of maintaining tree growth;
- 103 ee. "Zoning ordinance" means the zoning ordinance of the mu-
104 nicipality adopted pursuant to R. S. 40:55-30 et seq.

ARTICLE II

- 1 5. The governing body of any municipality may, by resolution,
2 establish a commission whose general purpose shall be to deter-
3 mine, within a time specified in the resolution, the feasibility of
4 the municipality adopting a development rights ordinance, and
5 upon such determination to make a recommendation to the govern-
6 ing body concerning the adoption of the provisions of this act, all
7 as hereinafter provided.
- 1 6. In adopting a resolution pursuant to section 5 of this act, the
2 governing body shall also designate the members of the commission
3 and select its chairman; provided, however, that the commission
4 shall have no more than 11 members, three of whom shall also be
5 members of the municipality's board of adjustment, and three of
6 whom shall also be members of the municipality's planning board;
7 provided, further, however, that where the planning board also
8 acts as the zoning commission pursuant to section 8 of P. L. 1953,
9 c. 433 (C. 40:55-1.8) and R. S. 40:55-33, the members of the com-
10 mission established herein shall also be members of the planning
11 board except that no more than two members shall be of the same
12 class on the planning board. The chief executive officer of the
13 municipality, the municipal planner and the municipal zoning offi-
14 cer, if such positions exist; and the municipal attorney, unless any
15 of the aforesaid are otherwise appointed to the commission as
16 provided hereinabove, shall also be members of the commission,
17 ex officio. Vacancies among the members shall be filled in the same
18 manner as the original appointments were made. The term of the

19 members shall be the same as the life of the commission and shall
20 terminate with the conclusion of the commission's work.

1 7. In the resolution adopted pursuant to section 5 of this act,
2 the governing body may also appropriate to the commission such
3 funds as it deems necessary and sufficient for its work. Within
4 the limits of such appropriations, the commission may appoint and
5 contract with such professional, clerical and stenographic assistants
6 as it shall deem necessary and, where applicable, in the manner
7 prescribed by the Local Public Contracts Law, P. L. 1971, c. 198
8 (C. 40A:11-1 et seq.). The members of the commission shall serve
9 without compensation but may, within the limits of the appropria-
10 tions therefor, be reimbursed for such expenses as are actually
11 incurred in the performance of their official duties.

1 8. Every commission established pursuant to section 5 of this
2 act shall, upon its organization, cause to be conducted a study to
3 determine the feasibility of the municipality adopting a develop-
4 ment rights ordinance which shall include, but not be limited to:

5 a. An analysis of the existing land uses in the municipality, and
6 an identification of any land which might be included within a
7 preservation and a transfer zone if such were to be established
8 pursuant to the provisions of this act;

9 b. An evaluation of the zoning ordinance of the municipality
10 adopted pursuant to the provisions of R. S. 40:55-30 et seq., if
11 one so exists, on the basis of existing and anticipated land uses
12 and development;

13 c. The identification of national, State and regional factors and
14 trends which will have an influence on development in the munic-
15 ipality;

16 d. The identification of the anticipated growth and development
17 the municipality may expect to experience in the next 10 years;

18 e. An assessment of the development potential of all areas of
19 the municipality on the basis of the projected growth of the munic-
20 ipality, the demand for development imposed by the market and the
21 suitability of the land for such development;

22 f. The identification and analysis of capital facilities currently
23 existing in the municipality and those that will be required by
24 virtue of the anticipated development.

1 9. Upon the completion of the study conducted pursuant to sec-
2 tion 8 of this act, the commission shall formulate its recommenda-
3 tion and prepare a report to communicate its findings to the
4 governing body of the municipality. If it is the recommendation
5 of the commission that the municipality would not find it in its

6 best interest to adopt a development rights ordinance, the com-
7 mission shall detail in its report such information as was available
8 to it which led to such recommendation. If it is the recommenda-
9 tion of the commission to adopt a development rights ordinance,
10 the commission shall prepare a report which shall include, but not
11 necessarily be limited to:

12 a. The designation of a proposed preservation zone within the
13 municipality in compliance with the provisions of section 13 of
14 this act;

15 b. A plan indicating the existing and permitted uses of the
16 proposed preservation zone accompanied by a statement detailing
17 the nature and distinguishing features of the zone at present;

18 c. A tax map for the proposed preservation zone specifying the
19 assessed value of the parcels contained therein;

20 d. An analysis of the development potential of the land in the
21 proposed preservation zone estimating the market value of the
22 parcels contained therein;

23 e. The designation of a proposed transfer zone in which the
24 development rights generated by the preservation zone may be
25 utilized;

26 f. A plan indicating the existing uses of the proposed transfer
27 zone and a statement detailing the permitted uses under the
28 existing zoning ordinance;

29 g. A tax map for the transfer zone indicating the assessed and
30 market value of the parcels contained therein;

31 h. A plan projecting the land use scheme in the proposed transfer
32 zone with the full transfer of development rights;

33 i. A proposal concerning the identification of the total number
34 of development rights assigned the preservation zone and their
35 distribution among the owners of property in said zone.

1 10. Upon the formulation of its recommendation and report, the
2 commission shall hold public hearings in the manner provided in
3 section 7 of P. L. 1953, c. 433 (C. 40:55-1.7), and within 10 days
4 following the conclusion of the public hearings, shall transmit its
5 recommendation, report and transcript of the public hearings to
6 the governing body of the municipality for its consideration.

1 11. Within 60 days of the receipt of the documents specified in
2 section 10 of this act, the governing body shall consider the com-
3 mission's recommendation and report. If the commission recom-
4 mends the adoption of a development rights ordinance, the govern-
5 ing body may adopt such ordinance by majority vote. If the
6 commission recommends against the adoption of such an ordinance,

7 the governing body may adopt a development rights ordinance
8 by a vote of two-thirds of the full membership of the governing
9 body. The commission shall terminate upon the action of the
10 governing body pursuant to this section unless otherwise provided
11 for by the governing body. Any ordinance adopted pursuant to
12 this section shall be subject to the provisions of article 1 of chapter
13 55 of Title 40 of the Revised Statutes (C. 40:55-1.1 et seq.) and
14 shall be considered an amendment to the zoning ordinance, if any,
15 then in effect.

ARTICLE III

1 12. Every development rights ordinance adopted pursuant to the
2 provisions of this act shall include:

3 a. The specification that the planning board of the municipality
4 shall have the responsibility for implementing the provisions of
5 any ordinance adopted pursuant to this act; shall hear and review
6 any applications or complaints that may result from the imple-
7 mentation of any such ordinance; and shall make such reports to
8 the governing body as it may require and such recommendations
9 as it shall deem necessary for the successful operation of the
10 ordinance;

11 b. The establishment of a method for the review and hearing of
12 applications and complaints in the manner provided by article 3
13 of chapter 55 of Title 40 of the Revised Statutes;

14 c. The designation and establishment of the preservation and
15 transfer zones as the governing body shall deem necessary and as
16 are consistent with the provisions of this act;

17 d. The provision that all construction, erection, demolition and
18 development in the preservation zone not heretofore approved
19 shall be prohibited except as provided in sections 15 and 23 of
20 this act;

21 e. Provisions for the total number, allocation and distribution
22 of development rights in the preservation zone; provided, however,
23 that prior to the adoption of any such provisions in the ordinance
24 all owners of property in the preservation zone shall be mailed a
25 notice informing them of the number of development rights to
26 which they will be entitled under the ordinance, the permitted use
27 or uses on the basis of which such development rights are to be
28 allocated in the preservation zone, the conversion schedule by
29 which such development rights may be applied to another use or
30 uses in the transfer zone, and the manner in which the development
31 rights may be transferred, all as hereinafter provided. Such notices
32 shall also contain the time and place the governing body or its

33 designate body shall hold a public hearing on the number, allocation and distribution of development rights. Public notice of the hearing required pursuant to this subsection may be given simultaneously with the public notice required pursuant to R. S. 40:4-2 concerning a hearing or hearings held for the purpose of considering any ordinance for final passage; provided, however, that a separate time shall be established for the hearing required pursuant to this subsection and the public hearing or hearings required pursuant to R. S. 40:49-2 shall not be finally adjourned until the completion of the hearing required pursuant to this subsection.

43 The governing body of any municipality which adopts a development rights ordinance pursuant to the provisions of this act shall appropriate such funds in such amounts and for such purposes as it shall deem necessary and sufficient for the purposes of implementing the ordinance.

1 13. In creating and establishing the preservation zone the governing body shall designate a tract in such numbers and of such sizes, shapes and areas as it may deem necessary to carry out the purposes of this act; provided, however, that

5 a. All land in the preservation zone contains one or a combination of the following characteristics:

7 (1) Substantially undeveloped or unimproved farmland, woodland, flood plain, swamp, aquifer recharge area, marsh, land of steep slope, recreational or park land;

10 (2) Substantially improved or developed in a manner so as to represent a unique and distinctive aesthetic or historic quality in the municipality;

13 (3) Substantially improved or developed in such a manner so as to represent an integral economic asset in and to the municipality;

15 b. The location of the zone is consistent with, and corresponds to, the master plan and zoning ordinance of the municipality if they so exist;

18 c. The aggregate size of the zone bears a reasonable relationship to the present and future patterns of population and physical growth and development as set forth in the study conducted by the commission pursuant to section 8 of this act, and are incorporated in the zoning ordinance and master plan of the municipality if they so exist;

24 d. Any nonconforming use or improvement existing in the preservation zone at the time of adoption thereof may be continued and in the event of partial destruction of such nonconforming use or improvement it may be restored or repaired; provided, however,

28 that such nonconforming use or improvement remains consistent
29 with the nonconforming use or improvement in effect at the time
30 of the adoption of the ordinance; and

31 e. Land within the preservation zone may be subdivided in the
32 manner prescribed in section 14 of P. L. 1953, c. 433 (C. 40:55-1.14),
33 only for the purpose of ascertaining the development potential and
34 for determining the number and allocation of development rights of
35 parcels contained therein, or, where a change, modification, or
36 amendment to the development rights ordinance has been approved
37 and issued pursuant to section 15 of this act, to provide for such
38 change, modification or amendment.

1 14. In creating and establishing the transfer zone, the governing
2 body may designate a tract or tracts, which may but need not be
3 contiguous, in such numbers and of such sizes, shapes and areas as
4 it may deem necessary to carry out the provisions of this act; pro-
5 vided, however, that

6 a. The density, topography, development and developability of
7 each transfer zone is such that it can adequately accommodate the
8 transfer of development rights from the preservation zone;

9 b. The density of each transfer zone is increased beyond the
10 density otherwise permitted as a matter of right under the zoning
11 ordinance of the municipality, if one so exists;

12 c. The result of the increase in the density shall be a zone
13 wherein there is a greater incentive to develop at the higher density
14 with certificates of development rights, than at a lower density
15 without such certificates;

16 d. Development at higher densities in each transfer zone shall
17 be permitted only with the utilization of certificates of development
18 rights and that any development in any transfer zone at a density
19 higher than that permitted by the zoning ordinance without such
20 certificates shall be prohibited;

21 e. The present capital facilities and municipal services in and
22 for each transfer zone are sufficient to accommodate the increased
23 density of the transfer zone. As used herein "present capital
24 facilities" means those facilities actually in existence and those
25 for which construction contracts have been entered into or which
26 are included in a capital facilities plan adopted by the municipality
27 requiring the construction of such facilities within 5 years of the
28 adoption of such plan; and

29 f. The overall developability of land in each transfer zone is
30 such so as to offer the most lucrative site possible and acceptable for
31 the transfer of development rights.

32 Nothing contained herein shall be construed so as to prevent or
33 prohibit a municipality from increasing the number of tracts in
34 the transfer zone at any time upon or after the adoption of a
35 development rights ordinance, using the same criteria as are con-
36 tained herein, for the purpose of guaranteeing the greater incentive
37 to develop with certificates of development rights as required pur-
38 suant to subsection c. hereof.

1 15. Any regulations, limitations, and restrictions contained in
2 the development rights ordinance shall not be changed, amended,
3 modified or repealed by the governing body or any other officer or
4 agent of the municipality except where the owner of property can
5 demonstrate that such regulations, limitations and restrictions pre-
6 vent him from a reasonable use of his land; provided, however, that
7 no such change, amendment, modification or repeal of the develop-
8 ment rights ordinance shall be granted where such will destroy,
9 change or otherwise alter the nature and characteristics of the
10 preservation zone and the purposes for which it was established.
11 Any application for a change, amendment, modification or repeal
12 of any of the provisions of the development rights ordinance shall
13 be made to the planning board of the municipality which shall hear
14 and decide on the application within 60 days of its receipt. All
15 actions taken by the planning board on any application submitted
16 pursuant to this section shall be subject to review by the governing
17 body of the municipality. No application for development or for
18 the construction of any improvement shall be made where the
19 development rights for the tract in question have been sold or
20 otherwise transferred for use in the transfer zone.

1 16. Every development rights ordinance shall provide that the
2 certificates of development rights issued in the preservation zone
3 for one use may only be exercised in the transfer zone for that use
4 unless otherwise converted and approved by the planning board as
5 provided in section 20 of this act.

1 17. Certificates of development rights shall be allocated to the
2 various portions of the preservation zone on the basis of the uses
3 permitted in each such portion of said zone as a matter of right
4 under the existing zoning ordinance, if any, at the time of the adop-
5 tion of the development rights ordinance; or, in the event no zoning
6 ordinance is in effect, on the basis of uses contained in the develop-
7 ment potential determined by the study conducted by the commis-
8 sion pursuant to section 8 of this act and as approved or amended
9 by the governing body. Each certificate of development right so
10 allocated shall contain on its face, a statement to the effect that it

11 is allocated on the basis of the specific use or uses cited in the
12 statement, and that it shall be exercised in the transfer zone or
13 zones in a development or developments of such specific use or uses
14 unless converted to another use or uses pursuant to section 20 of
15 this act. The total number of certificates of development rights so
16 allocated shall be equal to and deemed to represent the full and
17 total development potential of all land in the various portions of
18 the preservation zone as a matter of right under the zoning ordi-
19 nance, if any, existing at the time of the adoption of the develop-
20 ment rights ordinance, or on the basis of the development potential
21 of the preservation zone as determined by the study conducted by
22 the commission pursuant to section 8 of this act and as approved
23 or amended by the governing body of the municipality.

1 18. The total number of certificates of development rights deter-
2 mined pursuant to section 17 of this act shall be distributed to
3 property owners in the various portions of the preservation zone
4 in accordance with a formula whereby the number of certificates
5 distributed to an individual property owner in each of the various
6 portions of the preservation zone shall equal that percentage of
7 the total number of such certificates allocated to the preservation
8 zone that the assessed value of the property of any such owner is
9 of the total assessed value of all property in the preservation zone.

1 19. Any owner of property in the preservation zone may appeal
2 any determination concerning the number, allocation and distribu-
3 tion of development rights, pursuant to sections 17 and 18 of this
4 act, to the Law Division of the Superior Court.

1 20. The conversion schedule which every development rights
2 ordinance is required to contain pursuant to section 12 of this
3 act shall provide a means by which development rights allocated
4 pursuant to section 17 of this act on the basis of the uses permitted
5 in each portion of the preservation zone may be exercised for
6 another use or uses in the transfer zone.

7 Such schedule shall be based on the differing market values pre-
8 vailing in the municipality for development rights for differing
9 uses and shall be annually reviewed by the governing body and
10 amended, modified and changed as necessary. Every application
11 for the conversion of a development rights shall be received and
12 reviewed by the planning board in the same manner prescribed by
13 R. S. 40:55-35 for amending a zoning ordinance; and any such
14 application shall be granted in the manner provided by the schedule
15 if such application is found to be consistent with the provisions
16 of this act and in the best interests of the municipality. Upon the

17 granting of any such application, the secretary of the planning
18 board shall notify the county clerk of the converted use of the
19 development right or rights involved in such application.

1 21. Certificates of development rights shall be taxed in the same
2 manner as real property is taxed, and the assessed value of each
3 uncanceled certificate of development right at the time of the
4 adoption of the development rights ordinance shall be equal to the
5 quotient obtained by dividing the aggregate assessed value of all
6 property in that portion of the preservation zone which is zoned
7 for the particular use or uses to which the particular certificate of
8 development rights applies, by the total number of uncanceled
9 certificates of development rights applying to such particular use
10 or uses. Thereafter, such value shall be determined on the basis
11 of current sales of certificates of development rights in the
12 municipality.

1 22. Land within the preservation zone shall be eligible for assess-
2 ment at its agricultural value pursuant to the "Farmland Assess-
3 ment Act," P. L. 1964, c. 48 (C. 54:4-23.1 et seq.), on the same basis
4 as all other land within this State, upon meeting the agricultural
5 use requirements prescribed in said act; provided, however, that
6 certificates of development rights allocated and distributed to such
7 property shall be taxed pursuant to the provisions of section 21
8 of this act.

ARTICLE IV

1 23. Nothing in this act shall be construed to prohibit or prevent
2 the ordinary maintenance or repair of property contained within
3 the preservation zone nor to prevent any structural or environ-
4 mental change to such property which the building inspector of the
5 municipality shall certify is required by the public safety because
6 of an unsafe or dangerous condition it imposes.

1 24. Any two or more municipalities may enter into an agreement
2 pursuant to the "Interlocal Services Act," P. L. 1973, c. 208
3 (C. 40:8A-1 et seq.), to jointly implement the provisions of this act.

1 25. Nothing in this act shall be construed to prohibit or otherwise
2 prevent a municipality from receiving development rights for
3 municipal property contained within the preservation zone on the
4 same basis as other property owners within said zone, or from
5 buying and selling development rights of other parcels.

1 26. In implementing any development rights ordinance adopted
2 pursuant to this act, and in fulfilling the requirements of this act,
3 any municipality may establish a Development Rights Bank or
4 other such facility in which development rights acquired by the
5 municipality may be retained and traded in the best interests of
6 the municipality.

1 27. If any clause, sentence, subdivision, paragraph, subsection or
2 section of this act be adjudged unconstitutional or invalid, such
3 judgment shall not affect, impair or invalidate the remainder
4 thereof, but shall be confined in its operation to the clause, sen-
5 tence, paragraph, subdivision, subsection or section thereof directly
6 involved in the controversy in which said judgment shall have been
7 rendered.

1 28. This act shall take effect immediately.

STATEMENT

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. In essence, the bill provides the municipalities of this State with an additional tool or instrument through which they may control growth and its demands while preserving the dignity of natural areas, open spaces, farmlands and developed areas having a unique quality or characteristic.

ASSEMBLY, No. 1509

STATE OF NEW JERSEY

INTRODUCED JUNE 19, 1978

By Assemblyman DOYLE and Assemblywoman TOTARO

(Without Reference)

AN Act concerning municipalities in relation to planning and zoning, supplementing the "Municipal Land Use Law," approved January 14, 1976 (P. L. 1975, c. 291; C. 40:55D-1 et seq.).

1 BE IT ENACTED by the Senate and General Assembly of the State
2 of New Jersey:

ARTICLE I

1 1. This act shall be known and may be cited as the "Municipal
2 Transfer of Development Rights Act."

1 2. The Legislature hereby finds that the rate, extent, expense
2 and results of the physical development of New Jersey in recent
3 years have finally forced a recognition of the physical facts of
4 New Jersey life and of the inherent relationship which exists
5 between physical development and those physical facts; that
6 among the most important such physical facts are those concern-
7 ing New Jersey's size (forty-sixth in the Nation, in terms of land
8 area), population (more than 7,000,000), population density (more
9 than 950 per square mile; first in the Nation), population distribu-
10 tion (89% classified "urban"; 11% classified "rural"), geography
11 (130 miles of coastline, most of which possesses physical beauty or
12 economic value, or both), and land use (more than 1,000,000 acres
13 of land actively devoted to agriculture in 1975, approximately
14 10,000 acres of which each year is being sold for development and
15 for other than agricultural uses); that the period is long past
16 when uncontrolled, unplanned, unregulated and unrelated physical
17 development could be undertaken without regard for the afore-
18 said physical facts, and at no cost to the health, happiness, safety
19 and general welfare of the citizens of this State; that while physical
20 redevelopment is constantly necessary to renew and restore
21 declining and deteriorating areas of New Jersey, great care must
22 be exercised in undertaking new physical development which may
23 result in the destruction and permanent loss of natural assets,
24 structural amenities and those special, distinctive, and often irre-

25 placeable features which have contributed both to New Jersey's
26 history and to its recognition as the Garden State; that the 567
27 local units of municipal government in New Jersey experience not
28 only the greatest, most immediate and direct pressure for new
29 physical development, but also all the most adverse effects of that
30 development; that the State Government has an obligation to pro-
31 vide municipal governments with adequate and appropriate statu-
32 tory tools whereby these local units, acting within the statutory
33 framework and pursuant to guidelines provided by the State, may
34 respond to the pressures for, and the burdens imposed by, physical
35 development with sound, rational and comprehensive planning
36 techniques; that these techniques must recognize that the right to
37 own land is separate from the right to develop that land and that
38 a development right may become, under the proper circumstances,
39 a valuable negotiable instrument; that such techniques would per-
40 mit municipalities to set aside portions of publicly and privately
41 owned improved and unimproved land in permanent preservation
42 zones where new physical development would be prohibited, and
43 require such municipalities to establish other zones where the
44 right to develop the land permanently preserved may be trans-
45 ferred in the marketplace through the sale and exercise of certifi-
46 cates of development rights; and that the exercise by municipalities
47 of the authority to permanently preserve land and transfer the
48 right to develop therefrom pursuant to such a State law, within a
49 framework provided by statute and pursuant to guidelines pro-
50 vided by the State, is within the police power of the State and
51 necessary to insure the public health, happiness, safety and general
52 welfare of both present and future generations.

1 3. The Legislature declares as a matter of public policy that the
2 preservation by municipalities of improved and unimproved lands
3 and properties of historic, aesthetic, economic and environmental
4 significance, particularly those lands and properties the develop-
5 ment of which has been restricted or prohibited as a result of
6 any State law or rule or regulation promulgated thereunder, the
7 prohibition of physical development or redevelopment of lands
8 and properties so preserved, and the accommodation of the physical
9 development or redevelopment prevented as a result of such
10 preservation through the transfer of the right to develop or
11 redevelop such lands or properties so preserved to other lands and
12 properties specifically designed to receive and accommodate the
13 increased density as may result from such transfer or development,
14 is a public necessity and is required in the interests of the citizens
15 of this State now and in the future.

1 4. As used in this act unless the context clearly indicates other-
2 wise:

3 a. "Aesthetic and historic qualities" means those qualities pos-
4 sessed by any building, set of buildings, site, district or zone which,
5 by virtue of its architectural significance, role in an historic event
6 or general appearance, represents a unique quality or feature in
7 the municipality;

8 b. "Agricultural use" means substantially undeveloped land
9 devoted to the production of plants and animals useful to man,
10 including but not limited to: forages and sod crops; grains and
11 feed crops; dairy animals and dairy products; poultry and poultry
12 products; livestock, including beef cattle, sheep, swine, horses,
13 ponies, mules or goats, including the breeding and grazing of any
14 or all of such animals; bees and apiary products; fur animals;
15 trees and forest products; fruits of all kinds, including grapes,
16 nuts and berries; vegetables; nursery, floral, ornamental and
17 greenhouse products; or when devoted to and meeting the require-
18 ments and qualifications for payments or other compensation pur-
19 suant to a soil conservation program under an agency of the
20 Federal Government;

21 c. "Aquifer recharge area" means an area where rainfall infil-
22 trates the ground to porous, waterbearing geologic formations for
23 retention in underground pools or aquifers;

24 d. "Assessed value" means the taxable value of property as
25 established pursuant to the provisions of chapter 4 of Title 54 of
26 the Revised Statutes for purposes of taxation;

27 e. "Board of adjustment" means the municipal zoning board
28 of adjustment established pursuant to section 56 of P. L. 1975,
29 c. 291 (C. 40:55D-69);

30 f. "Capital facilities" means any substantial physical improve-
31 ment built or constructed by the municipality or privately to
32 provide necessary services for an extended period, including, but
33 not limited to: streets, roads, highways and other transportation
34 facilities; schools; police, fire and rescue facilities; health facili-
35 ties; sewer, water and solid waste systems;

36 g. "Certificate of development right" means the document in-
37 dicating the existence of a development right;

38 h. "Committee" or "Legislative Oversight Committee" means
39 the Legislative Oversight Committee for the "Municipal Transfer
40 of Development Rights Act" established by Article IV of this act;

41 i. "Compatible use" means two or more uses of land not in
42 conflict with each other individually or as combined.

43 j. "Density" means the average number of persons, families
44 or residential dwelling units per unit of area in the case of resi-
45 dential use; and the average number of square feet per unit of
46 area, in the case of industrial, commercial, or any other use;

47 k. "Developability" means the capability of a parcel or parcels
48 of land to accommodate the uses intended or proposed for it at the
49 density intended or proposed for it, based on its topography, exist-
50 ing use, physical composition, desirability and availability;

51 l. "Development potential" means the possible development of
52 a parcel or site based on its developability and the market in which
53 it exists;

54 m. "Development right" means the right to develop land as set
55 forth in sections 12 through 22 of this act;

56 n. "Economic asset" means an economic aspect of the use of a
57 parcel of land which is significant to the economic viability of the
58 municipality, region, State or nation;

59 c. "Exercise of development right" means the submission of a
60 development right to the designated municipal official in conjunc-
61 tion with an application for development approval in the transfer
62 zone;

63 p. "Farmland" means land being used for agricultural purposes
64 or substantially undeveloped land included in the categories of
65 Class I, Class II and Class III soil classifications of the Soil Con-
66 servation Service of the United States Department of Agriculture,
67 and Class IV soil classification when it exists contiguous to or
68 as a part of land in any one or more of the three aforesaid soil
69 classifications;

70 q. "Flood plain" means land subject to regulation pursuant to
71 P. L. 1962, c. 19 (C. 58:16A-50 et seq.), as amended and suppl-
72 mented;

73 r. "Governing body" means the chief legislative body of the
74 municipality;

75 s. "Improvement" means any building, structure or construction
76 on the land, including, but not limited to: houses, stores, ware-
77 houses, factories, churches, schools, barns or other similar struc-
78 tures, recreational or amusement facilities, parking facilities,
79 fences, gates, walls, outhouses, pumps, gravestones, works of art,
80 improved or unimproved streets, alleys, roads, paths, or sidewalks,
81 light fixtures or any other object constituting a physical betterment
82 of real property or any part of such betterment;

83 t. "Land of steep slope" means land of a slope of not less than
84 25%;

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85 u. "Market value" means the price property and improved
86 property would command in the open market for such property
87 and improvements;

88 v. "Marsh" means land seasonally saturated with moisture and
89 having persistent poor natural drainage. Marsh shall also include
90 the term "swamp";

91 w. "Master plan" means the master plan of the municipality
92 prepared and adopted pursuant to section 19 of P. L. 1975, c. 291
93 (C. 40:55D-28);

94 x. "Municipality" means any city, borough, town, township or
95 village of any size or class in the State of New Jersey;

96 y. "Planning board" means the municipal planning board es-
97 tablished pursuant to Article 2 of P. L. 1975, c. 291 (C. 40:55D-23
98 et seq.);

99 z. "Preservation zone" means the district or area in which de-
100 velopment is discontinued and has such features as are provided
101 in section 13 of this act;

102 aa. "Recreation or park land" means land whose primary use
103 or purpose is recreational;

104 bb. "Tax map" means the approved map prepared pursuant
105 to P. L. 1956, c. 48 (C. 40:50-9 et seq.);

106 cc. "Transfer zone" means the district or area to which devel-
107 opment rights generated by the preservation zone may be trans-
108 ferred and in which increased development is permitted to occur
109 in connection with the possession of such development rights, and
110 which has such features and characteristics as are provided in
111 section 14 of this act;

112 dd. "Use" means the residential, commercial, industrial or other
113 purpose for which land is zoned, designed or occupied, notwith-
114 standing the density of such zoning, design or occupation;

115 ee. "Woodland" means substantially undeveloped land consist-
116 ing primarily of trees and capable of maintaining tree growth;

117 ff. "Zoning ordinance" means the zoning ordinance of the mu-
118 nicipality adopted pursuant to Article 8 of P. L. 1975, c. 291
119 (C. 40:55D-62 et seq.).

ARTICLE II

1 5. The governing body of any municipality may, by resolution,
2 establish a commission whose general purpose shall be to deter-
3 mine, within a time specified in the resolution, the feasibility of the
4 municipality adopting a development rights ordinance, providing
5 for the preservation of lands and properties within the munic-
6 pality of historic, aesthetic, economic or environmental signifi-

7 cance, and upon such determination to make a recommendation to
8 the governing body concerning the adoption of the provisions of
9 this act, all as hereinafter provided. A copy of every such reso-
10 lution shall be filed with the Legislative Oversight Committee
11 within 30 days of its adoption. Nothing contained in this act
12 shall be construed as authorizing, empowering or otherwise per-
13 mitting any municipal governing body, planning board or other
14 municipal instrumentality to impose by ordinance, resolution or
15 other decision, any moratorium on account of and during the
16 conduct of the commission's study pursuant to this section, or the
17 governing body's deliberations on such study as hereinafter
18 provided. Any municipality which determines to establish a
19 commission pursuant to this section shall continue to act upon all
20 applications for construction, development, improvement or sub-
21 division in conformity with the laws of this State, notwithstanding
22 the establishment of such a commission, until such time as the
23 municipality adopts a development rights ordinance pursuant to
24 section 11 of this act, at which time such applications shall be
25 subject to the provisions thereof.

1 6. Each commission established pursuant to section 5 of this act
2 shall consist of either: a. the full membership of the planning board
3 of the municipality establishing such commission, and four addi-
4 tional members appointed by the governing body of the municipal-
5 ity, one of whom shall be the municipal tax assessor, unless such offi-
6 cial is already a member of the planning board; one of whom shall
7 be a representative of the real estate industry in such municipality,
8 if any; one of whom shall be a representative of the building or
9 construction industry in such municipality, if any; and at least
10 one of whom shall be a citizen of such municipality; in which case,
11 the chairman of the planning board shall be the chairman of the
12 commission; or, if the governing body so determines, b. no more
13 than 13 members, three of whom shall also be members of the
14 municipality's board of adjustment, and three of whom shall also
15 be members of the municipality's planning board, the provisions of
16 any other law to the contrary notwithstanding. The chief executive
17 officer of the municipality, the municipal planner, the municipal tax
18 assessor and the municipal zoning officer, if such positions exist;
19 a member of the municipal environmental commission, if any; and
20 the municipal attorney, unless any of the aforesaid are otherwise
21 appointed to the commission as provided hereinabove, shall also be
22 members of the commission, ex officio; in which case, the governing
23 body shall designate the chairman of the commission. Vacancies

24 among the members shall be filled in the same manner as the
25 original appointments were made. The term of the members shall
26 be the same as the life of the commission and shall terminate with
27 the conclusion of the commission's work as provided in section 11
28 of this act.

1 7. In the resolution adopted pursuant to section 5 of this act, the
2 governing body may also appropriate to the commission such funds
3 as it deems necessary and sufficient for its work. Within the limits
4 of such appropriations, the commission may appoint and contract
5 with such professional, clerical and stenographic assistants as it
6 shall deem necessary and, where applicable, in the manner pre-
7 scribed by the Local Public Contracts Law, P. L. 1971, c. 198
8 (C. 40A:11-1 et seq.). The members of the commission shall serve
9 without compensation but may, within the limits of the appropria-
10 tions therefor, be reimbursed for such expenses as are actually
11 incurred in the performance of their official duties.

1 8. Every commission established pursuant to section 5 of this
2 act shall, upon its organization, cause to be conducted a study to
3 determine the feasibility of the municipality adopting a develop-
4 ment rights ordinance. The study shall include, but not be limited
5 to:

6 a. An analysis of the existing land uses in the municipality, and
7 an identification of any land which might be included within a
8 preservation and a transfer zone if such were to be established
9 pursuant to the provisions of this act;

10 b. An evaluation of the zoning ordinance of the municipality
11 adopted pursuant to the provisions of Article 8 of P. L. 1975,
12 c. 291 (C. 40:55D-62 et seq.), if one so exists, on the basis of exist-
13 ing and anticipated land uses and development;

14 c. The identification of national, State and regional factors and
15 trends which will have an influence on development in the munici-
16 pality;

17 d. The identification of the anticipated growth and development
18 the municipality may expect to experience in the next 10 years;

19 e. An assessment of the development potential of all areas of
20 the municipality on the basis of the projected growth of the munici-
21 pality, the demand for development imposed by the market and the
22 suitability of the land for such development;

23 f. The identification and analysis of capital facilities currently
24 existing in the municipality and those that will be required by
25 virtue of the anticipated development;

26 g. An environmental inventory of any land which might be in-
27 cluded within a preservation zone and a transfer zone if such were
28 to be established pursuant to the provisions of this act;

29 h. A review of the adequacy of the assessment of property for
30 the purposes of taxation in the municipality;

31 i. The identification of those lands and properties within the
32 municipality the development of which has been restricted or
33 prohibited as a result of any State law or rule or regulation
34 promulgated thereunder.

1 9. Upon the completion of the study conducted pursuant to sec-
2 tion 8 of this act, the commission shall formulate its recommenda-
3 tion and prepare a report to communicate its findings to the
4 governing body of the municipality. If it is the recommendation
5 of the commission that the municipality would not find it in its
6 best interest to adopt a development rights ordinance, the com-
7 mission shall detail in its report such information as was available
8 to it which led to such recommendation. If it is the recommenda-
9 tion of the commission to adopt a development rights ordinance,
10 the commission shall prepare a report which shall include, but not
11 necessarily be limited to:

12 a. The designation of a proposed preservation zone within the
13 municipality in compliance with the provisions of section 13 of
14 this act;

15 b. A plan indicating the existing and permitted uses of the
16 proposed preservation zone accompanied by a statement detailing
17 the nature and distinguishing features of the zone at present;

18 c. A tax map for the proposed preservation zone specifying the
19 full assessed value of the parcels contained therein;

20 d. An analysis of the development potential of the land in the
21 proposed preservation zone;

22 e. The designation of a proposed transfer zone in compliance
23 with the provisions of section 14 of this act in which the develop-
24 ment rights generated by the preservation zone may be utilized;

25 f. A plan indicating the existing uses of the proposed transfer
26 zone and a statement detailing the permitted uses under the exist-
27 ing zoning ordinance;

28 g. A tax map for the transfer zone indicating the full assessed
29 value of the parcels contained therein;

30 h. A plan projecting the land use scheme in the proposed transfer
31 zone with the full transfer of development rights;

32 i. A proposal concerning the identification of the total number
33 of development rights assigned the preservation zone and their

34 distribution in compliance with the provisions of section 15 of this
35 act among the owners of property in said zone;

36 j. A report on the adequacy of the assessment of property for
37 the purposes of taxation in the municipality;

38 k. The identification and analysis of capital facilities currently
39 existing in the municipality and those that will be required by
40 virtue of anticipated development;

41 l. The identification and analysis of municipal services currently
42 in existence and those that will be required by virtue of anticipated
43 development;

44 m. An environmental inventory of any land which might be in-
45 cluded within a preservation zone and transfer zone if such were
46 to be established pursuant to the provisions of this act.

1 10. Upon the formulation of its recommendation and report, and
2 after soliciting and considering comments thereon from the munici-
3 pal planning board, zoning board and, if it so exists, environmental
4 commission, the commission shall hold public hearings in the
5 manner provided in section 6 of P. L. 1975, c. 291 (C. 40:55D-10),
6 and within 30 days following the conclusion of the public hearings,
7 shall transmit its recommendation, report and transcript of the
8 public hearing to the governing body of the municipality for its
9 consideration as well as filing an informational copy of same with
10 the Legislative Oversight Committee.

1 11. Within 60 days of the receipt of the documents specified in
2 section 10 of this act, the governing body shall consider the com-
3 mission's recommendation and report; if the commission recom-
4 mends the adoption of a development rights ordinance, the govern-
5 ing body may at any time thereafter adopt such ordinance by
6 majority vote; if the commission recommends against the adoption
7 of such an ordinance, the governing body may adopt a development
8 rights ordinance by a vote of two-thirds of the full membership
9 of the governing body; provided, however, that any ordinance
10 adopted pursuant to this section shall be subject to the provisions
11 of the "Municipal Land Use Law," P. L. 1975, c. 291 (C. 40:55D-1
12 et seq.) and shall be considered an amendment to the zoning ordi-
13 nance, if any, then in effect. Any action taken by the governing
14 body pursuant to this section shall, within 14 days of such action,
15 be filed, together with any related documents, with the Legislative
16 Oversight Committee. The commission shall terminate upon the
17 action of the governing body pursuant to this section unless other-
18 wise provided for by the governing body.

ARTICLE III

1 12. Every development rights ordinance adopted pursuant to the
2 provisions of this act shall include:

3 a. The specification that the planning board of the municipality
4 shall have the responsibility for implementing the provisions of
5 any ordinance adopted pursuant to this act, and the responsibility
6 for maintaining a reasonable balance between the number of un-
7 canceled certificates of development rights and the capacity of the
8 transfer zone to accommodate such uncanceled certificates; shall
9 hear and review any applications or complaints that may result
10 from the implementation of any such ordinance; and shall make
11 such reports to the governing body as it may require and such
12 recommendations as it shall deem necessary for the successful
13 operation of the ordinance;

14 b. The establishment of a method for the review and hearing of
15 applications and complaints in the manner provided by section 6 of
16 P. L. 1975, c. 291 (C. 40:55D-10);

17 c. The designation and establishment of the preservation and
18 transfer zones as the governing body shall deem necessary and as
19 are consistent with the provisions of this act;

20 d. The provision that all construction, erection, demolition and
21 development in the preservation zone not heretofore approved
22 shall be prohibited except as provided in sections 13d, 15 and 28
23 of this act;

24 e. Provisions for the total number, allocation and distribution
25 of development rights in the preservation zone; provided, however,
26 that prior to the adoption of any such provisions in the ordinance
27 all owners of property in the preservation zone shall be mailed a
28 notice informing them of the number of development rights to
29 which they will be entitled under the ordinance, the permitted use
30 or uses on the basis of which such development rights are to be
31 allocated in the preservation zone, the conversion schedule by
32 which such development rights may be applied to another use or
33 uses in the transfer zone, and the manner in which the development
34 rights may be transferred, all as hereinafter provided. Such notices
35 shall also contain the time and place the governing body or its
36 designate body shall hold a public hearing on the number, alloca-
37 tion and distribution of development rights. Public notice of the
38 hearing required pursuant to this subsection may be given simul-
39 taneously with the public notice required pursuant to R. S. 40:49-2
40 concerning a hearing or hearings held for the purpose of consider-
41 ing any ordinance for final passage; provided, however, that a

42 separate time shall be established for the hearing required pursuant
 43 to this subsection and the public hearing or hearings required
 44 pursuant to R. S. 40:49-2 shall not be finally adjourned until the
 45 completion of the hearing required pursuant to this subsection.

46 f. The provision that prior to the granting of any variance
 47 pursuant to section 57.d. of P. L. 1975, c. 291 (C. 40:55D-70.d.)
 48 for a parcel not contained within the transfer zone, a determina-
 49 tion shall be made in writing by the planning board that any in-
 50 crease in density on such parcel as a result of the granting of the
 51 variance will not substantially impair the operation of the develop-
 52 ment rights ordinance or the viability of the development rights
 53 market, and that should it be the determination of the planning
 54 board that the granting of the variance will so substantially impair
 55 either the development rights ordinance or the viability of the
 56 development rights market, the application for said variance may
 57 be denied by the board of adjustment.

58 g. The provision that within 1 year after certificates of develop-
 59 ment rights have been allocated and distributed to owners of prop-
 60 erty in the preservation zone, the valuation placed on the affected
 61 properties for real property tax purposes shall be adjusted to
 62 reflect the loss of the right to develop such property.

63 The governing body of any municipality which adopts a develop-
 64 ment rights ordinance pursuant to the provisions of this act shall
 65 appropriate such funds in such amounts and for such purposes as it
 66 shall deem necessary and sufficient for the purposes of implement-
 67 ing the ordinance.

1 13. In creating and establishing the preservation zone the gov-
 2 erning body shall designate a tract in such numbers and of such
 3 sizes, shapes and areas as it may deem necessary to carry out the
 4 purposes of this act; provided, however, that

5 a. All land in the preservation zone contains one or a combination
 6 of the following characteristics:

7 (1) Substantially undeveloped or unimproved farmland, wood-
 8 land, flood plain, swamp, aquifer recharge area, marsh, land of
 9 steep slope, recreational or park land;

10 (2) Substantially improved or developed in a manner so as to
 11 represent a unique and distinctive aesthetic or historic quality in
 12 the municipality;

13 (3) Substantially improved or developed in such a manner so as
 14 to represent an integral economic asset in and to the municipality;

15 b. The location of the zone is consistent with the master plan,
 16 zoning ordinance and environmental inventory of the municipality
 17 if they so exist insofar as practicable;

18 c. The aggregate size of the zone bears a reasonable relationship
19 to the present and future patterns of population and physical
20 growth and development as set forth in the study conducted by the
21 commission pursuant to section 8 of this act;

22 d. Any nonconforming use or improvement existing in the preser-
23 vation zone at the time of adoption thereof may be continued and in
24 the event of partial destruction of such nonconforming use or
25 improvement it may be restored or repaired; provided, however,
26 that such nonconforming use or improvement remains consistent
27 with the nonconforming use or improvement in effect at the time
28 of the adoption of the ordinance; and

29 e. Land within the preservation zone may be subdivided in the
30 manner prescribed in Article 6 of P. L. 1975, c. 291 (C. 40:55D-37
31 et seq.) only for the purpose of ascertaining the development
32 potential and for determining the number and allocation of devel-
33 opment rights of parcels contained therein, or, where a change,
34 modification, or amendment to the development rights ordinance
35 has been approved and issued pursuant to section 15 of this act,
36 to provide for such change, modification or amendment.

37 f. Wherever practicable, supportive of the public purpose of
38 this act and in keeping with the integrity of the development rights
39 ordinance, the governing body shall give first priority in the placing
40 of property within the preservation zone to that property the
41 development of which has been restricted or prohibited as a result
42 of any State law or rule or regulation promulgated thereunder;
43 provided, however, that the allocation of certificates of develop-
44 ment rights pursuant to section 17 of this act to all such property
45 the development of which has been so restricted or prohibited
46 shall, any zoning ordinance in effect with respect to such property
47 to the contrary notwithstanding, be on the basis of uses contained
48 in the development potential determined by the study conducted
49 by the commission pursuant to section 8 of this act, as approved
50 or amended by the governing body.

1 14. In creating and establishing the transfer zone, the governing
2 body may designate a tract or tracts, which may but need not be
3 contiguous, in such numbers and of such sizes, shapes and areas as
4 it may deem necessary to carry out the provisions of this act; pro-
5 vided, however, that

6 a. The density, topography, development and developability of
7 the transfer zone is such that it can adequately accommodate the
8 transfer of development rights from the preservation zone;
9 provided, however, that wherever practicable, supportive of the

10 public purpose of this act and in keeping with the purpose and
11 integrity of the development rights ordinance, land within the
12 transfer zone shall be vacant; and, provided further, however, that
13 land which is not vacant may be included within the transfer zone
14 upon a finding by the planning board that such inclusion will
15 provide at least as lucrative a site for the transfer of development
16 rights from the preservation zone as any vacant land within the
17 municipality;

18 b. The density of the transfer zone is increased beyond the
19 density otherwise permitted as a matter of right under the zoning
20 ordinance of the municipality, if one so exists;

21 c. The result of the increase in the density shall be a zone
22 wherein there is a greater incentive to develop at a higher density
23 with certificates of development rights, than at a lower density
24 without such certificates;

25 d. Development at higher densities in the transfer zone shall be
26 permitted only with the utilization of certificates of development
27 rights and that any development in the transfer zone at a density
28 higher than that permitted by the zoning ordinance without such
29 certificates shall be prohibited;

30 e. The present capital facilities and municipal services in and
31 for the transfer zone are sufficient to accommodate the increased
32 density of the transfer zone. As used herein "present capital
33 facilities" means those capital facilities actually in existence and
34 those for which construction contracts have been entered into or
35 which are included in a capital facilities plan adopted by the
36 municipality requiring the construction of such facilities within
37 6 years of the adoption of such plan, or which have been proposed
38 privately and agreed to by the municipality and will be constructed
39 within 5 years; and

40 f. The overall developability of land in the transfer zone is such
41 so as to offer the most lucrative site possible and available for the
42 transfer of development rights.

43 Nothing contained herein shall be construed so as to prevent or
44 prohibit a municipality from increasing the number of tracts in
45 the transfer zone at any time upon or after the adoption of a
46 development rights ordinance, using the same criteria as are con-
47 tained herein, for the purpose of guaranteeing the greater incentive
48 to develop with certificates of development rights as required pur-
49 suant to subsection c. hereof. Any such increase shall be consid-
50 ered an amendment to the development rights ordinance and shall
51 be subject to the provisions of the "Municipal Land Use Law,"

52 P. L. 1975, c. 291 (C. 40:55D-1 et seq.). Any land included in the
53 transfer zone shall not have been downzoned for a 1-year period
54 preceding the adoption of a development rights ordinance pursuant
55 to this act, unless such downzoning shall be directly related to
56 a change in, or revision or amendment of, the municipality's master
57 plan. For the purposes of this section, "downzoning" means a
58 change in the zoning classification of land to a classification per-
59 mitting development that is less intensive or dense.

1 15. Any regulations, limitations, and restrictions contained in
2 the development rights ordinance shall not be changed, amended,
3 modified or repealed by the governing body or any other officer or
4 agent of the municipality except where the owner of property can
5 demonstrate that such regulations, limitations and restrictions pre-
6 vent him from a reasonable use of his land; provided, however, that
7 no such change, amendment, modification or repeal of the develop-
8 ment rights ordinance shall be granted where such will destroy,
9 change or otherwise alter the nature and characteristics of the
10 preservation zone and the purposes for which it was established,
11 and that no change in the zone be permitted from the uses intended
12 therein by way of special exception, variance or, except as provided
13 in section 13e hereof, with respect to subdivision.

14 Any application for a change, amendment, modification or repeal
15 of any of the provisions of the development rights ordinance shall
16 be made to the planning board of the municipality which shall hear
17 and decide on the application within 60 days of its receipt. All
18 actions taken by the planning board on any application submitted
19 pursuant to this section shall be subject to review by the governing
20 body of the municipality. No application for development or for
21 the construction of any improvement pursuant to this section
22 shall be made unless the applicant therefor possesses, or has
23 entered into an option contract to purchase, the sufficient number
24 of development rights for the proposed development or improve-
25 ment. Any such change, amendment, modification or repeal shall
26 be filed, within 14 days of adoption thereof, with the Legislative
27 Oversight Committee.

1 16. Every development rights ordinance shall provide that the
2 certificates of development rights issued in the preservation zone
3 for one use may only be exercised in the transfer zone for that use
4 unless otherwise converted and approved by the planning board as
5 provided in section 20 of this act.

1 17. Certificates of development rights shall be allocated to the
2 various portions of the preservation zone on the basis of the uses
3 permitted in each such portion of said zone as a matter of right

4 under the existing zoning ordinance, if any, at the time of the adop-
5 tion of the development rights ordinance; or, in the event no zoning
6 ordinance is in effect, or in the event such portions consist of prop-
7 erty the development of which has been restricted or prohibited
8 as a result of any State law or rule or regulation promulgated
9 thereunder, on the basis of uses contained in the development
10 potential determined by the study conducted by the commission
11 pursuant to section 8 of this act and as approved or amended by
12 the governing body. Each certificate of development rights so
13 allocated shall contain on its face the name and address of the
14 owner of the property with respect to which such certificate is
15 allocated and a statement to the effect that it is allocated on the
16 basis of the specific use or uses cited in the statement, and that
17 it shall be exercised in the transfer zone or zones in a develop-
18 ment or developments of such specific use or uses unless converted
19 to another use or uses pursuant to section 20 of this act. The
20 total number of certificates of development rights so allocated
21 shall be equal to and deemed to represent the full and total develop-
22 ment potential of all land in the various portions of the preservation
23 zone as a matter of right under the zoning ordinance, if any, exist-
24 ing at the time of the adoption of the development rights ordinance,
25 or on the basis of the development potential of the preservation
26 zone as determined by the study conducted by the commission pur-
27 suant to section 8 of this act and as approved or amended by the
28 governing body of the municipality.

1 18. The total number of certificates of development rights deter-
2 mined pursuant to section 17 of this act shall be distributed to
3 property owners in the various portions of the preservation zone
4 in accordance with a formula whereby the number of certificates
5 distributed to an individual property owner in each of the various
6 portions of the preservation zone shall equal that percentage of
7 the total number of such certificates allocated to that portion of
8 the preservation zone that the qualified assessed value of the
9 property of any such owner is of the total qualified assessed value
10 of all property in that portion of the preservation zone. As used
11 in this section, "qualified assessed value" means the full assessed
12 value of property less the assessed value of any improvements
13 thereon and land appurtenant thereto; provided, however, that
14 land assessed at its agricultural value pursuant to the "Farm-
15 land Assessment Act," P. L. 1964, c. 48 (C. 54:4-23.1 et seq.) shall
16 be assessed at its full market value for the purposes of this section.

1 19. Any owner of property in the preservation zone may appeal
2 any determination concerning the number, allocation and distribu-
3 tion of development rights, pursuant to sections 17 and 18 of this
4 act, to the Law Division of the Superior Court.

1 20. The conversion schedule which every development rights
2 ordinance is required to contain pursuant to section 12 of this
3 act shall provide a means by which development rights allocated
4 pursuant to section 17 of this act on the basis of the uses permitted
5 in each portion of the preservation zone may be exercised for
6 another use or uses in the transfer zone.

7 Such schedule shall be based on the differing market values pre-
8 vailing in the municipality for development rights for differing
9 uses and shall be annually reviewed by the governing body and
10 amended, modified and changed as necessary. Every application
11 for the conversion of a certificate of development right shall be
12 received and reviewed by the planning board in the same manner
13 prescribed by section 6 of P. L. 1975, c. 291 (C. 40:55D-10) for
14 amending a zoning ordinance; and any such application shall be
15 granted in the manner provided by the shedule if such application
16 is found to be consistent with the provisions of this act and in the
17 best interests of the municipality. Upon the granting of any such
18 application, the secretary of the planning board shall notify the
19 county clerk of the converted use of the development right or rights
20 involved in such application.

1 21. Certificates of development rights, except as provided by
2 section 22 of this act, shall be taxed in the same manner as real
3 property is taxed, and the assessed value of each uncanceled cer-
4 tificate of development right at the time of the adoption of the
5 development rights ordinance shall be determined by subtracting
6 the aggregate assessed value of all property in that portion of the
7 preservation zone which is zoned for the particular use or uses to
8 which the particular certificate of development rights applies from
9 the aggregate assessed value of all such property prior to the
10 establishment of the preservation zone and dividing the difference,
11 by the total number of uncanceled certificates of development
12 rights applying to such particular use or uses. In determining the
13 aggregate assessed value of such property prior to the establish-
14 ment of the preservation zone, that land assessed at its agricultural
15 value pursuant to the "Farmland Assessment Act," P. L. 1964,
16 c. 48 (C. 54:4-23.1 et seq.) shall be assessed at its full market value.
17 Thereafter, the assessed value of each uncanceled certificate shall
18 be determined on the basis of current sales of certificates of
19 development rights in the municipality.

44

20 Certificates of development rights shall, for purposes of sale
 21 or exchange, be deemed real estate and shall be subject to the
 22 provisions of chapter 15 of Title 45 of the Revised Statutes
 23 (C. 45:15-1 et seq.) and any other relevant provisions of law with
 24 respect to the sale of real estate. Such certificates shall be subject
 25 to foreclosure by a proceeding in rem in the same manner as other
 26 real property.

27 The address of an owner of any certificate of development right
 28 shall be presumed to be the address contained in such certificate.

29 The provisions for entering and recording with the relevant
 30 county and municipal officials the allocation, distribution, sale,
 31 conversion, and exercise of development rights, and for issuing new
 32 certificates upon the sale, conversion, loss or destruction of certifi-
 33 cates allocated and distributed pursuant to this act, shall be
 34 identical to the relevant provisions of law applicable to entering
 35 and recording instruments evidencing ownership of, or interests
 36 in, real property.

1 22. Land within the preservation zone shall be eligible for assess-
 2 ment at its agricultural value pursuant to the "Farmland Assess-
 3 ment Act," P. L. 1964, c. 48 (C. 54:4-23.1 et seq.), on the same basis
 4 as all other land within this State, upon meeting the agricultural
 5 use requirements prescribed in said act and the certificates of
 6 development rights allocated and distributed to such property shall
 7 not be taxed upon allocation and distribution as long as such
 8 certificates of development rights and the land for which such
 9 certificates were allocated and distributed remain unsold. Upon
 10 the sale of either the land or the certificates, the certificates shall be
 11 taxed pursuant to the provisions of section 21 of this act and shall
 12 be subject to the tax rollback provisions of the "Farmland Assess-
 13 ment Act" on the basis of their taxable liability pursuant to
 14 section 21.

ARTICLE IV

1 23. There is hereby established upon the effective date of this
 2 act and upon the organization of each Legislature hereafter a
 3 permanent Legislative Oversight Committee on the Municipal
 4 Transfer of Development Rights Act. The committee shall consist
 5 of eight members, four to be appointed from the membership of
 6 the Senate by the President thereof, no more than two of whom
 7 shall be of the same political party, and four to be appointed from
 8 the membership of the General Assembly by the Speaker thereof,
 9 no more than two of whom shall be of the same political party. All
 10 members shall serve without compensation except that they may be

11 reimbursed for expenses incurred in the performance of their duties
12 out of such funds as the Legislature may appropriate, or as are
13 otherwise available to the committee.

1 24. The committee shall organize as soon as may be possible after
2 the appointment of its members and shall select a chairman from
3 among its members and a secretary who need not be a member of
4 the committee.

1 25. The committee shall be entitled to call to its assistance and
2 avail itself and wherever possible utilize for the purpose of reduc-
3 ing costs, the services of such employees of any State, county or
4 municipal department, board, bureau, commission or agency as it
5 may require and as may be available to it for said purposes, and to
6 employ such professional, stenographic and clerical assistants and
7 incur such traveling and other miscellaneous expenses as it may
8 deem necessary in order to perform its duties and as may be within
9 the limits of funds appropriated or otherwise made available to
10 it for said purposes.

1 26. The committee shall have the duty and responsibility:

2 a. To review, evaluate and monitor the activities and progress
3 of municipalities which have adopted, or are in the process of deter-
4 mining the feasibility of, a development rights ordinance;

5 b. To determine the effect of implemented development rights
6 ordinances on the preservation of lands and properties of historic,
7 aesthetic, economic and environmental significance on the State,
8 regional and municipal level;

9 c. To determine the effect of implemented development rights
10 ordinances on the provision of increased density development in
11 the State, regional and municipal levels;

12 d. To determine the effect of such implemented development
13 rights ordinances on private sector industries and businesses
14 associated with the preserved properties and on the provision of
15 residential, industrial and commercial construction in the transfer
16 zones;

17 e. To prepare regular reports to the Legislature advising it of
18 the effect of this act, its implementation by municipalities, and
19 recommending such changes, amendments or modifications to the
20 act as it may deem necessary;

21 f. To recommend to the departments, divisions, bureaus and
22 offices within the Executive Branch such rules and regulations,
23 policies and practices which will enhance or otherwise improve the
24 implementation of this act;

25 g. To provide direction to the counties and municipalities of this
26 State in the implementation of this act.

ARTICLE V

1 27. The departments of the Executive Branch of this State are
2 hereby directed to provide such assistance and cooperation to
3 private sector involved in the construction or provision of resi-
4 dences or other structures within the transfer zones in munici-
5 palities which have adopted the provisions of this act. It is there-
6 fore deemed to be in the public interest to encourage the private
7 sector to act to effectuate the provisions of this act and, as such,
8 the departments of the Executive Branch of this State are hereby
9 directed to provide such elements of the private sector expeditious
10 service in processing applications for permits or other required
11 documents, as authorized by statute or regulations to the private
12 sector involved in such municipalities.

1 28. Nothing in this act shall be construed to prohibit or prevent
2 the ordinary maintenance or repair of property contained within
3 the preservation zone nor to prevent any structural or environ-
4 mental change to such property which the building inspector of the
5 municipality shall certify is required by the public safety because
6 of an unsafe or dangerous condition it imposes.

1 29. Any two or more municipalities may enter into an agreement
2 pursuant to the "Interlocal Services Act," P. L. 1973, c. 208
3 (C. 40:8A-1 et seq.), to jointly implement the provisions of this act.

1 30. Nothing in this act shall be construed to prohibit or otherwise
2 prevent a municipality from receiving development rights for
3 municipal property contained within the preservation zone on the
4 same basis as other property owners within said zone, or from
5 buying and selling development rights of other parcels.

1 31. In implementing any development rights ordinance adopted
2 pursuant to this act, and in fulfilling the requirements of this act,
3 any municipality may establish a Development Rights Bank or
4 other such facility in which certificates acquired by the munici-
5 pality may be retained and traded in its best interest.

1 32. If any clause, sentence, subdivision, paragraph, subsection or
2 section of this act be adjudged unconstitutional or invalid, such
3 judgment shall not affect, impair or invalidate the remainder
4 thereof, but shall be confined in its operation to the clause, sen-
5 tence, paragraph, subdivision, subsection or section thereof directly
6 involved in the controversy in which said judgment shall have been
7 rendered.

1 33. This act shall take effect immediately.

STATEMENT

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.

Transferable Development Rights (TDR) is a new land management concept that purports to offer State and local governments a way to preserve historic, agricultural or environmentally sensitive areas at no public cost, without financial loss to owners, and without sacrificing future growth. The idea behind TDR is that a property owner can sell the right to develop his land just as he can sell a right-of-way to an electric power company for a transmission line, or the right to drill for oil or extract other minerals. The major difference between TDR and these other "sale of rights" concepts is that in TDR the property owner sells his development rights for use on another piece of property where they will permit construction at a higher density than would be permissible without the use of such development rights.

ASSEMBLY, No. 3664
STATE OF NEW JERSEY

INTRODUCED JUNE 23, 1983

By Assemblymen BOCCHINI and PATERO

AN ACT concerning transfer of development provisions in municipal zoning ordinances, and amending P. L. 1975, c. 291.

1 BE IT ENACTED by the Senate and General Assembly of the State
2 of New Jersey:

1 1. Section 3.4 of P. L. 1975, c. 291 (C. 40:55D-7) is amended to
2 read as follows:

3 3.4. "Sedimentation" means the deposition of soil that has been
4 transported from its site of origin by water, ice, wind, gravity or
5 other natural means as a product of erosion.

6 "Site plan" means a development plan of one or more lots on
7 which is shown (1) the existing and proposed conditions of the lot,
8 including but not necessarily limited to topography, vegetation,
9 drainage, flood plains, marshes and waterways, (2) the location
10 of all existing and proposed buildings, drives, parking spaces, walk-
11 ways, means of ingress and egress, drainage facilities, utility ser-
12 vices, landscaping, structures and signs, lighting, screening devices,
13 and (3) any other information that may be reasonably required in
14 order to make an informed determination pursuant to an ordinance
15 requiring review and approval of site plans by the planning board
16 adopted pursuant to article 6 of this act.

17 "Standards of performance" means standards (1) adopted by
18 ordinance pursuant to subsection 52 d. regulating noise levels,
19 glare, earthborne or sonic vibrations, heat, electronic or atomic
20 radiation, noxious odors, toxic matters, explosive and inflammable
21 matters, smoke and airborne particles, waste discharge, screening

EXPLANATION—Matter enclosed in bold-faced brackets [thus] in the above bill
is not enacted and is intended to be omitted in the law.
Matter printed in italics thus is new matter.

EXHIBIT F

22 of unsightly objects or conditions and such other similar matters
23 as may be reasonably required by the municipality or (2) required
24 by applicable federal or State laws or municipal ordinances.

25 "Street" means any street, avenue, boulevard, road, parkway,
26 viaduct, drive or other way (1) which is an existing State, county
27 or municipal roadway, or (2) which is shown upon a plat hereto-
28 fore approved pursuant to law, or (3) which is approved by official
29 action as provided by this act, or (4) which is shown on a plat duly
30 filed and recorded in the office of the county recording officer prior
31 to the appointment of a planning board and the grant to such board
32 of the power to review plats; and includes the land between the
33 street lines, whether improved or unimproved, and may comprise
34 pavement, shoulders, gutters, curbs, sidewalks, parking areas and
35 other areas within the street lines.

36 "Structure" means a combination of materials to form a con-
37 struction for occupancy, use or ornamentation whether installed
38 on, above, or below the surface of a parcel of land.

39 "Subdivision" means the division of a lot, tract or parcel of
40 land into two or more lots, tracts, parcels or other divisions of land
41 for sale or development. The following shall not be considered
42 subdivisions within the meaning of this act, if no new streets are
43 created: (1) divisions of land found by the planning board or sub-
44 division committee thereof appointed by the chairman to be for
45 agricultural purposes where all resulting parcels are five acres or
46 larger in size, (2) divisions of property by testamentary or in-
47 testate provisions, (3) divisions of property upon court order,
48 including but not limited to judgments of foreclosure, (4) consoli-
49 dation of existing lots by deed or other recorded instrument and
50 (5) the conveyance of one or more adjoining lots, tracts or parcels
51 of land, owned by the same person or persons and all of which are
52 found and certified by the administrative officer to conform to the
53 requirements of the municipal development regulations and are
54 shown and designated as separate lots, tracts or parcels on the tax
55 map or atlas of the municipality. The term "subdivision" shall
56 also include the term "resubdivision."

57 "Transcript" means a typed or printed verbatim record of the
58 proceedings or reproduction thereof.

59 "Transfer of development" means the assigning of the permitted
60 development, or a portion thereof, of any use specified for tradi-
61 tional onsite development in the zoning provisions of an ordinance
62 from one or more lots to a permitted use on one or more other lots,
63 by means of appropriate deed restrictions, covenants, dedications,
64 or other legal devices designed to retain the sending lot at the
65 intensity of development established at the time of transfer.

22 of unsightly objects or conditions and such other similar matters
23 as may be reasonably required by the municipality or (2) required
24 by applicable federal or State laws or municipal ordinances.

25 "Street" means any street, avenue, boulevard, road, parkway,
26 viaduct, drive or other way (1) which is an existing State, county
27 or municipal roadway, or (2) which is shown upon a plat hereto-
28 fore approved pursuant to law, or (3) which is approved by official
29 action as provided by this act, or (4) which is shown on a plat duly
30 filed and recorded in the office of the county recording officer prior
31 to the appointment of a planning board and the grant to such board
32 of the power to review plats; and includes the land between the
33 street lines, whether improved or unimproved, and may comprise
34 pavement, shoulders, gutters, curbs, sidewalks, parking areas and
35 other areas within the street lines.

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37 struction for occupancy, use or ornamentation whether installed
38 on, above, or below the surface of a parcel of land.

39 "Subdivision" means the division of a lot, tract or parcel of
40 land into two or more lots, tracts, parcels or other divisions of land
41 for sale or development. The following shall not be considered
42 subdivisions within the meaning of this act, if no new streets are
43 created: (1) divisions of land found by the planning board or sub-
44 division committee thereof appointed by the chairman to be for
45 agricultural purposes where all resulting parcels are five acres or
46 larger in size, (2) divisions of property by testamentary or in-
47 testate provisions, (3) divisions of property upon court order,
48 including but not limited to judgments of foreclosure, (4) consoli-
49 dation of existing lots by deed or other recorded instrument and
50 (5) the conveyance of one or more adjoining lots, tracts or parcels
51 of land, owned by the same person or persons and all of which are
52 found and certified by the administrative officer to conform to the
53 requirements of the municipal development regulations and are
54 shown and designated as separate lots, tracts or parcels on the tax
55 map or atlas of the municipality. The term "subdivision" shall
56 also include the term "resubdivision."

57 "Transcript" means a typed or printed verbatim record of the
58 proceedings or reproduction thereof.

59 "Transfer of development" means the assigning of the permitted
60 development, or a portion thereof, of any use specified for tradi-
61 tional onsite development in the zoning provisions of an ordinance
62 from one or more lots to a permitted use on one or more other lots,
63 by means of appropriate deed restrictions, covenants, dedications,
64 or other legal devices designed to retain the sending lot at the
65 intensity of development established at the time of transfer.

66 "Variance" means permission to depart from the literal re-
 67 quirements of a zoning ordinance pursuant to section 47 and sub-
 68 sections 29. 2b., 57 c. and 57 d. of this act.

69 "Zoning permit" means a document signed by the administrative
 70 officer (1) which is required by ordinance as a condition precedent
 71 to the commencement of a use or the erection, construction, re-
 72 construction, alteration, conversion or installation of a structure
 73 or building and (2) which acknowledges that such use, structure
 74 or building complies with the provisions of the municipal zoning
 75 ordinance or variance therefrom duly authorized by a municipal
 76 agency pursuant to sections 47 and 57 of this act.

1 2. Section 52 of P. L. 1975, c. 291 (C. 40:55D-65) is amended to
 2 read as follows:

3 52. Contents of zoning ordinance. A zoning ordinance may:

4 a. Limit and restrict buildings and structures to specified districts
 5 and regulate buildings and structures according to their type and
 6 the nature and extent of their use, and regulate the nature and
 7 extent of the use of land for trade, industry, residence, open space
 8 or other purposes.

9 b. Regulate the bulk, height, number of stories, orientation, and
 10 size of buildings and the other structures, and require that buildings
 11 and structures use renewable energy sources, within the limits of
 12 practicability and feasibility, in certain places; the percentage of
 13 lot or development area that may be occupied by structures; lot sizes
 14 and dimensions; and for these purposes may specify floor area
 15 ratios and other ratios and may employ regulatory techniques
 16 [governing], including but not limited to transfer of development,
 17 designed to govern the intensity of land use and the provision of
 18 adequate light and air.

19 c. Provide districts for planned developments (provided that an
 20 ordinance providing for approval of subdivisions and site plans
 21 by the planning board has been adopted and incorporates therein
 22 the provisions for such planned developments in a manner con-
 23 sistent with article 6 of this act.) The zoning ordinance shall estab-
 24 lish standards governing the type and density, or intensity of land
 25 use, in a planned development. Said standards shall take into ac-
 26 count that the density, or intensity of land use, otherwise allowable
 27 may not be appropriate for a planned development. The standards
 28 may vary the type and density, or intensity of land use, otherwise
 29 applicable to the land within a planned development in considera-
 30 tion of the amount, location and proposed use of common open
 31 space; the location and physical characteristics of the site of the
 32 proposed planned development; and the location, design and type

33 of dwelling units and other uses. Such standards may, in order to
34 encourage the flexibility of housing density, design and type, au-
35 thorize a deviation in various residential clusters from the density,
36 or intensity of use, established for an entire planned development.
37 The standards and criteria by which the design, bulk and location of
38 buildings are to be evaluated, shall be set forth in the zoning ordi-
39 nance and all standards and criteria for any feature of a planned
40 development shall be set forth in such ordinance with sufficient
41 certainty to provide reasonable criteria by which specific proposals
42 for a planned development can be evaluated.

43 d. Establish, for particular uses or classes of uses, reasonable
44 standards of performance and standards for the provision of
45 adequate physical improvements including, but not limited to,
46 off-street parking and loading areas, marginal access roads and
47 roadways, other circulation facilities and water, sewerage and
48 drainage facilities; provided that section 41 of this act shall apply
49 to such improvements.

50 e. Designate and regulate areas subject to flooding (1) pursuant
51 to P. L. 1972, c. 185 (C. 58:16A-55 et seq.) or (2) as otherwise
52 necessary in the absence of appropriate flood hazard area designa-
53 tions pursuant to P. L. 1962, c. 19 (C. 58:16A-50 et seq.) or floodway
54 regulations pursuant to P. L. 1972, c. 185 or minimum standards
55 for local flood fringe area regulation pursuant to P. L. 1972, c. 185.

56 f. Provide for conditional uses pursuant to section 54 of this act.

57 g. Provide for senior citizen community housing.

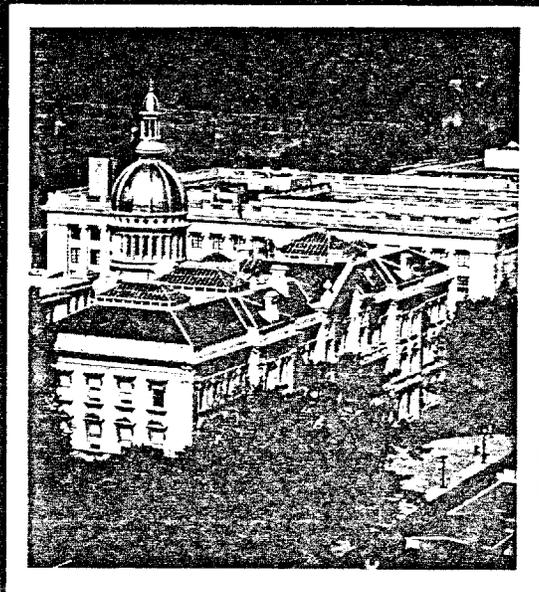
58 h. Require that as a condition for any approval which is required
59 pursuant to such ordinance and the provisions of this chapter, that
60 no taxes or assessments for local improvements are due or de-
61 linquent on the property for which any application is made.

1 3. This act shall take effect immediately.

STATEMENT

This bill would clarify the power of municipalities to include in their zoning ordinances adopted under the "Municipal Land Use Law," P. L. 1975, c. 291 (C. 40:55D-1 et seq.) provisions relating to the transfer of development from one area of the municipality to another. The bill would provide specific reference to the concept in the law, while describing the concept in terms sufficiently general to accommodate all of the municipalities currently practicing this land use regulatory technique.

ANNUAL MESSAGE
TO THE
NEW JERSEY STATE
LEGISLATURE



THOMAS H. KEAN
GOVERNOR

January 10, 1984

My Administration has continued its effort to ensure that all citizens in this state have adequate housing.

The Department of Community Affairs' neighborhood preservation program has continued to assist municipalities throughout the state in improving housing in urban and older suburban communities. The Department is also using federal small cities community block grant funds to revitalize existing residential neighborhoods.

Our weatherization program has continued during 1983 and approximately 5,000 homes occupied by low-income families have been weatherized by the Department in order to achieve significant reductions in heating costs.

The Department of Community Affairs has also established an Office of Housing Advocacy to provide assistance to municipalities and has prepared a model site development ordinance for use by municipalities in reducing housing costs.

Our Mortgage Finance Agency has made available mortgage financing for eligible residents throughout the state to the extent of almost \$500 million, and approximately 10,000 households have benefitted from the Agency's low-interest mortgage program. I intend to continue to lobby hard in the Congress and with the Administration to preserve the tax exempt bond program that allows New Jersey to offer competitive low-interest loans to persons seeking to buy homes.

I am pleased that the legislation merging the Housing Finance Agency and the Mortgage Finance Agency has passed the Senate and is scheduled for an Assembly vote early in January. This will enable these two agencies to function more efficiently as they combine their resources and staff.

I have also actively supported with our Congressional Delegation the new federal legislation that provides significant federal funds to subsidize new construction and housing rehabilitation. This legislation has now been approved by the Congress and signed by the President.



The Department of the Public Advocate and the Attorney General are engaged in a major legal effort to protect senior citizens and disabled citizens from eviction from rental housing because of condominium conversion. They are involved in at least five specific litigated cases involving the constitutionality or scope of the Senior Citizen and Disabled Protected Tenancy Act.

Another important initiative for the protection of tenants is the legislation sponsored by Senator Caufield which I have signed to establish the Bureau of Fire Safety which put into effect a modern and comprehensive system for fire safety in existing buildings. The Department of Community Affairs is in the process of adopting comprehensive fire safety regulations and will be providing training for fire safety inspection personnel throughout the state.

The decision by our State Supreme Court in the case known as Mt. Laurel II has caused a significant change in the law with respect to the obligation of various municipalities to provide a "fair share" of low and moderate income housing. Because of the novel and far-reaching implications of the Supreme Court's decision in this case, my Administration has been carefully monitoring the efforts of

municipalities, builders, land use planners and other groups and individuals affected by the decision.

Initially, public attention has focused on the State Development Guide Plan which the Supreme Court designated as the primary factor in determining which municipalities in the state are obligated to comply with the low and moderate income standards enunciated in the decision. The Court has also expressed its belief that the Guide Plan should be updated by January 1, 1985, if it is to continue to serve its purpose.

Because the State Development Guide Plan was not prepared to perform the function which the Supreme Court has imposed on it, I had substantial reservations about the wisdom and propriety of the state undertaking an update of a plan designed for one purpose to perform an entirely different function. I am mindful of the efforts by certain municipal officials, planners and attorneys to encourage the legislature to create a planning agency which would include representation from local municipalities and the planning community in order to allow such an agency to undertake a revision of the Guide Plan from a much broader perspective than could be attempted by a division of state government. I would be supportive of such an effort if the Legislature saw fit to establish an agency of this nature with local representation and assign to it the responsibility of review and revision of the State Department Guide Plan.

However, the problems generated by the Supreme Court decision in Mt. Laurel II do not begin or end with a decision to revise the State Development Guide Plan. The vast number of municipalities included within the purview of the Court's decision are now confronted with the prospect of having their zoning ordinances face judicial scrutiny and probable revision in order to assure compliance with the "fair share" standard enunciated by the Court. I believe that the wholesale revision of local zoning ordinances by the judiciary is an undesirable intrusion on the home rule principle that has served our state well for many years.

For that reason, I would urge you to consider means to encourage municipalities to undertake on their own the revision and updating of local master plans and zoning ordinances in order to reflect more accurately existing and prospective demands for housing. In this connection, I would particularly commend to your attention revision of the land use law in order to encourage on an optional basis the enactment of housing elements in municipal master plans and zoning ordinances. You might also consider incentives in the form of presumptions of validity of such ordinances if they were submitted to and approved by county planning boards.

I will be glad to cooperate with you in the design of legislation that would encourage municipalities to assume this responsibility voluntarily rather than leave to the judiciary the task of redesigning zoning ordinances throughout the State of New Jersey.

Another aspect of the Mt. Laurel decision that may require legislative intervention is the fact that the decision appears to apply to each developer in each municipality that falls within the growth area designated by the Guide Plan. Conceptually, it would appear to make much more sense for the Legislature to provide a system of transfer development credits so that a builder skilled in constructing low and moderate income housing could sell excess credits for such housing to builders without this type of construction experience. The price of the credit would constitute part of the subsidy which in many counties will be required to encourage the construction of low and moderate income housing. I am advised that a system of transfer development credits is presently operating in at least one other state and I would encourage you to consider the enactment of legislation which would afford to municipalities, on an optional basis, the right to adopt ordinances allowing for the transfer of low and moderate income housing credits. Such legislation would avoid the mandate that low and moderate income housing be located in each development constructed in every municipality subject to the decision, and would allow greater flexibility among municipalities and developers in determining where such housing could most appropriately be constructed.

In last year's annual message, I called for the protection of consumers in cases where utility service lines have been diverted by landlords for their own illegal use. In response to that call, our Board of Public Utilities has implemented regulations to stop such diversions of service. The regulations require utilities to conduct an investigation of service diversion within two months of receiving a tenant's written complaint and to act accordingly before service can be shut off.

Legislation aimed at amending landlord-tenant law would be more effective in preventing such diversions, however, and Senator Cowan is now developing such legislation. It merits your support.

One of New Jersey's most important communities is its farm community. This past year I signed two bills, the Agriculture Retention and Development Act and the Right to Farm Act, sponsored by Senator Zane and Assemblyman Zimmer, which are aimed at ensuring that New Jersey's prime farmland remains in agricultural use.



I also signed legislation designed to stop the growing problem of farmland vandalism and trespass, which costs New Jersey farmers more than \$1.5 million each year.

I worked with our Department of Agriculture to secure Federal disaster assistance for 12 New Jersey counties which were hard hit by last summer's drought. Farmers in these counties may apply for low-interest loans from the Federal government to recoup their losses.

The Department of Agriculture, working along with the New Jersey Department of Defense, distributed more than 11 million pounds of Federal

surplus commodities valued at more than \$16.5 million to thousands of New Jersey's needy families in 1983. New Jersey's surplus food distribution program has been cited as the most effective in the nation. I am grateful to the many service and volunteer agencies, as well as the countless individual volunteers, who helped make this program a success.

Two thousand members of the National Guard also provided needed assistance to stranded and snowbound people, transported doctors and nurses to essential medical facilities, and delivered essential food to nursing homes during the blizzard which paralyzed much of the state last February.

The arts community has played a valuable role in conveying the richness of New Jersey history and culture to others. Our Department of State has taken the lead role in coordinating the state's various cultural and arts-related activities. In 1983, the Department helped organize a ceremony in Princeton to commemorate the 200th Anniversary of the Signing of the Treaty of Paris. I believe that continued support for the arts in New Jersey is an important part of the effort to improve the understanding of New Jersey's many treasures, and I will ask you to provide such support again this year.

One of my chief goals as Governor has been to encourage the participation by all of New Jersey's minority communities in the political and economic development processes of our state.

To help fulfill that goal, I will shortly be announcing the appointment of an Advisory Committee on Hispanic Affairs which will make recommendations for encouraging the economic development of the Hispanic community, for involving more Hispanics in the political process and for addressing the special needs of Hispanics in New Jersey.

I will ask this Advisory Committee to report to me no later than September of this year.

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

Plaintiff,

v.

THE MAYOR AND COUNCIL OF THE TOWNSHIP
OF EAST WINDSOR, a Municipal corporation,
THE PLANNING BOARD OF THE TOWNSHIP OF
EAST WINDSOR, et al., and THE EAST
WINDSOR MUNICIPAL UTILITIES AUTHORITY,

Defendants.

and

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

Plaintiff,

v.

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

Defendants.

STENOGRAPHIC TRANSCRIPT OF
COUNSELS' ARGUMENT AND JUDGE'S DECISION

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

B E F O R E:

HONORABLE PAUL G. LEVY

TRANSCRIPT ORDERED BY: JOHN F. MCCARTHY, III

MA

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

1
2
3 MESSRS. STERNS, HERBERT & WEINROTH,
4 By: Frank J. Petrino, Esq., and Joel Sterns, Esq.,
Attorneys for Plaintiff.

5 MICHAEL A. PANE, ESQ.,
6 Attorney for Defendant, The Mayor
and Council of the Township of East Windsor.

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

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

12
13 ANNE C. NEMETH, C.S.R.
14 OFFICIAL COURT REPORTER
15 MERCER COUNTY COURTHOUSE
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GIA

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

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

The New Jersey Association of Professional Planners, also, moved to intervene as Amicus Curiae. Apparently the brief was filed here in the courthouse and was misplaced and was, apparently, filed on April 22. I have reviewed that brief, and I will discuss its contents during the course of my ruling on the motions for summary judgment with regard to the 1983 cause of action. The point of view expressed there is, basically, that a TDR concept is nothing more than a simple extension

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1 of cluster zoning, and its purpose is to preserve open
 2 space, including agricultural areas. That, basically,
 3 was argued this morning by Mr. Pane. Their arguments
 4 as Amicus Curiae are limited to whether TDR is permissi-
 5 ble under the Municipal Land Use Law and without spe-
 6 cific reference to the East Windsor ordinance. That
 7 particular issue has, I believe, been adequately briefed
 8 and argued by the parties to this matter. There are
 9 some interesting arguments raised in this brief with
 10 regard to what property owners may do in terms of open
 11 space area in a cluster zoning ordinance, and that there
 12 are different ways that is handled by different muni-
 13 cipalities. My problem with that is that, although that
 14 may be, I don't get enough out of that to change my
 15 mind as to what I see in terms of TDR as a basis. So,
 16 I'm going to deny that motion for two reasons. First,
 17 because I've, also, denied the motion for Amicus Curiae
 18 from the Builders Association, which was covered by the
 19 plaintiff, and I think this is, also, covered by the
 20 defendants as far as the Planners are concerned. There-
 21 fore, although I stated earlier this morning before Mr.
 22 Norman appeared here -- and he should enter his appear-
 23 ance on the record.

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

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

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

Ordinance 1982-16 is invalid because it creates zones in East Windsor Township dependent upon transfer of development rights, a zoning concept not authorized by the legislature. Having reached that conclusion, I think I need only deal with the motions for summary judgment and cross-motion for summary judgment on Count 1, and the motions with regard to Counts 2 and 9 need not be considered at this time. Summary judgment is granted to plaintiff on Count 1 of the complaint, and defendant's cross-motion for summary judgment on that count is denied. Similarly, defendant's motion to consolidate this action with the earlier action,

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Docket No. L.51177-80, is denied as is plaintiff's motion to dismiss the counterclaims filed in the instant action.

Summary judgment, of course, may only be granted when there are no material questions of fact to be decided. All parties agree that this matter is proper for such disposition and a motion and cross-motion to that end have been filed. Undoubtedly, this is the proper procedure, as the parties argue that the ordinance is either valid or invalid on its face. See Brunetti v. New Milford, 68 N.J. 576 (1975); Morristown v. Hanover, 168 N.J. Super. 295 (App. Div. 1979); Bridge Park Co. v. Highland Park, 113 N.J. Super. 219 (App. Div. 1971). Can everybody hear? I don't want anybody to have come this far and not be able to hear ^{what's} with's going on.

The constitution provides that the legislature may delegate certain zoning powers to municipalities permitting them to adopt ordinances, which either regulate the construction, nature and extent of use of buildings in specified districts, or regulate the nature and extent of the uses of land in specified districts. See, N.J. Constitution (1947), Article IV, Section VI, paragraph 2. The legislature delegated such zoning authority in the Municipal Land Use Law.

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1 See, N.J.S.A. 40:55D-62, which repeats the terms of the
 2 constitution: "The governing body may adopt or amend
 3 a zoning ordinance relating to the nature and extent of
 4 the uses of land and of buildings and structures there-
 5 on." Any zoning ordinance must conform to those limits
 6 or it is void, because a municipality has no inherent
 7 power to adopt a zoning ordinance. See, Dresner v.
 8 Correra, 69 N.J. 237 at 241 (1976) and Rockhill v.
 9 Chesterfield Township, 23 N.J. 117 at 125 (1957).

10 To begin with, the language of the enabling act
 11 has no express reference to or authorization of
 12 "development rights" or the TDR concept. One must
 13 look to N.J.S.A. 40:55D-62 and 65 as the source of
 14 the municipality's power, rather than N.J.S.A. 40:55D-2,
 15 which sets forth the "intent and purpose" of the Muni-
 16 cipal Land Use Law. Defendants argue that the latter
 17 section is the basis for the implied authority of
 18 East Windsor Township to enact the ordinance in question.
 19 Subsections (a), (e), (g), (i) and (j) demonstrate the
 20 legislative concern with preservation of agricultural
 21 land and stand for the proposition that such a concern
 22 or purpose may be the basis for an ordinance creating
 23 a zone for agricultural uses. But the power to create
 24 such a zone and to restrict land, herein, to such uses
 25 comes from sections 62 and 65, rather than from section

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Lot

1 2. An examination of the effect of this ordinance will
2 demonstrate that East Windsor Township has, herein,
3 exceeded its power to zone.

4 In order to preserve agricultural land, the or-
5 dinance creates an AP (agricultural preservation) zone
6 which includes approximately 3000 acres in the south-
7 easter and southern parts of the township. Permitted
8 uses are limited to agricultural, roadside produce
9 stands and farm dwellings. Conditional use provisions
10 permit single-family dwellings on farms at a ratio of
11 one per 20 acres and on smaller farms if the land is
12 not suitable for agricultural preservation. Plaintiff
13 owns some 600 acres in this zone, all of which is desig-
14 nated as "growth area" in the State Development Guide
15 Area. An owner of land in that zone may be granted
16 some "development rights" for which he gives the town-
17 ship a recordable covenant against future nonagricul-
18 tural use of the farmland. The ordinance defines a
19 development rights as "an interest in land which repre-
20 sents a certain right to use the land for residential
21 or nonresidential purposes."

22 Such development rights may then be transferred
23 by such landowners to developers of land in another
24 portion of the township. That other land, consisting
25 of, approximately, 700 acres, is in the REAP (residential

1 expansion for agricultural preservation) zone. Per-
2 mitted uses in that zone are agricultural, single-
3 family dwellings on two-acre lots and planned develop-
4 ment. Higher density development for single-family
5 residences, townhouses, or garden apartments is permitted
6 if development rights are transferred according to
7 schedule. Thus, landowners desiring to develop resi-
8 dential units in the REAP zone of any significant
9 density must purchase development rights from land-
10 owners in the AP zone and surrender them to the munici-
11 pality in order to obtain approval of the desired higher
12 density development.

13 This court is to decide whether the Municipal Land
14 Use Law authorizes municipalities to adopt zoning laws
15 creating a preservation zone, providing for separation
16 of development rights from land ownership in that zone,
17 and permitting development of land in a receiving zone
18 conditioned on purchase and transfer of such rights.
19 I think it does not when the ordinance involves a
20 departure from traditional concepts of zoning and plan-
21 ning permitted by the Municipal Land Use Law. The leg-
22 islative development of N.J.S.A. 40:55D-65 demonstrates
23 that changes in the traditional concepts are made by the
24 legislature, rather than by the municipalities. If spe-
25 cific authority was provided for such mundane matters

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1 as creation of flood plain area, requiring taxes to be
2 paid prior to subdivision approval, permitting planned
3 developments and zoning for senior citizen community
4 housing, it is clearly necessary for this proposed
5 zoning, which impacts on title interests and taxation
6 problems so seriously that statewide uniform regulation
7 is required. Ordinance 1982-16 of East Windsor Town-
8 ship is an ordinance, which departs from the accepted
9 concepts of zoning and planning, no matter how liberally
10 construed.

11 Plaintiffs argue that the two bills were introduced
12 by legislators to regulate the concept of transfer of
13 development rights, and they claim that this indicates
14 the legislature's intent to exclude such authority from
15 the Municipal Land Use Law. That is not persuasive
16 authority for such an argument, but these proposed bills
17 do indicate the complexity of the issue and the need for
18 uniform regulation. See, A-3192 (1975) and A-1509(1978).
19 Certainly, after the decision by the Supreme Court in
20 South Burlington County NAACP v. Mt. Laurel Township,
21 92 N.J. 158 (1983), the State Development Guide Plan
22 (May 1980) has become a very important document for
23 Mount Laurel type disputes, and the other cause of
24 action related to the instant case has such disputes
25 at issue. The extant fact question of whether the AP

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and REAP zones were located in a manner inconsistent with that plan indicates the need for uniform regulation of the criteria for delineating the preservation and transfer zones in a TDR plan. Such regulation was proposed by A-1509 (1978), as was a scheme for determining how development rights were to be assessed, taxed and sold or exchanged.

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

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TAA

1 "to regulate the ownership of buildings or the types
 2 of tenancies permitted." In the matter at bar, East
 3 Windsor Township has enacted an ordinance which regu-
 4 lates the ownership of property rather than the physical
 5 use of land and structures. See, also, Metzdorf v.
 6 Rumson, 67 N.J. Super. 121 (Appellate Division-1961)
 7 where the zoning ordinance was invalidated because
 8 it prohibited transfer of title to land by specific
 9 devise.

10 Defendants argue that this ordinance is sustainable
 11 as an exercise of the ordinary police power of the
 12 municipality pursuant to N.J.S.A. 40:48-2. However,
 13 as noted at the start, the constitution only permits
 14 the legislature to empower a municipality to regulate
 15 land use within its borders, and the vehicle by which
 16 the legislature granted such power is the Municipal
 17 Land Use Law and only that. There is no doubt that
 18 Ordinance 1982-16 fulfills many of the worthy purposes
 19 of zoning legislation, but that it does so without any
 20 statutory power to achieve such purposes. The Planning
 21 Association argued the same thing, I think, in their
 22 brief, I think, when they stated that there are valid
 23 purposes of zoning to be achieved by this particular
 24 technique. And as I've just said, I agree that the
 25 concept is worthy and should be certainly considered

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1 as a possible pool in land use development and growth
 2 in this state, but, I believe, that because of the
 3 other implications of taxation and title questions,
 4 that this has to be addressed on the uniform basis
 5 by the legislature.

6 Finally, there is the issue of remedy -- that is,
 7 what happens when summary judgment is granted to
 8 plaintiff? The ordinance contains a severability
 9 clause, and defendants rely on that to protect all parts
 10 of the ordinance not specifically related to TDR.

11 The entire background of the enactment of Ordinance
 12 1982-16 shows that it was a unitary plan to adopt the
 13 TDR concept, and that the zones created were only cre-
 14 ated to fit into the overall TDR scheme. This is the
 15 dominant purpose of the ordinance, no one part is func-
 16 tionally independent of another, and TDR was the signi-
 17 ficant inducement to adoption. Thus, by the rule of
 18 Incanamort v. Fort Lee, 72 N.J. 412 (1977), the entire
 19 ordinance is invalid notwithstanding the existence of
 20 a severability clause.

21 Plaintiff says the next step is for the court to
 22 order the township to rezone the area within 90 days and
 23 submit the new ordinance to judicial review. There is
 24 nothing to demonstrate any substantial legal problems
 25 with the prior ordinance, except as it is challenged

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in the related matter of Docket No. L-51177-80. The land in question is not unzoned. Cf., Petlin Associates, Inc. v. Dover, 64 N.J. 327 (1974); Morris County Land v. Parsippany-Troy Hills, 40 N.J. 539 (1963). I'll talk more about this when I get into the question of the defenses and the counterclaims.

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

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

Defendants state that the essence of their counterclaim is that plaintiff and/or its officers, agents and employees desired to turn a loss into a substantial profit by tortiously threatening and seeking to coerce the township into rezoning plaintiff's property. They claim the plaintiff committed fraud, violated the

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1 civil rights of the township and its inhabitants and,
2 filed a baseless lawsuit (meaning the instant 1983
3 case). The basis of these claims is a series of in-
4 ternal memoranda from plaintiff's files indicating
5 litigation strategy which this court finds to be or-
6 dinary and usual in prerogative writ cases involving
7 rezoning requests by land developers. That is, pre-
8 sentation of a worst case plan or one legally noxious
9 is often done by developers to convince the municipal
10 authorities that the proferred plan should be approved.

11 In general, the counterclaim sounds as if it was
12 a complaint for malicious use of process. All parties
13 acknowledge that such a claim may not be brought by
14 counterclaim, but must await termination of the under-
15 lying action. See, Penwag Property Co. v. Landau,
16 76 N.J. 595 (1978). Defendants argue that such is not
17 the true nature of their counterclaims, but they seek
18 redress for conspiracy, harassment and other tortious
19 conduct. It seems to me, however, that the defendants
20 are merely trying to rename a rose, and the familiar
21 cliché is pertinent. Such claims will be permitted
22 as affirmative defenses, and if they are established,
23 they may support an action for malicious prosecution
24 in the future. Since nothing on the fact of the Centex
25 memoranda, when read in context, indicates unusual or

1 bad faith action by the plaintiff, the claims are
 2 facially insufficient. However, because I will grant
 3 additional time to complete pretrial discovery until
 4 September 9, 1983, defendants may seek further support
 5 for the presentation of these claims as affirmative
 6 defenses at trial or for the renewal of this motion.

7 There's another motion that relates to this,
 8 in which plaintiff moves to dismiss counterclaims
 9 filed in the 1983 action. I'll grant this motion be-
 10 cause the counterclaims have been considered and
 11 dismissed in connection with the earlier filed action.

12 Now, as to trial and whether or not these affirma-
 13 tive defenses may be struck or the counterclaims suc-
 14 cessfully added, I think that we would consider trying
 15 what plaintiffs call a Mount Laurel issue on the two-
 16 acre zoning claim and the use or non-use of the PD zone.
 17 Your discovery will be over right after Labor Day. What
 18 I'd like you to do is contact me as soon as the --
 19 well, we're in session the day after Labor Day. I was
 20 going to say the new term, but the new term begins
 21 July 1 this year, and we should set up a status con-
 22 ference in the way of a pretrial conference. I'd like
 23 you to be prepared at that time to tell me how long
 24 it's going to take to try the case, how many witnesses
 25 your're going to have and have suggestions for breaking

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1 the litigation up, so that we don't try it all at once.
2 But that if this is an issue that would be the pre-
3 dominant issue, that would then require, if the plain-
4 tiffs prevail, a new ordinance, or if the defendants
5 prevail, the plaintiffs will have to do whatever steps
6 they deem necessary. That will be, basically, dispositive
7 of -- I don't know, tactics or where you stand and
8 let you each move off to another step outside of the
9 court. I think we should consider trying to break
10 that issue out of litigation, and that would, also,
11 impact on the MUA.

12 Now, the next set of motions deal with the MUA's
13 motion for summary judgment in the 1981 action, and
14 in this instance, East Windsor MUA moves for summary
15 judgment claiming: (1) there is no legally cognizable
16 dispute because Centex never made a complete application
17 and it requested a stay of the preliminary application
18 it had been processing; (2) the claim for a violation
19 of the federal civil rights act (42 U.S.C.A. section
20 1983) is barred by a two-year statute of limitations;
21 (3) no notice of claim was filed as required by the
22 Tort Claims Act (N.J.S.A. 59:8-8) and EWMUA is immune
23 from liability thereunder for its licensing and per-
24 mitting activities; (4) the prerogative writs claims
25 were not brought within the time limit permitted by

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Rule 4:69-6; and (5) Centex failed to exhaust administrative remedies and required by Rule 4:69-5.

Centex replies by arguing: (1) the Tort Claims Act does not apply to a damage claim under the federal civil rights act or to an action seeking injunctive or declaratory relief; (2) the proper statute of limitations is six years or two years from discovery of the cause of action; (3) the complaint was amended timely under Rule 4:69; and (4) it is not required to exhaust administrative remedies because there are important constitutional issues raised in this matter and because such exhaustion would be futile.

As we all know, summary judgment will be denied if there is a genuine issue as to a material fact as long as the statute of limitations has not been violated. It will, also, be denied if discovery is incomplete, if discovery would lead to revelation of such issues of fact. The gist of the amendments to the complaint, which added East Windsor MUA as a defendant is the claim that it, the governing body and the planning board "acted in concert to formulate an exclusionary land use plan for the Township that utilized the lack of sewer plant and line capacity as a key element to prevent or limit development in East Windsor Township." Count 14 seeks damages under the federal civil rights

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1 act for the alleged conspiracy. As such, the notice of
2 claim and immunity provisions of the Tort Claims Act
3 do not apply. See, Gipson v. Bass River, 82 Federal
4 Rules Decision 122 (District of New Jersey 1979);
5 T & M Homes, Inc. v. Township of Mansfield, 162 N.J.
6 Super. 497 (Law Division 1978); Lloyd v. Stone-Harbor,
7 179 N.J. Super. 496 (Chancery Division 1981), Counts
8 15 and 16 ask the court to require East Windsor MUA
9 to approve the extention of its water and sewer lines
10 to plaintiff's property, so plaintiff may develop its
11 land. Since no relief by way of damages is sought
12 in these two counts, the Tort Claims procedures would
13 not apply. N.J.S.A. 59:1-4. I conclude that neither
14 the notice provisions, nor the immunity provisions of
15 the Tort Claims Act impact on claims under the federal
16 civil rights act.

17 As to the applicable statute of limitations, the
18 rule requires reference to the most appropriate state
19 law. See, Johnson v. Railway Express Agency, 421 U.S.
20 454 at 462 (1978). The nature of the conduct plaintiff
21 complains of is a conspiracy to prevent it from devel-
22 oping its land -- a tortious injury to real property.
23 As such, N.J.S.A. 2A:14-1 is directly applicable and
24 ist six-year period of limitations governs. Compare,
25 Gipson v. Bass River, supra.

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The 45-day limitation of Rule 4:69-6 cannot fairly apply to this situation. As plaintiff points out, nothing is being done by EWMUA regarding plaintiff's property, so the doctrine of continuing wrong is pertinent. But more than that, the interaction of a utilities authority with other local administrative bodies is obvious and necessary in any large scale land development today. If plaintiff can prove the existence of a conspiracy, all conspirators would be liable if the conspiracy involved a deprivation of due process of law or equal protection of law under the U.S. Constitution. Along those lines, there's a case called Lawrence Wood Sales Corp. v. Lawrence Township Planning Board and the Township of Lawrence. I believe it's an unreported opinion of the Appellate Division, decided February 10, 1983, in which Lawrence Township land development ordinance allowed subdivisions where public sewage and water facilities were available, and if there was individual sewage, facilities had to have, at least, 60,000 square feet. Plaintiff applied for some approval and was rejected because he was unable to give assurance that the public sewage facilities would be available, and the plaintiff said that, although this can be required on an application for final subdivision approval, it can ^{not} require it on a

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1 preliminary application. The court referred to part
2 of the Municipal Land Use Law, 40:55D-38(b)(3), which
3 provided that an ordinance requiring approval by the
4 planning board of either subdivisions or site plans
5 or both, shall include provisions insuring sewage
6 facilities and other utilities necessary for essential
7 services to residents and occupants. So, they have
8 this in their ordinance, and they required a subdivi-
9 sion applicant to give them written assurance, which,
10 obviously, they couldn't do. The trial judge, which
11 was me, found that sewage facilities were neither
12 available, nor planned because there was a letter from
13 the local sewage authority which clearly stated that
14 such a project was not contemplated, and the Appellate
15 Division upheld that.

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

25 Centex will undoubtedly have to comply with

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1 applicable administrative regulations if it prevails
2 against the municipality, and the usual relief would
3 be a remand for further proceedings in accordance
4 with the court's rulings on the substantive issues.
5 Then both the state DEP and EWMUA would be involved
6 with plaintiff's plans. But because of the nature of
7 the overall complaint, alleging a conspiracy by three
8 municipal bodies, it would be uneconomic to dismiss
9 the claim against the East Windsor MUA now and require
10 another action if plaintiff prevails against the town-
11 ship and the planning board, but has problems with the
12 utilities authority. Therefore, although the appli-
13 cation by Centex to East Windsor MUA was voluntarily
14 placed "on hold", East Windsor MUA might be liable for
15 participating in an illegal conspiracy against plain-
16 tiff, and its administrative or regulatory actions in-
17 volving plaintiff's property might be evidential as to
18 plaintiff's main claims for declaratory or injunctive
19 relief. So, for those reasons it would stay in this
20 action so all matters can be resolved expeditiously.
21 I would encourage that the MUA to fully participate
22 with everybody else during the next three months of
23 the discovery with an eye towards moving again to
24 dismiss the complaint in September or to be placed at
25 our pretrial conferences in a status of just a "by-

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stander." It may be that this particular claim should stand aside and another issue be tried first, and that other issue might lead to no further need for litigation. The expenses that the MUA is undergoing are strictly legal, and I think that for the time being, the MUA should stay in the case.

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

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

Now, I have for you sets of orders that cover each of these motions and sets of my notes on which this oral opinion was based. I assume, too, if you are going to seek any type of interlocutory relief, you might need this transcript, but 97 percent of what I said is in these notes, and I think that could get you off to a start there. Otherwise, I don't want you to delay the discovery, even though you are moving on to the Appellate Division for an interlocutory

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1 relief because there isn't going to be any action from
2 the Appellate Division this summer, other than to
3 grant or deny the motion for relief of interlocutory
4 appeal. That should not stop the discovery. This
5 matter has been going on for quite some time. Several
6 times, both sides advised me that you were close to
7 resolving your differences and that didn't work out.
8 But I think we're right close to getting to a decision
9 on whether something should be done about the original
10 lawsuit. It may be that that won't be tried in this
11 court. The Supreme Court has been surveying, as you
12 all know, people involved in various types of litiga-
13 tion after soliciting the bar to advise it of possible
14 Mount Laurel disputes, as well as the bench. This case
15 was one of those in which, I believe, you were all --
16 at least, the lead counsel were contacted by the Chief
17 Justice's law clerk, as I was, and I assume they are
18 doing this around the State, and there will be a new
19 assignment order coming out of the Supreme Court to
20 start the new term, the July assignment order, and that
21 may, although it may not, designate three judges as
22 Mount Laurel judges. If it does, when we meet in Septem-
23 ber, if we decide there are Mount Laurel issues and that
24 they are preliminary and should be tried first, it
25 will be assigned to whichever judge has Mercer County
in its region. Nobody knows who they are, what the

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regions will be, or anything about that at the present time. Okay.

MR. ROSENSWEIG: In your opinion, you indicated that the property was not unzoned. In the order you made no mention of it. Is it your Honor's ruling that the prior ordinance is still in effect?

THE COURT: Yes.

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

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

MR. ROSENSWEIG: Okay.

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

MR. ROSENSWEIG: I have the ordinance booklet.

MR. PETRINO: 1918-13, but --

MR. ROSENSWEIG: Let me look.

THE COURT: Is there a name for it?

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

THE COURT: Would you call it a zoning ordinance?

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

THE COURT: Does it have a name?

MR. ROSENSWEIG: Agricultural district?

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