VOLUME II

P U B L I C H E A R I N G

before the

ASSEMBLY MUNICIPAL GOVERNMENT COMMITTEE

on

ASSEMBLY, No. 3192

(An Act concerning municipalities in relation to planning and zoning and supplementing chapter 55 of Title 40 of the Revised Statutes and known as the "Municipal Development Rights Act.")

Held:
The Daily Observer Building
Toms River, New Jersey
March 19, 1975

Committee Members Present:

Assemblyman Vincent O. Pellecchia (Chairman)

Assemblyman John Paul Doyle

* * * * *

I N D E X

INDEX (continued)

- - - - -

ALSO:

INDEX (continued)

- - -

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.

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

ARTICLE I

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

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

result in the destruction and permanent loss of natural assets, structural amenities and those special, distinctive, and often irreplaceable features which have contributed both to New Jersey's history and to its recognition as the Garden State; that the 567 local units of municipal government in New Jersey experience not only the greatest, most immediate and direct pressure for new physical development, but also all the most adverse effects of that development; that the State Government has an obligation to provide municipal governments with adequate and appropriate statutory tools whereby these local units, acting within the statutory framework and pursuant to guidelines provided by the State, may respond to the pressures for, and the burdens imposed by, physical development with sound, rational and comprehensive planning techniques; that these techniques must recognize that the right to own land is separate from the right to develop that land and that a development right may become, under the proper circumstances, a valuable negotiable instrument; that such techniques would permit municipalities to set aside portions of publicly and privately owned improved and unimproved land in permanent preservation zones where new physical development would be prohibited, and require such municipalities to establish other zones where the right to develop the land permanently preserved may be transferred in the marketplace through the sale and exercise of certificates of development rights; and that the exercise by municipalities of the authority to permanently preserve land and transfer the right to develop therefrom pursuant to such a State law, within a framework provided by statute and pursuant to guidelines provided by the State, is within the police power of the State and necessary to insure the public health, happiness, safety and general welfare of both present and future generations.

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

4. As used in this act unless the context clearly indicates otherwise:

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

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

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

c. "Aquifer recharge area" means an area where rainfall infiltrates the ground to porous, waterbearing rock formations for retention in underground pools or acquifers;

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

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

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

g. "Certificate of development right" means the document indicating the existence of a development right;

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

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

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

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

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

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

n. "Exercise of development right" means the submission of a development right to the designated municipal official in conjunction with an application for development approval in the transfer zone;

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

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

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

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

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

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

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

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

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

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

y. "Preservation zone" means the district or area in which development is discontinued and has such features as are provided in section 13 of this act;

z. "Recreation or park land" means land whose primary use or purpose is recreational;

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

bb. "Transfer zone" means the district or area to which development rights generated by the preservation zone may be transferred and in which increased development is permitted to occur in connection with the possession of such development rights, and which has such features and characteristics as are provided in section 14 of this act;

cc. "Use" means the specific purpose for which land is zoned designed or occupied;

dd. "Woodland" means substantially undeveloped land consisting primarily of trees and capable of maintaining tree growth;

ee. "Zoning ordinance" means the zoning ordinace of the municipality adopted pursuant to R. S. 40:55–30 et seq.

ARTICLE II

5. The governing body of any municipality may, by resolution, establish a commission whose general purpose shall be to determine, within a time specified in the resolution, the feasibility of the municipality adopting a development rights ordinance, and upon such determination to make a recommendation to the governing body concerning the adoption of the provisions of this act, all as hereinafter provided.

6. In adopting a resolution pursuant to section 5 of this act, the governing body shall also designate the members of the commission and select its chairman; provided, however, that the commission shall have no more than 11 members, three of whom shall also be members of the municipality's board of adjustment, and three of whom shall also be members of the municipality's planning board; provided, further, however, that where the planning board also acts as the zoning commission pursuant to section 8 of P. L. 1953, c. 433 (C. 40:55–1.8) and R. S. 40:55–33, the members of the commission established herein shall also be members of the planning board except that no more than two members shall be of the same class on the planning board. The chief executive officer of the municipality, the municipal planner and the municipal zoning officer, if such positions exist; and the municipal attorney, unless any of the aforesaid are otherwise appointed to the commission as provided hereinabove, shall also be members of the commission, ex officio. Vacancies among the members shall be filled in the same manner as the original appointments were made. The term of the

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

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

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

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

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

c. The identification of national, State and regional factors and trends which will have an influence on development in the municipality;

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

e. An assessment of the development potential of all areas of the municipality on the basis of the projected growth of the municipality, the demand for development imposed by the market and the suitability of the land for such development;

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

9. Upon the completion of the study conducted pursuant to section 8 of this act, the commission shall formulate its recommendation and prepare a report to communicate its findings to the governing body of the municipality. If it is the recommendation of the commission that the municipality would not find it in its

best interest to adopt a development rights ordinance, the commission shall detail in its report such information as was available to it which led to such recommendation. If it is the recommendation of the commission to adopt a development rights ordinance, the commission shall prepare a report which shall include, but not necessarily be limited to:

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

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

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

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

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

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

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

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

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

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

11. Within 60 days of the receipt of the documents specified in section 10 of this act, the governing body shall consider the commission's recommendation and report. If the commission recommends the adoption of a development rights ordinance, the governing body may adopt such ordinance by majority vote. If the commission recommends against the adoption of such an ordinance,

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

ARTICLE III

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

a. The specification that the planning board of the municipality shall have the responsibility for implementing the provisions of any ordinance adopted pursuant to this act; shall hear and review any applications or complaints that may result from the implementation of any such ordinance; and shall make such reports to the governing body as it may require and such recommendations as it shall deem necessary for the successful operation of the ordinance;

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

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

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

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

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. 40:49–2 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.

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.

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

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

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

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

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

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;

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;

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,

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

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

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

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

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

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

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

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

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

Nothing contained herein shall be construed so as to prevent or prohibit a municipality from increasing the number of tracts in the transfer zone at any time upon or after the adoption of a development rights ordinance, using the same criteria as are contained herein, for the purpose of guaranteeing the greater incentive to develop with certificates of development rights as required pursuant to subsection c. hereof.

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

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

17. Certificates of development rights shall be allocated to the various portions of the preservation zone on the basis of the uses permitted in each such portion of said zone as a matter of right under the existing zoning ordinance, if any, at the time of the adoption of the development rights ordinance; or, in the event no zoning ordinance is in effect, on the basis of uses contained in the development potential determined by the study conducted by the commission pursuant to section 8 of this act and as approved or amended by the governing body. Each certificate of development rights so allocated shall contain on its face, a statement to the effect that it

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

18. The total number of certificates of development rights determined pursuant to section 17 of this act shall be distributed to property owners in the various portions of the preservation zone in accordance with a formula whereby the number of certificates distributed to an individual property owner in each of the various portions of the preservation zone shall equal that percentage of the total number of such certificates allocated to the preservation zone that the assessed value of the property of any such owner is of the total assessed value of all property in the preservation zone.

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

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

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

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

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

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

ARTICLE IV

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

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

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

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

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

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.

ASSEMBLYMAN VINCENT O. PELLECCHIA (Chairman): Good morning, ladies and gentlemen. This is the second hearing conducted on Assembly Bill 3192, sponsored by Assemblywoman Rosemary Totaro and co-sponsored by Assemblyman S. Howard Woodson.

At the outset, I would like to thank the Daily Observer for allowing us to use these facilities. It was through the good efforts of our friend John Doyle that that was made possible.

As I did at the first hearing, I request that all those who want to be heard should limit their presentation to a maximum of 15 minutes if at all possible because of the large number of people who want to be heard. However, we reserve the right to examine the witnesses as long as we feel is necessary to get from you all we need to make this good bill a better bill.

At this time, I am going to exercise the right of the Chair and I would like to introduce the Assemblyman from this district, Assemblyman Doyle, who really needs no introduction from me. He is one of the most articulate and capable members of the Assembly. Now I would like to turn this over to him for an opening statement on this hearing.

ASSEMBLYMAN DOYLE: Thank you, Mr. Chairman. Thank you for the kind words and compliment. Let me also thank you for bringing this hearing down to Toms River. I want to thank particularly Joseph Mills and the Daily Observer for loaning us these facilities. We are most appreciative. I am also appreciative that I see other members of the media, both the written and oral media, here who were not deterred by the fact that the hearing is held in one of their competitors' buildings.

The Municipal Government Committee is composed of more Assemblymen than Mr. Pellecchia and myself, as I am

sure you realize. Unfortunately, there are certain difficulties that come upon us when we try to perform a full-time job when other aspects of the job are part time, and that results in the absence of most, if not the rest, of the Committee today, as well as some unfortunate events, such as funerals and what not, that many of the members explained they had to attend. I speak specifically about the funeral of the able Dick De Korte.

In their absence though, please bear with me if I ask any of the witnesses more questions than would seem normal because I see my job not only to try to get at those things in which I am interested, but also to advance the nature of the transcript so that the other Assemblypersons who could not be with us today will have an opportunity to review a complete transcript and to have the feeling that the questions they may have asked had they been here were asked and answered.

In addition, we will have our staff continuously here so that when we go into our workshop meetings on this important piece of legislation, we will be able to share with the Assemblymen, though they were not here, what was said and done and the thoughts that were expressed.

A 3192 is a very modern proposal and I see our job today, not only as members of the New Jersey Legislature to take a look at this bill, but to advance the state of the art in planning and zoning and the idea of the transfer of development rights, which is encompassed by this bill, so that others who may come this way will know a little bit better about what the transfer of development rights means by looking at the transcript that we will have because of the hearing we are holding today.

It would seem from the prior hearing that the proponents of this bill feel that the transfer of development rights would present a new municipal tool, a tool

that municipalities can use if they so choose, because this law is not mandatory, to preserve land while at the same time encouraging building, and doing it all at less cost than condemnation would mean.

I realize that presents a somewhat sunny picture of the proposal. As with every other major proposal in any area, but particularly in the area of land use planning, there are major questions, such as: Will municipalities accept it? Will preservation zones stay preserved? Will those transfer of development rights' certificates actually work? Will the transfer zones that are picked accept the kind of denser building that will be meant for those zones?

Those are some of the basic questions and I am sure we will get into others today.

I am very pleased though that this hearing can be held in Ocean County. Your legislative delegation from this district, representing this county, Senator Russo, Assemblyman Newman and myself, has always thought that to the degree possible, a little bit of Trenton, whenever possible, should be brought to Ocean County. I think this is the third public hearing we have been able to hold in this county on various ideas during our tenure in office.

Ocean County, right now, is beset by a combination of an environmental and an economic crunch. To the degree that this bill would possibly provide some responses to an area beset by a woeful decrease in housing starts, but at the same time trying to encourage its building while maintaining its open space, I am very glad that we can have the hearing here today on a subject that is really on the frontiers of land-use planning and what good land-use planning needs.

The Chairman mentioned the rules before. We do have a lengthy day ahead of us. I hope those of you who are here just to listen will enjoy it and those who are here to be witnesses will be able to help us in our joint project to advance the state of the art. And I look forward to a good day. Thank you very much.

ASSEMBLYMAN PELLECCHIA: Is Walter Johnson here?

W A L T E R K. J O H N S O N: Mr. Chairman, my name is Walter Johnson. I am Executive Director of the Delaware Valley Regional Planning Commission. I personally have a long history in planning and land use, not only in this region but in other parts of the country, and it is with singular interest that I observe what is happening in New Jersey in the way of land use development and development rights, transfer of such.

The appearance I am making here today is in support of this measure.

The preamble of A. 3192 states, "The state government has an obligation to provide municipal governments with adequate and appropriate statutory tools whereby these local units, acting within the statutory framework and pursuant to guidelines provided by the state, may respond to the pressures for, and the burdens imposed by, physical development with sound, rational and comprehensive planning techniques." Heretofore, the principal tools controlling development at the municipal level have been (1) police power, exercised through subdivision regulations, zoning and (2) eminent domain. However, in many cases, these tools have not adequately protected

historic areas or the environment. Open space zoning, for example, in many cases has been ruled unduly restrictive or confiscatory. Conventional zoning in itself has not successfully preserved historic, ecologically sensitive areas from the competitive demands of the marketplace. Indeed, economic forces have been much more determinative of land uses than government regulations in most areas of this Country. Where the two forces come into conflict, the zoning change or zoning variance devices are generally used to resolve the conflict in a way acceptable to market forces. If this Bill becomes law, it could increase the odds that sound, long-term community based planning might some day prevail over pure expediency in more of the day-to-day development decisions being made in New Jersey.

The economic forces which in such a large part determine the development potential of undeveloped land cannot be ignored. While it is not always possible to predict economic impacts prior to development, it is possible to utilize their potential for public purposes and social benefits. This, we hope, can be accomplished through the transfer of development rights procedure. Under the increased economic pressure that is borne by a scarce resource, local municipalities may not otherwise have the means to guide development to effectively preserve open space, whether in the form of passive recreation, agriculture, or sites of ecological importance. Nor do many local municipalities have the capability for historic preservation. The capital costs of

open space or historic site acquisition may be enormous. As an example, the Open Space Capital Program prepared by DVRPC for the Years 1975-1980 for the municipalities in just Burlington, Camden, Gloucester, and Mercer Counties totals nearly $90 million. This figure is for open space alone and does not include historic site preservation. Obviously there are and will be limits as to the capital resources of the public treasuries, especially among competing public programs. And as more land is developed, the public dollar buys a diminishing quantity of open space, and some areas of singular value, as in the case of historic sites, will certainly be irretrievably lost.

The mechanism of development rights transfer can put the economic forces of the market to work in behalf of the community's advantage and the public interest. By recognizing development values and assigning the right of transferability, the community can use the market mechanism to protect open space and provide historic site preservation while channeling development into desirable areas where more intensive development may be permitted. A partnership can be established among property owners, developers, and the community for their mutual benefits, public and private.

The Delaware Valley region's future open space, historic sites, and land ecology are often determined or greatly influenced by decisions made at the local municipal level. Legislation such as A. 3192 could provide local communities

with the requisite regulatory and incentive tools to significantly protect the environment for the local as well as the regional good.

I believe it is most appropriate that the State of New Jersey, the most densely populated State in the Nation, be the first to launch development rights transfer legislation. At minimum it will provide municipalities in the State with an alternative to total reliance on other land use controls. At best it could provide a viable new system of planning and development controls of immeasurable benefit to residents of the Garden State. It is a concept that appears to have great promise and one which needs to be tested in the marketplace. This legislation provides the authority which municipalities will need to demonstrate its viability. The legislation outlines the procedures and standards which local officials will need to observe in implementing their respective plans. I believe that it is a law which merits your support.

Thank you.

ASSEMBLYMAN DOYLE: Mr. Johnson, in our earlier hearings and in my reading concerning TDR, I am concerned about whether giving a landowner a piece of paper which would allow development elsewhere is due and proper compensation. You used the word "marketplace" a number of times. Given the idea that this is a new idea, given that fact, how can we be so sure the market mechanism will work?

MR. JOHNSON: I believe we can't be sure without trying. All this law does is provide an opportunity for municipalities to try it, and I believe it does need that test. Whether they are going to be marketable certificates, we don't know and I believe that that is going to depend very much upon the local circumstances. I can't help but believe that among all the municipalities in the State of New Jersey there won't be a few who won't find this a demonstrably useful instrument.

ASSEMBLYMAN DOYLE: Let's say we have a municipality who thinks that it would be a demonstrably useful instrument and adopts this ordinance, pursuant to this legislation, if it were adopted, and does compensate a landowner in the preservation zone by giving him a certificate, which certificate later proves unmarketable or to some degree is difficult to market, what responsibility, if any, do you think is on the municipality to guarantee the marketability of that certificate? Should they have to buy it back, for instance?

MR. JOHNSON: I think not. I think not because when we speak of marketability, we speak of just that. And if there is not a speculative value in those certificates, if there is not growth in the community to warrant that value in the marketplace, then it seems to me they are not entitled to anything. They haven't lost anything.

ASSEMBLYMAN DOYLE: You mean the landowner hasn't lost anything?

MR. JOHNSON: The landowner hasn't lost anything because the marketplace is not purchasing the certificates; they are not of value on the marketplace.

ASSEMBLYMAN DOYLE: Well, he has lost the right to develop the land he had and, therefore, to put it to any beneficial use. He was not given money by way of eminent domain and condemnation for the land because instead this

concept of TDR was used. So all that he has gotten in this example, if you will, is a valueless, at least temporarily valueless, piece of paper and has lost the beneficial use of his land and the development rights to that land. Mightn't he have a challenge as to whether his land wasn't unfairly taken without due compensation?

MR. JOHNSON: I think we need to look at the alternative. What would the alternative be? Suppose that the municipality instead of going the TDR route had simply zoned his land as a conservation district, in which event he would never receive any compensation. Now, under which circumstance is he better off or worse off? My feeling is that he has a better prospect of recovering under the TDR approach than under the zoning approach.

ASSEMBLYMAN DOYLE: Of course, if a municipality zoned an area a conservation zone and didn't give him any money and the zoning was such that the land couldn't be used, that would be no better. But I don't think that zoning would hold up in the courts.

MR. JOHNSON: Well, I think it depends on circumstances a great deal. If it were a flood plains area or if it were an area of unique ecological importance, such as a unique water resource or possibly even a unique historic site, I believe it would hold up.

ASSEMBLYMAN DOYLE: Are there municipalities within the region for which you operate that would be interested in this concept, do you feel?

MR. JOHNSON: I don't know as a matter of fact because we have worked largely with the counties and don't have that much direct contact with the municipalities.

ASSEMBLYMAN DOYLE: That is an interesting point. You work on a regional basis. This would give municipalities a tool.

MR. JOHNSON: That's right.

ASSEMBLYMAN DOYLE: There has been much discussion lately that planning and zoning should be done on a regional basis because municipalities are perhaps somewhat selfish, isolated and not concerned with regional needs. Don't you think giving municipalities new tools flies in the face of regionalism?

MR. JOHNSON: Of course, we operate within the constraint of our compact legislation. And under the terms of that compact, we are specifically proscribed from carrying out plans or engaging in those activities which involve direct decision-making over development. We are an advisory unit. I am fully aware of the fact there is considerable discussion over the appropriateness of moving more decision-making to the regional level. I don't see that as being essential as long as at the regional level there is such coordination achieved that the local decisions are made in concert and in light of regional needs. We believe that that can be achieved.

ASSEMBLYMAN DOYLE: Even under this bill if it were adopted?

MR. JOHNSON: Yes.

ASSEMBLYMAN DOYLE: Thank you.

MR. JOHNSON: I am certainly not concerned over strengthening municipal decision-making. I think that is where the action ought to begin.

ASSEMBLYMAN PELLECCHIA: Thank you.

Is William Queale here, please? Mr. Queale is Planning Consultant to Chesterfield Township and Past President of the New Jersey Chapter of the American Institute of Planners. I understand he is going to have Denton Layman appear too.

MR. QUEALE: Mr. Layman cannot be present today.

ASSEMBLYMAN PELLECCHIA: You may proceed.

W I L L I A M Q U E A L E, J R.: Mr. Chairman and members of the Committee, my name is William Queale, Jr. I am here today, as you indicated, in two roles, I guess, wearing two hats, representing the New Jersey Chapter of the American Institute of Planners, having served as its immediate Past President, currently on the Executive Committee, and serving as Chairman of the Chapter's Legislative Committee.

We reviewed the bill last week as a Committee and I am authorized to put into the record the statement, copies of which you have received, addressed to the honorable Assemblymen.

The New Jersey Chapter of the American Institute of Planners supports the Municipal Development Rights Act. The concepts incorporated in this legislation add flexibility to the basic land use goals of a municipality and enables development, environmental issues and economic concerns to be equitably balanced. The concept applies to residential and non-residential uses; urban, suburban, and rural areas; mountainous to coastal areas; and is optional to municipal officials.

The A.I.P. Chapter's Legislative Committee has reviewed the draft bill but has had insufficient time to prepare detailed comments on specific provisions of the bill. We would respectfully request the opportunity to meet with your staff to review our comments and offer suggestions with respect to eliminating some definitions in Section 4; correlating definitions with S-3054 which our Chapter is also supporting; clarifying the composition of a regional commission in Section 6 and the role of the tax assessor and environmental commission; clarifying in Section 6 that where the municipal planner and attorney are serving as consultants, not staff, that their ex officio membership on the commission is optional and, where exercised, they serve with compensation; clarifying that the review and appeal implied in Sections 12a and 12b do not have an applicant who has been denied by the planning board take his first appeal to the same board; rewording Section 13e to permit the subdivision and sale of land in a preservation zone without development; in Section 14e, allowing a private developer to install facilities where the municipal capital improvements program or construction contracts do not provide the facilities needed to serve the proposed project; and specifying in Section 20 that the conversion of development rights to another use are permissive and not required.

It is the opinion of the Chapter's Legislative Committee that these questions and modifications are easily accommodated within the framework of the proposed legislation and we offer our services to your staff in the interest of urging passage of this legislation.

ASSEMBLYMAN PELLECCHIA: Mr. Queale, we appreciate your offer and we would appreciate it if you would make arrangements with the Committee Aide, Mr. Helb, to find out when our next working session on this bill will be. We will be glad to have you in to discuss with you some of the problems that you raised.

MR. QUEALE: Thank you.

ASSEMBLYMAN PELLECCHIA: There is one problem that concerns me, coming from an urban area. I come from Paterson which is small in area - it is about eight square miles - and most of the land has been used and reused many times. How would this affect a city like Paterson?

MR. QUEALE: I think, first of all, the key point is that it is optional. If Paterson felt that there would not be a specific application, they would not, of course, have to take advantage of it. The extent to which they may take advantage of it will, of course, also depend then on their specific interests. We at the Legislative Committee meeting discussing the provisions of this bill did discuss the section that indicated economic - I forget the terminology, whether it was viability or economic interest, etc. We did not come up with any specific examples as to how that might be implemented through this legislation, but we felt that there would be an opportunity in the urban areas similar to the air rights that are now being sold and used, the fact that some of the major industries may, in fact, be enticed elsewhere and there may be economic returns through this concept to preserve some of that economic vitality. But we did not get into specific examples based on our own individual experiences in those areas.

ASSEMBLYMAN PELLECCHIA: The reason I asked the question is that we are going through a period where Paterson has been declared one of the Bicentennial historic cities and there are several problems that have come up

because of the fact that some areas of the city have been declared historic sites. I was just wondering whether you had made any study of what kind of an impact this may have.

MR. QUEALE: No, sir.

ASSEMBLYMAN PELLECCHIA: Thank you.

ASSEMBLYMAN DOYLE: Forgetting, if I may for a second, the specific example of Paterson, generally though in an urban area, how would you see this bill being used?

MR. QUEALE: I have no specific response at this time as to how an urban area might do it, recognizing, number one, a time frame in the review of this specific legislation, and also the fact that I would be interested in the urban application of this law in that I personally have just worked with Jersey City on their revised zoning code and I think would have opportunity, knowing that particular ordinance, as to the application of this bill. But I have not sat down and tried to work in specific examples.

ASSEMBLYMAN DOYLE: Am I right in assuming that New Jersey law, particularly zoning law, right now does not recognize the concept of air rights?

MR. QUEALE: There is no specific mention of it; that's correct.

ASSEMBLYMAN DOYLE: Could you see this bill being operative in our urban areas without some sort of statutory recognition of the concept of air rights?

MR. QUEALE: I always feel that if there is statutory recognition, of course, you are on firmer grounds in making land-use recommendations or development recommendations. It is, I think, for that same reason that I am on your schedule of witnesses today representing Chesterfield because we have utilized this transfer of development rights' credit under the existing planned unit development and zoning provisions, the statutory provisions, in an

attempt to test the water, and I might add have had favorable responses in two municipalities where we have tried this TDR concept, calling it not transfer of development rights, but transfer of development credits.

One of the comments that has arisen from the public is that there is no State legislation and wouldn't we be on firmer ground if we did have that statutory provision. My answer had to be, yes, but that I felt under our limited concept of development credits, not development rights, that there was reasonable interpretation under the existing planned unit development and zoning statutes and it was a worthwhile test. And I think the same would have to apply if we are discussing air rights.

ASSEMBLYMAN DOYLE: But whether or not it is recognized in the statute,and admitting it would be better if it were, is it not true that you are going to need air rights to make this idea operative in the cities?

MR. QUEALE: I would expect so only because of the intensity of the development. It is conceivable that where there is a land shortage and intensity of land use, even in some smaller centers, air rights might come into play. But I think your main direction of air rights would be in the very urban quarters, the Trentons, the Patersons, the Passaics and the Jersey Cities.

ASSEMBLYMAN DOYLE: Do I understand you are going to be back later to talk to us about Chesterfield or are you here now too in that capacity?

MR. QUEALE: I was going to try to just breeze right into that if I could.

ASSEMBLYMAN PELLECCHIA: Be my guest.

MR. QUEALE: Chesterfield, as you may be aware, is in Burlington County. It is just east of Bordentown. A portion of the New Jersey Turnpike cuts through and Exit 7 is just outside its boundaries. It is predominantly

a rural area with very limited development. And the request made to us during the preparation of their master plan program or during the period when we were coming to a conclusion was: How can we preserve farmland? It was in the thrust of farmland preservation that we got involved in working up an option to TDR, calling it the transfer of development credits. Our thought process went in the reverse of planned unit development, in essence, saying that if you can take a large tract of land and subdivide it and then end up with individual parcels that would become public land, private homeowners' association land or development lots, why can't you start out with fragmented parcels and allow the acreage to be assembled for a total credit of acreage and just build on one of the pieces that you would have selected?

We, in essence, took the community; and, if you can visualize a square, we divided it into four equal quadrants and said initially development should be directed toward the northwestern quadrant and the remaining three quadrants would remain in farmland preservation. We indicated in the preservation district that a minimum parcel size of 25 acres would be desirable on which there could be a farm residence, and the person owning that land would then get credit for the acreage which he could transfer into that northwestern quadrant.

As I indicated, the concept, itself, was acceptable within the community with two major questions arising on a constant basis, both at public hearings, at the work sessions of the planning board which were open to the public, as well as the regular monthly public meetings of the planning board; and, they were: There is no State legislation; therefore, isn't this somewhat questionable and aren't we running a risk? If we had State legislation, wouldn't this be of assistance? The second question is something that has arisen, I believe, at these public hearings about

the restriction of land development opportunities in the preserved district: Why can't we build anywhere? Without the legislation, in fact, we have now in Chesterfield's instance backed off the preserve requirement and said that we will in the draft zoning ordinance permit development to go anyplace, but still retain the transfer concept that a person can accumulate separate parcels of land acres and put that development anywhere in the township, with the strict provision that he must have water and sewers available. There are soil conditions that make development without water or sewers very problematical in that area.

The real reason for that, which has now as I understand it and read the public comments - they had accepted this - but the reason that the Planning Board and myself accepted that concept was very simply that the drainage patterns are such and the regional sewer proposals are such that it is all directed toward the northwestern quadrant anyway. And perhaps,with some minor exceptions, we expect the bulk of development occurring in Chesterfield will do so in that northwestern quadrant. So we felt we were giving away basically snow in the winter by allowing that type of modification in our proposal.

We have added some provisions to the proposal to offer again some additional flexibility, one being that once land is set aside and dedicated, it could be undedicated if a public improvement or some other service makes itself available to that tract that had not been foreseen at the time of dedication, in exchange for dedication of equal acreage elsewhere in the community that would serve the same purpose as the purposes set forth for the original tract's dedication.

We also established ratios of the types of credits in an effort to assure that all land had marketability or that credits had marketability by permitting 150 percent of the credits to be acquired, and we did this through

establishment of so many units per acre entitled by right. Then we also incorporated in this an industrial provision whereby industrialists who would go out and buy farmland and preserve it for farmland purposes could increase their floor area or their building height or both in order to add an extra dimension to the acquisition of these farmland credits.

ASSEMBLYMAN DOYLE: How many housing units could have been built in Chesterfield before you took on this idea?

MR. QUEALE: There are approximately 22,000 acres, I believe --- There are 14,000 acres in the township. They now have half-acre lots throughout the township. Arithmetically, you might assume 28,000 units, but that would be improper because you would probably lose 25 or 30 percent to undevelopable land and necessity for streets. So if you take 28,000 and take 25 percent off of that, the residual might be the number of units.

What we have then said is that if you allow one unit per acre as the basic density, we have estimated that there would be approximately 12,000 units that would result in a population of close to 40,000 people.

ASSEMBLYMAN DOYLE: So if this plan were implemented, there would be less housing units in Chesterfield than otherwise would have been allowed?

MR. QUEALE: Only strictly on an arithmetic basis because in the northeastern, far eastern and southeastern portions of the township the foreseeable demand for development, I think, is reduced because of the lack of facilities, the lack of sewers, the soil conditions, highway access, etc. In fact, there is a general feeling, and I concur with it, that this transfer concept will actually stimulate development in the community, also being stimulated by the fact that our proposal sets no strict restrictions on the types of dwelling units. We are specifically encouraging a mix

of housing unit types, encouraging that they be available for all income groups, etc. So we are looking for apartments, townhouses, single families, quadplexes, etc.

ASSEMBLYMAN DOYLE: But all basically in the northwest quadrant?

MR. QUEALE: As far as development is concerned, that is where we expect it to go. The ordinance that is just currently being worked on in draft form theoretically allows it to go anywhere in the township.

ASSEMBLYMAN DOYLE: Where would the preservation areas wind up being in the town?

MR. QUEALE: Maybe I didn't make myself clear in my statement. We had originally advocated that the northwest quadrant would be the only area for development and the remaining three-quarters would be a preserve. But, as I say, we ran into some opposition on that, one of the reasons for it being that there was no State legislation to permit this concept. Therefore, the people were saying, we want to allow this exchange to take place anywhere in the township. We concurred because we think development will be directed because of streets and utilities to the northwest quadrant anyway.

ASSEMBLYMAN DOYLE: So that by placing all of the capital improvements, community improvements, in that area, you are going to generate growth pretty much only in that area?

MR. QUEALE: That is what I would expect, yes.

ASSEMBLYMAN DOYLE: To the degree that the other three quarters will by and large remain preserved under your zoning, how can you assure the town and yourselves that it will stay preserved when we are in the midst of all kinds of zoning complexities, litigation and problems?

MR. QUEALE: I have indicated to boards, whether it would be Chesterfield under this concept or Hillsborough,

which is outside of Somerville, where we have also advocated it and we have had public hearings up there --- In those two communities we have specifically discussed the transfer of development credits. But I have also indicated to numerous communities under planned unit development and cluster provisions that there is no long-term assurance; but short term, we know if we don't make the try that it is just going to be gobbled up and developed all in the wrong way. If we can sit down and logically proceed through a thought process of trying to tie this up for a public purpose and put the proper covenants, deed restrictions or outright purchase of land for these purposes, we have done the best we could. If additional ideas and legislation come along later, then perhaps we can take advantage of those.

ASSEMBLYMAN DOYLE: You mentioned S 3054. That is the new Land Use Planning legislation, is it not?

MR. QUEALE: Yes.

ASSEMBLYMAN DOYLE: Do you think that now is perhaps the wrong time for TDR in that we are awaiting any day now a decision on the Mount Laurel and Madison Township cases, we do have S 3054 to consider, and we do have the land-use ramifications of the Botter decision still with us? Are we now trying to put a little more salt in the wound, as it were?

MR. QUEALE: I don't believe so. I think this bill can move independent of these other provisions and pending court cases. It has to do with an administrative procedure that provides another option to municipal officials. There is a provision for a regional commission to be established, if it be the desire of adjoining municipalities. We are not talking about the social implications - at least in my opinion we are not - because there are social implications in the actions that any municipal group might

take in implementing the provisions of this bill, just like there are social implications under the zoning statutes or under the proposed land-use law. I think this bill can move independently.

ASSEMBLYMAN DOYLE: You have worked for a municipality, at least, and I am sure several more. My experience is that municipalities oftentimes are reluctant to accept something new, particularly in the area of land use, unless they are prodded by court decisions. What optimism, if any, do you have, notwithstanding Chesterfield Township, that municipalities, if allowed to, would accept this new concept?

MR. QUEALE: I feel very optimistic about it. I believe there is a natural desire to preserve many ecologically sensitive areas, and I am talking about legitimate desires now, not some artificial desires that have social overtones. I have not found an entire reluctance on the part of planning boards and elected officials municipally to go into new areas too hesitantly. I think they are genuinely interested in these and, if there is a real purpose to be served, they are anxious to explore the opportunities available to them.

ASSEMBLYMAN DOYLE: Thank.

ASSEMBLYMAN PELLECCHIA: Thank you.

Is Phil Coccuza here? I believe I saw him in the back of the room before.

MR. BERKOW: He is here, Mr. Chairman, but in lieu of his addressing you, I would like, on behalf of the New Jersey Builders Association, to have that opportunity.

ASSEMBLYMAN PELLECCHIA: Your name, please?

G O R D O N B E R K O W: For the record, my name is Gordon Berkow of the law firm of Hutt, Berkow and Hollander, and we are general counsel to the New Jersey Builders

Association.

In trying to analyze and evaluate 3192 ---

ASSEMBLYMAN PELLECCHIA: Do you have a prepared statement?

MR. BERKOW: Yes, I do, and I will be happy to have copies of it distributed.

What has been passed out to you is a distillation of the thinking of the Association. A committee met and spent a great deal of time going over the bill within the time limitations it did have, and they have distilled this thinking into about 10 or 11 different categories that I am about to go through with you, if I may.

Ideally - and we emphasize the theoretical nature of that word - TDR would be a method whereby municipalities, faced with the rising costs of open space acquisition, and the legal-fiscal implications of police power and "taking" issues, could allow land market mechanisms to remain fluid and, at the same time, plan for low-cost, open-space preservation and/or protection of environmentally sensitive or historically interesting parcels of land.

Practically --- however --- A-3192, as its accompanying statement indicates, "provides the municipalities of this State with an additional tool or instrument through which they may control growth" --- in effect, still another exclusionary zoning device, which, like the praiseworthy PUD and open space concepts before it, will be abused by virtually every municipality which chooses to implement TDR, as it is proposed in A-3192.

Consequently, the New Jersey Builders Association could not possibly support A-3192, in its present form.

Experience indicates that development in New Jersey is --- contrary to the bill's legislative finding --- anything but "uncontrolled, unplanned,

unregulated," and that, in fact, the controls and regulations, instituted on State and municipal levels, have been not only the primary inflationary factor in the cost of new housing, but the main inhibitory element as well.

* * *

The control and regulation of which we speak above are embodied in New Jersey not only by the restrictive, inconsistent and outdated municipal land use procedures and ordinances, but by the Wetlands Act (1970), regulations pertaining to sewer and septic conditions (1971), the Flood Plain Protection Act (1972), and the Coastal Area Facilities Review Act (1973), all of which prohibit or severely restrict development over approximately 68 percent of the State, and which have rendered sizable parcels of land useless and, hence, virtually without value --- a taking of land without compensation to the affected land owner.is what you have.

Ideally, again, TDR contains the potential to provide compensation, or at least redress to land owners whose property, for one of the above reasons or other cause, has been severely reduced in usefulness or meets reasonable standards defining land which should be preserved, by "paying" such owners with development rights.

Practically --- however --- unless a number of mandatory changes are implemented and the Constitutional questions concerning the act, both of which are detailed further in this document, are answered, A-3192 can only be seen through the negative, "no growth" elements to which it will appeal and by whom it will be exploited to perpetuate the housing shortage and the economic stagnation that now mark New Jersey.

* * *

While the principle of TDR was widely discussed in the 1950's and 1960's, it is generally accepted that the concept, in New Jersey, was first and most prominently embodied in "Transfer of Development Rights: A New Concept in Land Use Management," by B. Budd Chavooshian and Thomas Norman, Esq.

A comparison of that document and related excerpts from A-3192 indicate that A-3192 fails to embrace several vital elements of the plan on which it was obviously based --- and, in so "missing" these points, only opens the way for the abuse which is foreseen on the part of most municipalities which choose to implement by ordinance a TDR plan.
Some prime examples follow:

I see Mr. Chavooshian in the audience. I hope he will forgive me if I do quote at some length from his work. I presume he has testified or is about to testify. But we have taken these extracts from his pamphlet, which I think was probably the introduction that we all first had to the concept of TDR.

PURPOSE OF TRANSFER OF DEVELOPMENT RIGHTS (TDR)

According to Chavooshian: "The main thrust of a transfer of development rights proposal would be to preserve the prime agricultural lands and woodlands of the State."

Yet, Section 13 a. of A-3192 states a host of other purposes:

> "a. All land in the preservation zone contains one or a combination of the following characteristics:
> (1) substantially undeveloped or unimproved farmland, woodland, flood plain, swamp, acquifer recharge area, marsh, land of steep slope, recreational or park land;
> (2) substantially improved or developed in a manner so as to represent a unique and distinctive aesthetic or historic quality in the municipality;
> (3) substantially improved or developed in such a manner so as to represent an integral economic asset in and to the municipality;"

This wide range of lands which may be included within the preservation zone provides sufficient leeway for municipalities to "preserve", or, more accurately, render useless virtually any type of property --- yet, the restrictions which govern the selection of property for the transfer zone (Section 14) are so loose and general, and lack any meaningful definition, thereby allowing the municipality to select transfer zones totally impractical for development and increased density from the key point of view of marketability, and leaving the individual who seeks to use development rights in this zone no recourse but extensive and costly litigation.

In effect --- no real change from the present abuses such as "holding zones," large lot zoning, and restrictive municipal land use practices.

THE INCENTIVE OF MARKETABILITY

On pages 13 and 14 of his report, Chavooshian stated:

> "The actual increase in residential density and above the former zoning maximum (of the transfer zone) is the incentive which should attract a willing buyer of development rights ... Moreover, whatever new density requirements are established in whatever location the overall result must be a new zoning district where it is more desirable to build with development rights primarily because it is more profitable for the builder."

Ideally, then, if TDR is to be effective, the municipality must create the incentive to guarantee marketability in setting up the transfer zone.

However, in the aforementioned Section 14 of A-3192, at no point is there a positive reference to incentive in terms of marketability. This shortcoming will prove to be a key in the establishment of "undesirable" transfer zones, or transfer zones in which no fiscally knowledgeable developer will or can feasibly show interest --- thereby achieving the "no growth" or "growth control" that so many municipalities desire in their exclusionary practices.

EQUALIZING TRANSFER ZONES AND DEVELOPMENT RIGHTS

Chavooshian, on Page 14 of his report, said:

> "The incentive to purchase development rights must be perpetuated until all outstanding rights are utilized in actual development. Since building proposals can be approved without development rights as a prerequisite if the proposals conform to the old zoning it is possible to have a surplus of development rights. If this should occur so that more development rights exist than land upon which they can be utilized, it then becomes the responsibility of the designated governmental body to rezone another district in which development rights can be used, that is, to re-establish 'incentive zoning.'"

While the last sentence of Section 14 of A-3192 makes reference to increases in the number of tracts in the transfer zone, such a decision is left at the option of the municipality, which is to be guided in the decision by the loose and arbitrary standards of the section.

Anything less than an absolute mandatory rezoning and increase in the number of transfer zone tracts, in the event of a disproportionate relationship between the number of development rights and the number of transfer zone tracts, will mean that the owners of preservation zone tracts have been "compensated" with non-negotiable development rights.

MUNICIPAL PURCHASE OF DEVELOPMENT RIGHTS

On Page 6 of his report, Chavooshian states:

> "Transfer of development rights helps a community plan its growth. The net effect is the preservation of environmentally important areas with equitable compensation for the owners. There is no cost to the taxpayers since no acquisition by government is involved."

Yet, on Page 19 of A-3192, Sections 25 and 26 read as follows:

> "25. Nothing in this act shall be construed to prohibit or otherwise prevent a municipality from receiving development rights for municipal property contained within the preservation zone on the same basis as other property owners within said zone, or from otherwise buying and selling development rights of other parcels.
>
> 26. In implementing any development rights ordinance adopted pursuant to this act, and in fulfilling the requirements of this act, any municipality may establish a Development Rights Bank or other such facility in which development rights acquired by the municipality may be retained and traded in the best interests of the municipality."

The purchase of development rights by municipalities, under the restriction of such meaningless criteria as "the best interests of the municipality," not only further entrusts land use decisions with individuals

who have proved themselves incapable of sound management, but also opens the way for a virtual moratorium by a municipality which plays on the misguided "no growth" sentiments of segments of the population, to gather support, political and financial, for using TDR to "bank" land, and thereby, bring to a halt, all growth which is not politically or personally expedient.

In the event that a parcel of municipally-owned land falls within the preservation zone, the municipality should be mandated, under A-3192, to liquidate such development rights within a specified period of time, and further, should be prohibited from purchasing development rights.

POSITIVE STATEMENT CONCERNING HOUSING

The previous statement, from Page 6 of Chavooshian's report, concludes with the statement:

> "And at the same time the housing needs of a growing population can continue to be met."

It is obvious that this goal is not even within the practical effect of A-3192, since no reference is made with regard to housing and, therefore, no positive constructive suggestion for housing is envisioned under A-3192.

* * *

The above conflicts with Chavooshian's report are an indication of the oversights and loopholes which mark A-3192. In addition to these points, however, attention is also directed to:

(1) The constitutional questions inherent in the concept, as it is presented in A-3192; and
(2) The several major changes necessary for the bill to even begin to approach practicality; and
(3) Problems inherent in A-3192 as they relate to existing municipal land use law,

all of which are presented in the following sections.

CONSTITUTIONAL ISSUES

1. Does the fifth amendment to the U.S. Constitution, barring the taking of private property by the government without just compensation, allow municipalities to pay for such property by means other than money? (In this case, by paying them with personal property called development rights).

A possible answer to the question may be found on Page 16 of Chavooshian's report, where he states:

> "Transfer of development rights is intended to redress the landowner for his loss and therefore serve as a form of compensation... However, development rights are not intended as just compensation in the legal sense, for example, as under eminent domain."

2. Are property owners who are required to comply with the existing zoning ordinance, because they cannot afford to purchase development rights or do not wish to purchase development rights, denied the equal protection of the law guaranteed by the 14th amendment to the U.S. Constitution?

A-3192 proposes that development rights may be transferred only to specifically designated areas of the municipality (transfer zones) and, in these areas, the property owners would be prohibited from developing their land at higher density than allowed by the zoning ordinance unless they purchased or acquired development rights permitting such greater density (Article III, Section 14 d.).

This would appear to deny to these owners the right to seek hardship or special reasons variances from the board of adjustment under N.J.S.A. 40:55-39 et. seq. This denial of administrative relief, apparently because such owners can now buy the relief they need, raises a substantial equal protection question under the 14th amendment of the U.S. Constitution. If the purpose of this prohibition is to drive up the price of development rights by barring other avenues to property owners, then the act takes on a commercialism inappropriate to public law.

MANDATORY MAJOR CHANGES

1. The composition of the commission, which determines the feasibility of such a plan and which prepares a report designating transfer and preservation zones and establishing the value and quantity of development rights, should be changed to reflect regional views and professional, objective, knowledgable planning and land use experts.

A commission made up of members of the municipal planning boards and boards of adjustment, the mayor, and the municipal planner, zoning officer, and attorney (as per Section 6 of A-3192) is composed of basically the same parties who perpetuate the land use and planning abuses which the bill seeks or should seek to correct.

If the intent of A-3192 is a valid one, then the more sensible and practical elements of regional planning, to be carried out by qualified professionals, should be exercised in the development of the plan --- and that plan should not be limited to the municipal boundaries, since such boundaries have no bearing on the environmentally-sensitive areas to which A-3192 directs its main thrust.

No one can deny that the municipal land use chaos and abuses, which A-3192 would allegedly attempt to rectify, could be best met by objective, apolitical, and professional planning experts. A denial of this recommended change is a tacit admission of the true purpose of the bill --- a further perpetuation of the "no growth" customs of most of New Jersey's municipalities, and their officials.

2. Transfer zone land owners must be given the flexibility, within A-3192, to permit them to develop a part of the transfer zone at more than the maximum density, without precluding the purchase of development rights and subsequent development of the remaining part of the transfer zone, with the limit of the overall transfer zone maximum density still the "ceiling" on the total development of the transfer zone.

The option must exist for the owner of transfer zone land to use, or not use, development rights at his choice, with the obvious proviso that the maximum density cannot be exceeded

For example, assume a transfer zone of 100 acres with an existing density of 1 unit/acre, or 100 units. Assume also that the maximum density, through the procurement of all development rights, is 6 units/acre, or a total of 600 units.

If the owner of this transfer zone land purchases 2 development rights per acre, and therefore now has 3-units-per-acre development rights, or the rights for 300 units, he should be permitted to place the 300 units on 25 acres (a density of 12 units/acre) --- knowing that the remaining 75 acres can take no more than 300 units, thereby preserving the "ceiling" of 600 units on the 100-acre parcel.

Without such flexibility, which is not specifically enumerated in A-3192, a transfer zone land owner would be forced to use more land than he would necessarily need for sound development. In the above example, under A-3192, he would be forced to use all 100 acres for the 300 units because he only had 3 development rights per acre. This is not only wasteful land use, but precludes either his purchase of the additional 3-units-per-acre development rights or forces him to wait until he can purchase the maximum development rights before proceeding with land development.

3. The municipality must be prohibited from reducing the density of a transfer zone for five years prior to the adoption of the ordinance.

That is to say that the maximum density within that 5-year period would have to obtain.

Although this seems like a rather strict provision, Section 14 e. requires the construction or planning of capital facilities in the transfer zone within five years of the adoption of the plan, and, in order to ensure coordination between such facilities and subsequent development and to prevent the municipality from creating a lower density with the thought that the owner can "make it up" through the purchase of development rights, such a prohibition must be enforced. In addition, it will help guarantee that the capital facilities to be constructed will meet the eventual maximum density and that the construction of lesser capital facilities, to accommodate reduced existing density, will not be used as a justification for establishing an artificially low maximum density in the transfer zone.

4. The municipality must be prohibited from declaring a moratorium during the feasibility study by the commission and during the development of the TDR plan.

It is obvious that the feasibility study and the development plan could be abused just as municipalities now abuse the "rewrite of the master plan" as an almost perennial justification for a moratorium. A-3192 contains no time limit on the allowable length of time for the feasibility report, thereby providing municipalities with an open-end moratorium excuse.

5. It must be a mandatory requirement that municipalities include in the preservation zones, all privately-owned land known, planned or projected to rendered undevelopable under Federal, State or local laws, rules, or regulations.

One of the alleged purposes of A-3192 is to provide a form of redress for property owners whose land has been rendered unusable or severely restricted in use. With this premise, every private land owner, whose property meets this description, should therefore receive an assurance that he will be "compensated" --- whether the compensation is just or a partial recovery of the value of the property.

6. The owner of land in the transfer zone must be permitted to make application for planning board approval, without actually owning the necessary development rights, provided that he holds a contract option for the purchase of such rights.

This provision will allow a developer to utilize the money normally spent for development rights for the other pre-development costs necessary for preparation of an application to a planning board. In this way, money will not be spent for development rights, which may not be used for a year or more if the plans which are reviewed by the planning board are found to be in need of substantial changes --- meanwhile the developer has been forced to purchase development rights and, therefore, actually spend considerable amounts of money for such rights, which cannot be used until planning board approval is received ... and may never be used if planning board approval cannot be obtained. The

contract option provision places the developer in considerably less financial jeopardy, while still guaranteeing the municipality that he cannot proceed with development at the higher density unless he does in fact obtain the necessary development rights.

PROBLEMS RELATIVE TO EXISTING LAND USE LAW

1. A-3192 provides that the ordinance is to be administered by the planning board and that applicants and complaints shall be heard by the planning board (Article III, Sections 12 and 15). The act also states that it is part of the municipal zoning ordinance and, therefore, subject to the provisions of the zoning law, N.J.S.A. 40:55-30 et seq. This would also make it subject to the variance provisions and procedures of N.J.S.A. 40:55-39, administered by the zoning board of adjustment.

There is, therefore, an apparent overlapping of jurisdiction in the planning board and board of adjustment, which would create confusion and difficulties of administration. The specific authority of each board should be spelled out in the act and, if it is intended that the variance procedures of N.J.S.A. 40:55-39 are not to apply to this act, it should so state.

2. Under the provisions of Article III, Sections 17 and 18, development rights are to be distributed in proportion to the "assessed value" of the properties. However, under this procedure, an owner of developed property, who can continue using his property, will receive more compensation (i.e. development rights) than the owner of undeveloped property, whose future use of his property is totally barred. Therefore, owners who suffer less damages will receive more compensation.

3. The act provides that development rights granted by a municipality shall be for specific uses, but that such development rights can be converted to other uses in accordance with a schedule contained in the development rights ordinance (Article III, Section 20).

For example, development rights for five single family houses might be converted to a development right for a gas station or a supermarket or ten multi-family residential units, etc. Such conversion must be approved by the planning board. However, the standard provided for

approving such conversion is "the best interest of the municipality." This standard is vague and gives undue discretion to the planning board and, therefore, its legality is very doubtful.

4. Article IV, Section 21 provides for the taxing of development rights by municipalities in the same manner as real property. However, development rights would constitute personal property and, since other personal property is not subject to such taxation by the municipality, the denial of equal protection of the law, under the Constitution, is apparent.

I might also add in this context at this point that one who could not afford this tax might be pushed into a position where he would have to sell or dispose of the development rights at an unfavorable time, at an unfavorable price and an unfavorable financial climate,simply because of the tax burden that might be placed on these development rights.

ASSEMBLYMAN DOYLE: That is true of land too, isn't it?

MR. BERKOW: Yes, but this is to be compensation, Mr. Doyle, for the land that was taken - for the use of the land that was taken.

It is obvious that while the concept of transfer of development rights contains the potential for rectifying the problem of "compensating" land owners for the "taking" of their property, its embodiment in A 3192 creates the distinct probability that the plan cannot practically be applied in New Jersey without accompanying blatant abuses on the municipal levels.

Unless and until the bill is amended to incorporate the assurances against municipal abuse contained herein, it would be impossible for the New Jersey Builders Association to support a bill that will only further perpetuate the practice of "no growth" that has marked municipal

land use throughout New Jersey.

To this statement, I would like to add two things, one of which was brought out by Assemblyman Doyle in a question he asked a previous witness. This, to me, personally, represents probably the most frightening aspect of all of 3192; and, that is, the total uncertainty that these certificates have any value whatsoever, that these are going to be commercially acceptable, commercially usable, that these are going to have any market whatsoever. Indeed, at the inception, when these certificates were to be issued, being untried, being untested, the very situation that I think your question portended is that people are going to be put in the position where they are going to be told, "Well, you have a piece of paper," and it might as well be confederate currency because it is totally unusable, or at least I, Mr. Banker, or I, Mr. Builder, am not going to take a risk and buy this; or, if I am going to buy it, I am going to buy it up from you so dirt cheap that my investment will be commensurate with the fact that this is of questionable commercial and marketable validity.

The second thing that I call to your attention is this: In distribution of the development rights - and this is the second thing that concerns me greatly - the assessed value of property is what is to be used, the assessed valuation. That might be well and good if instantaneously there was a complete municipalwide revaluation. But in the absence of a mandate to that effect, we all know that unless you constantly have -- in fact, even when you do constantly have re-evaluations, it isn't long in most instances before the re-evaluation has gone stale, almost as soon as it is implemented in some cases and you have the problem of this disparity. in assessed valuation which does exist, to which anyone

who has been to any number of tax appeals will certainly testify. This presents a very serious problem. Unless it is mandated and instantaneous with this determination of assessed valuation, there should be the implementation of a thorough re-evaluation.

Thank you very much, gentlemen.

ASSEMBLYMAN PELLECCHIA: Mr. Berkow, I allowed you to continue. Our time limit was set at 15 minutes. You went well beyond that.

MR. BERKOW: I am sorry, sir.

ASSEMBLYMAN PELLECCHIA: However, I thought you made some very valid points. But what gives me the impression that the New Jersey Builders Association doesn't like this bill?

MR. BERKOW: I tried to convey that, sir.

ASSEMBLYMAN PELLECCHIA: I do feel, however, you made some very valid points and I believe Assemblyman Doyle would like to ask you a few questions.

MR. BERKOW: Surely.

ASSEMBLYMAN DOYLE: Outside of the bill, forgetting if you will for a second the bill, just looking at the concept, do you think the concept of TDR is necessarily inherently bad?

MR. BERKOW: Not necessarily, no. We viewed it, as we had to,within the confines of 3192 for the reasons I stated. No, I can't say that. I would be without a basis to say that. If it had been constructed differently, as I mentioned, perhaps our feelings would be different about it. But I cannot say that I would be against the concept, itself.

ASSEMBLYMAN DOYLE: Let me suggest that if a municipality wanted to preserve an area, currently I would think they have two mechanisms. One is eminent domain, condemnation and purchase. Another one is through zoning,

perhaps perverted zoning, to zone it in such a way that it would not be used for the kind of growth or development they would not want. The first is legal. The second, depending upon the circumstances, is of questionable legality. Under either method, houses that could have otherwise been built would not be built. To that degree, doesn't TDR represent an advancement in the sense that it could encourage building if properly done?

MR. BERKOW: If properly done, yes, sir. That is the main reason why I said I was not against TDR in concept.

ASSEMBLYMAN DOYLE: You mentioned some suggestions as to major changes in your statement. And let me say that while the statement was lengthy, this is the first witness we have had in two hearings now that has come forth with some specific opposition and suggestions for major changes. Hopefully, a hearing will bring out two sides and you have managed to complement the other side. We had Mr. Chavooshian in the audience before. I have a feeling he will look at your statement with some interest.

MR. BERKOW: I imagine so, sir.

ASSEMBLYMAN DOYLE: You question the composition of the Commission and suggest that they should take in regional concerns.

MR. BERKOW: Yes, sir.

ASSEMBLYMAN DOYLE: This is a municipal tool. How would you have them take in regional concerns on a municipal level?

MR. BERKOW: Perhaps one of the problems you, yourself, articulated, Mr. Doyle, when you said maybe this is not the precisely right time because, of course, the complete new land use bill, the Senate bill, has just been introduced, and because we are waiting for certain key land-use decisions to come down. I think that anyone who looks at zoning and thinks it is strictly on a municipal

level and wishes to perpetuate it on a municipal basis has a certain amount of naivete. These are artificial lines as has been clearly illustrated time and time again. The day of regional planning and regional zoning I think is about to be with us. It has to be, even though the municipal land use law does not portend that, as I understand it.

ASSEMBLYMAN DOYLE: No, it doesn't.

MR. BERKOW: But we are on the threshold of this. I think we have to stop viewing these artificial political boundaries as zoning boundaries because they simply are not.

ASSEMBLYMAN DOYLE: I suggested that to a witness at the first hearing and he said that regionalization is so long away and so unlikely to happen perhaps even in our lifetime, we have to do what we have with what we have, and that is why it is the municipality that has to be strengthened. Wouldn't you agree with that?

MR. BERKOW: Not necessarily, no, sir.

ASSEMBLYMAN DOYLE: How do you see regionalization being encouraged o r developed, given all of the political, economic and home rule, to some degree unfortunately, realities that it is ever going to happen?

MR. BERKOW: You are right. There are problems to itscoming about. But I think, if nothing else, it is going to happen by the judicial process ultimately.

ASSEMBLYMAN DOYLE: Your third suggestion as to a major change,that the municipality must be prohibited from reducing the density of a transfer zone for five years prior to the adoption of the ordinance, would make the effective date of this ordinance six or seven years from now. Is that practical?

MR. BERKOW: Well, sir, it is the question of the merchant who marks up the merchandise just before he announces a sale and then says, "price slashed." We have the situation that we have here. If they are going to

start reducing the density and then the development rights are put on the market and the builder is taken right back where he would be under existing zoning, again going back to the proposition you advanced earlier this morning, these development rights just are not going to be worth anything.

ASSEMBLYMAN DOYLE: Couldn't you achieve the same purpose by saying no area would be in a transfer zone in which the zoning density has been reduced over the past five years?

MR. BERKOW: Yes, sir, I think perhaps that articulates it better than our report.

ASSEMBLYMAN DOYLE: You made certain comments about moratoriums, having represented developers and municipalities, I know what you mean. But don't you think that a municipality taking on something as major as TDR would need a breathing time, if it were limited perhaps even within the terms of the legislation to a fixed period of time such as six months with no extensions?

MR. BERKOW: These are always difficult questions. It is certainly an unfavorable type of situation.

ASSEMBLYMAN DOYLE: They are not meant to be easy.

MR. BERKOW: First of all, I think the hypothesis is: a six-month period is sufficient for the Commission to do the type of work that is outlined in 3192. As I see it, that borders on the impossible. I believe, for instance, that there are provisions in the preservation zone that there have to be studies as to market value, etc. That is an unusual instance where the use of the words "market value" is concerned. This really requires a parcel-by-parcel appraisal. This is the sort of thing that isn't going to be done in six months, and that is where the clear and present danger is and that is why I believe in the drafting of this bill certainly it occurred to them that there should have been a date for the Commission to

report back its findings. There certainly should have been a limitation on the life of the Commission's activities. And I think that deliberately for these reasons, they omitted any time period. It is to open the door to just that type of freezing, just that type of moratorium, that this sort of thing presents such a danger.

ASSEMBLYMAN DOYLE: I agree with you that it might take more than six months. You mentioned some things about reassessment and the bill almost presupposes without saying it that you will need a re-evaluation of the entire municipality, and I agree that that should be stated more specifically and does represent a problem.

Your fifth suggested major change was: It must be a mandatory requirement that municipalities include in the preservation zones basically all undevelopable land. How can you give development rights on that land which was by definition undevelopable?

MR. BERKOW: You are talking here about undevelopable because of these rules, regulations, etc. In many cases, there has not been any device. It presents a difficulty, yes. But the land has to be given some utility. I agree with you, to put land in a classification where it can't be used at all, is not to zone it, not to use it, is to preclude any value whatsoever to the owner of that land. Something has to be done about this situation. Our incorporating that in our suggestions is because this is a very serious problem, one that exists today. Certainly, if we are going to have this type of legislation, it should be a wrong that requires redress. It is only in a situation like this that practical redress can be given to property owners.

ASSEMBLYMAN DOYLE: You suggested that the municipality should be prevented from buying these TDR certificates. You also mentioned or shared with me my questioning as to

whether these TDR certificates would ever be marketable. But you didn't mention the other question I asked, which was: Isn't there an affirmative duty for the municipality to maintain the market for these TDR certificates and to the degree that they have that affirmative duty, shouldn't they be allowed to purchase them?

MR. BERKOW: No, because this is an artificial market that is created, a market that the municipality, the very party that is your buyer, your vendee, can virtually put you at their mercy if you happen to be the seller of these rights, the owner of these rights. They come into the marketplace with distinct advantages which no private party would have in buying. The distinct advantages turn out to be disadvantages to the property owner and, as a matter of fact, put him in a position where his development rights can't be marketed freely. I think the question has to be a larger one. Whatever advantage there could be to that is far outweighed by the disadvantages and the abuses which would be inherent in a plan if the municipality could deal in these. Of course, a concomitant part of that is that municipalities would be in a position, under the bill, to have a certificate bank, if you will, like a land bank, only with regard to these development rights certificates. This creates an artificial market.

I think this whole concept here can't go on the presumption that the municipality is going to make a purchase or that the purchase will be in order to stimulate the market and to help the property owners realize their dollars and cents value. I think these certificates either have to float or sink on their own in the commercial world of negotiable paper. I think it goes back to that. And to go on the pretext that by government there is going to be purchase of these things and the purchase is going to result in a fair price to the owner of the

development rights, I don't think that that can be expected. It has not been my experience with municipalities in other matters and I don't think it would be in this.

ASSEMBLYMAN DOYLE: You are familiar with the concept of cluster zoning?

MR. BERKOW: Yes, sir.

ASSEMBLYMAN DOYLE: Would you be generally in favor of that concept?

MR. BERKOW: Yes, sir.

ASSEMBLYMAN DOYLE: Could not TDR be viewed as nothing more than cluster zoning, except that you are separating the green areas from the built-upon areas?

MR. BERKOW: Well, yes, in a sense. But then you have the other things that go with it, the TDRs, etc. that we have been speaking about.

ASSEMBLYMAN DOYLE: To the degree that cluster zoning has been an encouragement to building, couldn't TDR work the same way?

MR. BERKOW: We don't say TDR can't work. It is only within the framework of these specific things that we tried to call your attention to this morning that we think that this bill represents ill-advised proposed legislation.

ASSEMBLYMAN DOYLE: You mentioned that nowhere in Section 14 was there enough language encouraging density. Drawing your attention to page 10 of the bill, 19 (c), "The result of the increase in the density shall be a zone wherein there is a greater incentive to develop at the higher density with certificates of development rights, than at a lower density without such certificates." Is that not satisfactory incentive language or would you suggest something more?

MR. BERKOW: I think it would have to be considerably different, sir. I think this is a broad, loose general statement, as I said before. The fact is that the bill

is really replete with words like "incentive," "reasonableness," etc., very arbitrary standards. What is an incentive to you may not be to me. This is the problem. It is a terrible subjective thing, "incentive." Words like that I don't think belong in legislation of this type.

ASSEMBLYMAN DOYLE: So are words like "equal protection" and "interstate commerce." But they have been given meaning over the years.

MR. BERKOW: Yes, sir, and they have been given meaning by such a long string of judicial interpretations that they probably go from the State Capitol to here if they were laid end to end.

ASSEMBLYMAN DOYLE: But this has to be viewed in the same way as a charter and not a specific delineation for all of our municipalities. It is enabling legislation and I think,by definition, it has to be broad in its concept, doesn't it?

MR. BERKOW: Well, sir, all I can say is that, if you take a look under any of the zoning or planning statutes, as you are well aware, any of the key ones, you see one heck of a host of little squibs. The answer is that this type of legislation necessarily begets litigation because it is in too general terms, it is in too vague terms, and not specific. I think that the main purpose of the whole new proposed Land Use Law was to get away from all of the problems of language of the type that we have in A 3192.

ASSEMBLYMAN DOYLE: What kind of more specific language would you suggest other than a phrase, such as, "greater incentive to develop at the higher density"?

MR. BERKOW: Let me say this to you ---

ASSEMBLYMAN DOYLE: Excuse me. Let me just append to the question --- without trying to write in numbers, percentages and the like.

MR. BERKOW: Sir, when you take away percentages and you take away numbers, that is where the problem comes. I realize this is enabling legislation that is proposed. What has to be done here, and I hesitate to say that we have studied what specific language should be used for this Subsection (c) of Section 14 -- but what has to be done away with is something like "greater incentive." Some standard has to be put in its place. I don't want to say other standard because I don't believe the word "incentive" is a standard. But something must be put in its place, something definitive. This type of language can only bring forward the ills of additional litigation. Don't get me wrong. I am an attorney; I like litigation.

ASSEMBLYMAN DOYLE: Me too.

MR. BERKOW: I feed a couple of kids that way. But I don't think that it belongs in legislation of this type so that we are going to wind up, if this becomes law, with the same little host of squibs following each section of this statute.

ASSEMBLYMAN DOYLE: Sometimes the statute has proven its worth by the fact people think it important enough to use it to go to the courts with.

I appreciate your testimony. I would hope at one of our work-shop sessions when we have Mr. Chavooshian, you will be there to complement his viewpoint.

MR. BERKOW: Thank you kindly.

ASSEMBLYMAN PELLECCHIA: Is David Moore here?

MR. GALANTOWICZ: I am speaking for him.

ASSEMBLYMAN PELLECCHIA: Will you please state your name, sir?

R I C H A R D E. G A L A N T O W I C Z:

My name is Richard E. Galantowicz, I am Special Project Director of the New Jersey Conservation Foundation, a non-profit membership foundation with offices in Morristown, N. J. The Foundation operates in three major areas, acquiring open space for public purposes, environmental education, and assisting municipal environmental commissions and other conservation groups in a service capacity.

We are pleased to have been invited here to make this statement. The Foundation has been and continues to be vitally concerned with land-use problems.

The facts cited in the introduction to bill A-3192 concerning the State of New Jersey's dubious distinction of being the most crowded, most urbanized of the United States, require that new approaches to proper land use planning and the implementation of those plans through zoning be devised. The proposal before us today is truly inventive in that it does provide for a new and better approach to planning and zoning while avoiding the legal problems of the "taking issue" and the political problems of "home rule". Congratulations should be extended to Dudd Chavooshian and his colleagues at Rutgers for bringing the Transfer of Development Rights (TDR) concept to New Jersey and studying it in detail, and to Assembly Speaker Woodson and Assemblywoman Totaro for introducing this innovative legislative proposal.

The New Jersey Conservation Foundation is in favor of any new concept of land use planning and zoning that is based on environmental factors in combination with social and economic data, and therefore generally supports A-3192. However, we do have specific comments on the Bill and feel that certain areas should be strengthened and clarified while certain provisions should be added.

Our comments on the proposed Bill will be in two sections. The first, comments on the Bill as written; the second, on provisions we would like to be considered for addition to the Bill.

1. Specific Comments on A-3192 as drafted.

Pg. 7, Sec. 6 - Although this entire piece of legislation has to do with land use and environmental matters, the composition of the study commission overlooks entirely the existence of the State's 200 plus environmental commissions. It is recommended that at least <u>two members</u> of the municipal study commission <u>shall be</u> members of the environmental commission in those municipalities where they exist.

Also, a word of caution - the requirement of planning board members on the study commission may be in conflict with other state laws which preclude planning board members from being on other commissions. This conflict has to be resolved as well in reference to the environmental commission legislation requiring one member of that commission to be a planning board member.

Pg. 8, Sec. 8a - In this and following sections of the draft, reference is made to the delineation of the preservation zone and the transfer zone with little direction given as to the bases for that delineation. It is therefore recommended that wording be included here and in other appropriate sections (8e, 9a, 13a, 14a) that the determination of the preservation zone and transfer zone shall be based on a natural resource inventory (NRI) with a definition of the basic data to be included in such an inventory and a discussion of the standards to be used in applying the inventory data. This approach is being used by the DEP in its planning for the coastal zone and some 50-60 municipalities in the State are in various stages of completing NRI's as their first steps toward environmental zoning. It is the only reasonable first step in a land planning program and should be a requirement in this legislation.

I could add that in your comments to the last witness, the use of the word "undevelopable" is, perhaps, not correct because with our technology, almost anything can be developed, but the use of a natural resource inventory would at least tell you what lands are most suitable for development and which are least suitable.

Pg. 8, Sec. 8d - To avoid the problems that could be created by the use of different growth figures by different municipalities, it should be required that population growth figures prepared by the DCA, Div. of State and Regional Planning (or some other appropriate state or county agency) be used in section 8d.

Pg. 9, Sec. 9a & e - Again the description of a preservation and transfer zone should be based on an NRI plus economic and social data.

Pg. 12, Sec. 12 a & b - Here again, for those municipalities that have them, environmental commissions should at least be given a role as advisors to the planning board in implementing the provisions of the ordinance.

Pg. 13, Sec. 13a - What does "economic asset" mean as used in this section. If it cannot be clearly defined it ought to be deleted to eliminate confusion or, perhaps, misuse.

Pg. 13, Sec. 13b & c - Requiring the preservation zone to be consistent with an existing master plan or zoning ordinance should not

be required unless it can be shown that the existing plan was based on environmental factors. Most master plans completed in the past paid little or no attention to environmental factors nor did the zoning ordinances based on those plans. As a matter of fact, that is probably the cause of much of the litigation in the court cases we have today.

Pg. 14, Sec. 14b - To make the best use of the development rights in the transfer zones, the density permitted above that as a matter of right should be expressed as a range with a maximum. For example, where the density as a matter of right allows 1 D.U./ acre the optional zoning using development rights should be stated as "up to 4 D.U./acre", instead of just "4 D.U./acre". This allows more flexibility to the buyer and seller of development rights and to the developer in his site plan which may eliminate the need to create new transfer zones later.

Pg. 18, Sec. 22 - As written, Farmland Assessment would only apply to those areas of the preserve zone that qualify under the Farmland Assessment Act (FLA) of 1964. How would land not qualified under FLA, but still in the preservation zone be taxed? We recommend that all land within the preservation zone be taxed at FLA or similar low (raw land) values. Land in New Jersey is now equally taxed based on assessment for "highest and best use", usually considered to be development. If lands in the preservation zone have development rights separated from land ownership, and the development rights have been sold, then logically assessment should be reduced. At present no law (except FLA) requires or allows this.

Pg. 18, Sec. 24 - Incentives should be offered for regional application of the development rights process. Incentives could include grants from the State to do the study as required in Sec. 8 and 9.

Pg. 19, Sec. 25 & 26 - Limits should be placed on the percentage of development rights a municipality can own and/or the length of time they may hold them. As written it is possible for a municipality to designate half the town a preservation zone, the other half transfer zone and then buy up all development rights and not use them. This could allow the municipal development rights process to be used for discriminatory or exclusionary purposes.

Sec. 11 - Provisions that should be considered for inclusion in this legislation.

A. As already stated above, every incentive, including more persuasive language in the bill, should be used to have the municipal development right process used on a regional or inter-municipal basis. A regional approach makes much more sense from a natural resource and development point-of-view.

B. The possibilities of combining the municipal development rights process and the purchase of agricultural easements as proposed by the Blueprint Commission by allowing the State (with the approval of the municipalities) to purchase some of the development rights and retire them. This could be done to maintain the density of population at a low level or, by purchasing just the land at raw land value, it would allow greater preservation potential from Green Acres or similar programs. Funds for such purchases could be derived from the tax on real estate transactions (see C below) or from Green Acres funds for non-farm lands. In this way a truly rural community could permanently preserve its essential land resources without increasing its total population or population density. Such a measure would also tend to spread the cost of some parcels over the entire State, rather than having them borne by the buyers of the homes built in the transfer area.

C. Funds to be used in the purchase of any development rights by the State, if such a condition were included, could be raised by a tax on real estate transfers, not as originally proposed by the Blueprint Commission, but a value added tax patterned after the Vermont Capital Gains Tax or that proposed by our organization in 1972 (Copy of that proposal may be found at 3-X) This approach would tax high profits made by the rapid turnover of land at a higher rate than profits made from a sale of land held for many years. This would reduce the tax burden for the landowner who sells his property only once or twice in a lifetime and recapture some of the profit normally made by speculators for use in preserving other areas of land.

Thank you very much.

ASSEMBLYMAN DOYLE: You indicated that the State should, perhaps, have a fund to buy up the development rights.

MR. GALANTOWICZ: Some of the development rights.

ASSEMBLYMAN DOYLE: If we are going to give development rights certificates for the land's development uses, and then we are going to end up buying the rights, having already, in effect, gotten the land, why don't we just go ahead and condemn?

MR. GALANTOWICZ: Well, it could work either way. If the State wanted to use an area for active recreation, like a State Park, they might just want to buy the land and let the owner keep the development rights and use them somewhere else. On the other hand, if the State just wanted to preserve agricultural land, as proposed by the Blueprint Commission, they could just buy the development rights and thereby not allow public access but still preserve that land. It is just another potential; it is not suggested that the State buy all the rights.

ASSEMBLYMAN DOYLE: You suggest that this could be done to maintain the density of population at a low level. Wouldn't you agree that in order to maintain open space somewhere, we are also going to have to allow building somewhere?

MR. GALANTOWICZ: Absolutely.

ASSEMBLYMAN DOYLE: I can realize why this would be an attractive proposal to conservation and open space groups, but I have not heard from those groups, either at this hearing or the last hearing, a total concern for the entire problem; that is, also encouraging some building.

MR. GALANTOWICZ: I think that is a mistaken impression, if that impression has been created. I think that we are, perhaps, at fault for that. Our organization is not at all against growth, and we certainly would like to see growth and development happen where it should. That is why, I think, the suggestion was made that the delineation of the preservation zone and transfer zone be based on a natural resources inventory. That will tell you which lands are least suitable for development and which lands are most suitable. We would like to see the development happen because we all need houses to live in, including conservationists. But, we

would like to see those houses in the best places. I think that this process could help that by transferring the rights from the least suitable places to the most suitable places. As I said before, I do not believe that the term "undevelopable land" holds. We can build houses anywhere, and we have - on marshland, in the middle of lakes, on the bottom of lakes, on the moon.

ASSEMBLYMAN DOYLE: It just costs more.

MR. GALANTOWICZ: Right. So, technically speaking, there is nothing undevelopable. It may cost a lot more, but it still can be built.

ASSEMBLYMAN DOYLE: If it costs a lot more, then it is practically undevelopable.

MR. GALANTOWICZ: Right, but I think that, at least, we should talk about most suitable and least suitable if we want to be more accurate about it.

ASSEMBLYMAN PELLECCHIA: Thank you very much.

I, of necessity, have to relinquish the chair to Assemblyman Doyle, who will act as chairman and continue with the hearing.

The next speaker will be S. Cable Spence.

S. C A B L E S P E N C E: Mr. Chairman, ladies and gentlemen: My name is Cable Spence. I am secretary to the New Jersey Farm Bureau, a non-profit, voluntary general farm organization, the largest in the State including farmers of every commodity grown in New Jersey and representing 20 counties.

There are many ironies and paradoxes in this world in which we live, not the least of which is the manner in which we, as individuals and members of the body politic, treat agriculture.

Only recently has the world become aware of the fact that food can no longer be taken for granted.

Only farmers grow food, and to do that, there are certain basic needs that must be met. Heading any such list of requirements is land, fertile soil, that with care and conditioning, will continue to supply the food and fiber for the peoples of this State, the nation, and the world.

We as a nation are telling our global neighbors that they must put more of their land into agriculture. Nations are trying to turn burning desert sands into fertile fields. Others are turning jungles into acres of corn and wheat. Yet others are converting wastelands into grazing areas for livestock.

Back at the ranch, here in New Jersey, and in many other sections of our nation, we are converting our prime agricultural land into shopping centers, houses, and factory sites. It doesn't make much sense. But, there is hope for a solution to this problem, at least here in New Jersey.

There is a need for industrial and residential development, but not at the expense of prime agricultural land, and I emphasize the word "prime." Recognizing this fact, in 1971, former Governor William T. Cahill appointed a Commission on the Future of New Jersey Agriculture. For nearly two years this commission, made up of academicians, legislators, attorneys, businessmen, clergy, and farmers, labored to come up with a recommendation which would solve agricultural use problems in New Jersey. Of prime interest, of course, was land use.

The commission's report was issued in 1973. Since then, the process of educating both public and farmers has been underway. Due to the revolutionary concepts regarding land use and the many other proposals, this has been a slow process.

Since the Blueprint's first introduction, the New Jersey Farm Bureau has supported its vision

and purpose to create a permanency in the agricultural industry. The word "permanency" is important there. This does not exist now, nor will it come about under any other program currently being considered.

After examining A-3192, the position of the State's larges farm organization, New Jersey Farm Bureau, remains unchanged. The Blueprint Commission Report is the program that best suits the needs of agriculture and environment and would improve the economic posture of agriculture to an even greater role than it presently has.

At the direction of our membership, we are ready now to request the movement of enabling legislation which would put the referendum on the ballot in November. The Farm Bureau, along with the other farm and environment groups, is preparing to campaign for its passage.

We would hope that, in light of these developments, A-3192 would not be necessary and would further ask for the support of all legislators when the bill reaches each respective House.

Thank you for the privilege of allowing me to speak on this important subject.

I know there are a lot of questions, so I kept my presentation brief.

ASSEMBLYMAN DOYLE: I don't have a lot, but I do have a few.

In your brief statement, you treated the Blueprint as something that we all know about. For my edification and, perhaps, the audience's, basically, isn't this a plan to preserve something like a million acres in this State by purchasing development rights which would be financed through an increase in the real estate transfer tax? Isn't that the bottom line?

MR. SPENCE: Yes, but just so you have all the history on this, the American Farm Bureau, as far back

as 1968 and 1969 - that is the parent organization for Farm Bureau; it's the largest farm organization in the world - was very much aware of the fact that the federal government was getting interested in land use. When we discussed this during the commission hearings, at which we accepted testimony, we realized that we would have to come up with a program, as described in my statement, that had permanency. That is why we felt that the State had to be involved in it.

Secondly, we felt that the federal government would, at some point in time, get involved and that we had better have a program that would be compatible with the federal government, in some fashion. Most of the members of the comittee - and, in fact, most farmers across the nation - would prefer local control wherever possible.

So, we created a program whereby, if the federal government moves in--- There are two bills now. One is sponsored by Congressman Udall, and the other is sponsored by Senator Jackson. The Farm Bureau's position on these is this: As long as they would be grants-in-aid to States, the States would still maintain control. If these programs go through, as we hope they will, then the money that would come from the federal government to the State could be used to buy the easement rights, instead of the transfer tax. But, until such time as the federal government makes its decision, we will have to have some method of funding it.

ASSEMBLYMAN DOYLE: Would the land picked for preservation under the Blueprint Commission be mostly or totally farmland.

MR. SPENCE: It would be mostly prime agricultural land. That is why I emphasized that before. These would be your prime growing areas.

There are, I think, eight classes of land. We are talking about the first three, four, or possibly, five. In other words, these are the ones with the most fertile soil and would be able to grow the most food.

ASSEMBLYMAN DOYLE: Would this concept be statewide in nature rather than local?

MR. SPENCE: It would be cooperative between the state and municipal governments.

ASSEMBLYMAN DOYLE: If you w a n t e d to preserve an area that was almost all farmland, that town's zoning would be pretty well pre-empted from any further building.

MR. SPENCE: Well, we suggest that up to 70 per cent of the agricultural land be put into agriculture.

ASSEMBLYMAN DOYLE: Seventy per cent of the State?

MR. SPENCE: No. Seventy per cent of each municipality. There are some municipalities that don't have any agriculture at all, so there is no problem there.

ASSEMBLYMAN DOYLE: I realize that you don't have an adjunct in Hudson County.

MR. SPENCE: I am not sure, for example, whether Bergen County could put 70 per cent of its land in agriculture, considering the development that has occurred there in the last 30 years.

ASSEMBLYMAN DOYLE: So, under the Blueprint, no more than 70 per cent of the municipality's land that is currently used for farmland could be bought up to be preserved for farmland?

MR. SPENCE: We suggest no more than that.

ASSEMBLYMAN DOYLE: The idea of TDR, hopefully, would be, if fully implemented, equally acceptable to

Newark as to the most farm-oriented community in Sussex or Gloucester Counties. That being so, why can't they coexist.

MR. SPENCE: I cannot say that they can't coexist. I think that is too far down the road to speculate about. We are saying that we want a program that is permanent in nature. One of the biggest concerns now among most legislators is the speculators who have been buying up farmland and sitting on it. Of course, we don't see that as as great a concern as, perhaps, you do. Much of this land is being farmed, even though it may be owned by someone else. It is still producing food and fiber. However, there is every reason to believe that a large speculating organization could buy up the majority of the easements within a community. In a sense, they would end up owning the development rights, so you would have a kind of speculation there. Should the municipality, then, or someone else want to do some development, they would have to deal with them.

ASSEMBLYMAN DOYLE: You are concerned about permanency. You don't see TDR, if implemented, as being a permanent devise?

MR. SPENCE: No.

ASSEMBLYMAN DOYLE: In the sense that the preservation zones might not always be preserved?

MR. SPENCE: Not only that. As we see it, it is basically a municipally-controlled element. In order to be permanent, whether we like it or not, it has to have the State involved. That is why we are seeking the amendment to the Constitution - to permit this to happen - just as we did with the Farmland Assessment Act.

ASSEMBLYMAN DOYLE: Is there a name for the preservation zone under the Blueprint?

MR. SPENCE: You can use that term. Terms are not important; I know what you're talking about.

ASSEMBLYMAN DOYLE: After having adopted the Blueprint Commission's Report and the necessary referendum, what is to prevent the State from deciding, 20 years from now, that, even though we've allowed 70 per cent for farmland and 30 per cent for development, we have an imbalance, we need more housing, we need to increase our density, and we need to change that 70 per cent to 50 per cent? Why is that necessarily any more permanent than TDR?

MR. SPENCE: This would be an amendment to the Constitution as the Farmland Assessment Act is. The program would be spelled out under that and could not be changed without an amendment to the Constitution. History has shown that it is a lot more difficult to change the Constitution than it is to change a law such as this.

ASSEMBLYMAN DOYLE: A couple of presidential candidates, as you mentioned, are getting interested in land use. Could you see the day that what the State thinks about control of land use will be meaningless in any event?

MR. SPENCE: Not if we move now. What is happening is that there is a vacuum. As you well know, wherever there is a vacuum, somebody is going to move in. I think the classic example is the situation with the OSHA law. The federal government gave us sufficient time. Action was not taken; at least it hasn't been taken yet. If they don't, the government is going to move in. If the State, before March 31, does take action, then the federal government will cooperate. All I am saying is this: Under our program, if we don't move somewhere soon, the federal government is going to move. They are already taking

steps. Assemblyman Udall's bill, incidentally, is the same one that the Congress rejected last year by a very small margin. With the nature of this Congress, it could very well go through.

ASSEMBLYMAN DOYLE: Let me go back to the compatibility, hopefully, of TDR and the Blueprint. This is permissive legislation. What would the municipality that wants to preserve non-farmland, but still open space, have available to it if this was not adopted?

MR. SPENCE: Which one wasn't adopted?

ASSEMBLYMAN DOYLE: If TDR was not adopted, and they didn't fall into the farm-oriented area under the Blueprint Commission Report, what would they go to other than to the existing tool of condemnation?

MR. SPENCE: I think this falls in the area of drafting the legislation. Once this program has been accepted by the public - and hopefully it will be - and becomes an amendment to the Constitution, we will go through the same procedure we did with the Farmland Assessment Act. The legislation will be drawn up to implement it. I see no reason why the legislation could not cover some of the problems that you have mentioned here.

ASSEMBLYMAN DOYLE: The Blueprint Commission Report would preserve farmland and, thus, open land?

MR. SPENCE: Yes.

ASSEMBLYMAN DOYLE: But, that doesn't mean they would be recreational areas or used for anything except for the profit of the farmer, correct?

MR. SPENCE: No. We are saying that in order for people to live, they have to have shelter, they have to have food, and they have to have water. Our plan provides at least the food and the water. The

shelter is going to have to be determined when the legislation is drawn up. Those municipalities that don't have large farm areas would have to use the same program, but it would permit them to do other things with it. I think this can be done in the legislation. What we are seeking here is a permanency for agriculture. If we are going to have this industry in the State - and it does contribute nearly 26 per cent of the State's economy - and if it and all the related jobs are going to survive, then we have to have some kind of system that has some permanency to it. We feel that this program does it.

ASSEMBLYMAN DOYLE: How much would it cost to implement the Blueprint Commission's report under the last estimate that you know of?

MR. SPENCE: To implement it?

ASSEMBLYMAN DOYLE: To purchase the development rights to the million acres.

MR. SPENCE: I would not even want to venture a guess at this point.

ASSEMBLYMAN DOYLE: Wouldn't the sum be likely to be so large that a bond issue would have to go to the people as well as a constitutional amendment?

MR. SPENCE: That is part of the Blueprint program. It allows initially for the commission to be able to float bonds to get the money.

ASSEMBLYMAN DOYLE: You're talking in terms of how much?

MR. SPENCE: I guess that would have to be determined at the time that this goes through. There is no way to tell today what your costs are going to be two or three years from now, or even a year from now. I wouldn't want to venture a guess. I would be just shooting in the dark.

ASSEMBLYMAN DOYLE: One of the arguments of TDR proponents is that it would allow a municipality to preserve open land without having to commit funds. This is particularly appealing at a time when money is tight, taxes are high, and public employees are getting laid off. Doesn't that represent something more attuned to tough times than does a concept that would require a large bond issue to be passed, especially when five out of the six were defeated last time?

MR. SPENCE: That is one of the reasons we did not put it on last time.

ASSEMBLYMAN DOYLE: Good judgment.

MR. SPENCE: People have asked us why we held off. Now you know why. I think we have to make some decisions, to answer your question. New Jersey happens to be one of the rare States that can be considered a bellwether State. We are ten years ahead of everybody else in environmental problems, in urban problems, in highway problems, in water, etc.

ASSEMBLYMAN DOYLE: Ahead?

MR. SPENCE: Ahead. Most States haven't come anywhere near us yet. We are solving problems today that they haven't even gotten to yet.

ASSEMBLYMAN DOYLE: I'm glad we are solving some problems.

MR. SPENCE: At least we are tackling problems. I am not saying that we have solved them completely. We really have no one else to follow. We have to be creative on our own and hope we have done the right thing. The Farmland Assessment Act, when it passed, was a first for the nation. Now, we have at least 30 States that have copied it in some form or another. So, we are kind of experimenting with the future. We are trying to figure out a way that will preserve what we have. I am talking now about

agriculture. But, also in this program, we are preserving environmental lands, we are preserving our water, we are preserving our woodlands, and we are preserving our open space. I think what we are talking about here is priorities. Are we going to be able to supply the food to the people of this corridor? New Jersey is one of the main suppliers of fruits and vegetables to this northeast corridor. Are we going to be able to continue to do that? Are the people who live in this megalopolis still going to be able to get in their cars and, within an hour, get the fruits and vegetables that they want, fresh and at reduced prices at the market? Are we going to be able to do that?

ASSEMBLYMAN DOYLE: What percentage of the food that we Jerseyans eat is produced in New Jersey?

MR. SPENCE: I would say about 30 per cent. I could be wrong on that. I am considering processing too.

ASSEMBLYMAN DOYLE: What percentage of the farms in this State are owner-operated as opposed to being operated by someone other than the landowner?

MR. SPENCE: About 72 or 73 per cent.

ASSEMBLYMAN DOYLE: That percentage is owner-operated?

MR. SPENCE: Yes. Let's clarify that so there is no confusion. A lot of them are incorporated, and that is where the confusion comes in. The families have incorporated. This goes back to the old tax problems. Most farmers cannot pass their farms along to their sons and daughters because of the tremendous tax problems that are involved with both the federal and state inheritance taxes. So, in order to try and get around that, they have incorporated. When we talk about corporate farms, I think that should be clarified.

There are many, many corporate farms, but they might involve just the families.

ASSEMBLYMAN DOYLE: Thank you very much for your testimony.

MR. SPENCE: It's been my pleasure.

ASSEMBLYMAN DOYLE: The next speaker will be R. Lee Hobough.

R. L E E H O B A U G H:

My name is Lee Hobaugh. I have been a consulting professional planner for more than 15 years. I am currently President of Herbert H. Smith Associates.

I am here to register my support for A-3192 "The Municipal Development Rights Act," in principle. I believe some minor modifications to the bill as initially worded may be helpful. I will provide those thoughts in written form only.

My support for this concept is founded upon my belief that it would establish a much needed mechanism to assist in implementing sound land use planning throughout our state. The mechanism would provide a means, without expenditure of tax dollars for acquisition of land:

to provide a variety of development densities while maintaining equity of financial return to landowners.

to preserve areas of prime agricultural lands.

to preserve areas of significant environmental, social and/or economic values.

This would not be accomplished by either of the laborious processes of negotiating a price between government and landowner or condemnation. Rather, it would be accomplished by creating a potential for the free market exchange of a valuable commodity.

Those whose circumstances or philosophy make deferral of sale desirable can defer. But at any point in time, a landowner would find the market value for his land in fee simple with the right to create the same development on it, rather than elsewhere. These factors also elicit my support.

Let me cite just two examples in which I have been involved where this concept would be useful in achieving proper planning. One is a rural community with some areas underlain by layers of rock through which water flows quickly, far and wide. A sewer system would be extremely expensive to install in these areas. Development with on-site septic systems in these areas, even on 25 acres of land each, would threaten the quality of ground water because of the rapid underground flow of effluent through the stone formations. The ability to transfer the development potential of those areas to another area would improve directly what now must be a compromise from every viewpoint.

My second example is a large tract of vacant land adjacent to a stream that remains ecologically sound, one of the few remaining in the State. This tract is within a large expance of vacant land. There are steps which can and have been taken to protect this asset. More certain protection would be afforded, however, if the transfer of development rights concept could be applied.

I would like to take just a moment to touch on a couple of subjects that have come up this morning that I have definite viewpoints on.

The statement has been made that all planning should emanate from a natural resources inventory. I have no quibble with that statement whatsoever. I do feel, however, it is half of the necessary statement.

The other half of the necessary statement is that the natural resources inventory must be balanced against economic projections of what the marketplace must provide with the two brought into balance in the best way possible. In my opinion, this particular bill offers improved opportunity to accomplish that.

The second point deals with the potential for municipal purchase of development rights. I do not read the bill, in its present form, to offer the opportunity for condemnation of development rights, but rather, only for purchase and sale, which implies to me that there would have to be the coming together of a willing buyer and a willing seller. If the willing buyer happened to be a governmental body, at whatever level, it seems to me that the landowner would remain in the same position as he would were he selling to a private interest.

The third thing I want to briefly mention is the transfer of development rights concept versus the blueprint for agriculture concept. The first point would be that I find no inconsistency between the two. Secondly, I find potential within the transfer of development rights concept to remain consistent with the blueprint for agriculture concept and further offer the potential for the blueprint for agriculture concept to accomplish its purpose at lesser cost to public bodies.

ASSEMBLYMAN DOYLE: Mr. Hobaugh, have you been here from the beginning of the hearing?

MR. HOBAUGH: No, sir, I have not.

ASSEMBLYMAN DOYLE: I had asked this question of, I believe, the first witness, and I ask the same question of you: In your statement, you mentioned that the mechanism, that is, TDR, "would provide a means, without expenditure of tax dollars for acquisition of

land." How can we be so sure that there is going to be a market for these TDR certificates?

MR. HOBAUGH: The bill requires that the municipality adopting this concept voluntarily assure the continuance of a market. My own viewpoint of the manner in which that would be accomplished most desirably is that it would be through the assurance of sufficient land being in transfer zones with sufficient density of development permitted therein to create a potential market for the development rights of all areas designated as preservation zone. I carefully use the word "potential" because, in fact, any landowner, at the present time, has only a potential market for his land in its entirety. The fact that it is a new concept should not, in my opinion, carry along the requirement that there be a guaranteed market. There is not a guaranteed market at the moment for any land. If the demand is there and a willing buyer and a willing seller can come together, a market has been created. The same thing would apply with the development rights as now applies with land in fee simple.

ASSEMBLYMAN DOYLE: There is a significant difference between the open, but private, market, between the willing buyer and the willing seller, and our situation. In our situation, we are taking something from the landowner, and we are compelled by constitutional requirements to give him due compensation. If there is no development in the transfer zone, and if there are no sales of these certificates, don't we, by virtue of those facts, automatically have no market? If that occurs, what, then, should the municipality do, particularly if the person with those valueless papers is about to take the municipality to court suggesting it took his rights without due compensation, which is not necessarily an unlikely scenario?

MR. HOBAUGH: If we had that situation, two things come to mind immediately, one of which would probably be the circumstance. One possibility would be a poor job, initially, of determining where the preservation and transfer zones should be. The second possibility would be that there simply was not a market for land for development purposes, and therefore no market for development rights, in that given municipality. In the second instance, the circumstance is no different than it would be if a landowner were attempting to transfer his entire rights to the land, not only development rights. In the first instance, obviously some reparation has to be made. It's a situation of error.

ASSEMBLYMAN DOYLE: You mentioned an example of a tract of land that is near "a stream that is ecologically sound." What steps do you presently envision that a municipality would have to take to preserve the ecological soundness and non-development of that land, if any other than condemnation?

MR. HOBAUGH: I was going to say that purchase would be, of course, the most sure. Beyond that, it could make provisions for a planned residential or cluster-type development which would provide opportunity for development on a portion of the tract but would also provide protection for the most critical areas of the tract, in environmental terms.

ASSEMBLYMAN DOYLE: If that tract had ecological soundness in recreational or aesthetic value to the entire community--- By the way, is that the situation with this particular site?

MR. HOBAUGH: To more than the entire community, yes, sir.

ASSEMBLYMAN DOYLE: If we employed the TDR concept, or even the cluster concept, that would not

necessarily mean that the citizens in that entire municipality, as well as region, would have access to enjoy the beauty or use the the area. It would only mean that it would be preserved.

MR. HOBAUGH: Along that line of thought, yes, you are correct.

ASSEMBLYMAN DOYLE: To the degree that that is so, wouldn't condemnation still be the best method?

MR. HOBAUGH: If public access for recreational purposes was the desired goal, yes, sir. Purchase through some means would continue to be the way to accomplish that goal. Conversely, the manner in which those areas can be dealt with at the present time, short of purchase, provides the same circumstance that you have described would come to occur under TDR, in that, normally, the areas not developed within a planned residential development or cluster-type development are not set aside for the use of the general public, but, rather, are set aside for the use of those specific residents who live in the development adjacent to this open space. So, there is restriction upon its use under present arrangements as there would be under the TDR concept.

ASSEMBLYMAN DOYLE: But, you want more people to use this particular site than just the homeowners who happen to be able to live nearby in that cluster housing, if I understood your description of the parcel correctly; that is, that it has regional value.

MR. HOBAUGH: Portions of it have potential regional value, and portions of it are currently in public ownership as parkland.

ASSEMBLYMAN DOYLE: What would the landowner of such a piece have remaining after the development rights were sold or taken, even if it were just

condemnation? What would be his encouragement to still be the landowner of this beautiful stream that everybody wanted to go to if he just sat there with it but had nothing to do with it?

MR. HOBAUGH: You are raising another point, which is a question that I have raised in my list of nine questions and thoughts submitted to you; that is, whether or not some subdivision should be permitted in conjunction with this. We will be talking about this through the legislative committee of the American Institute of Planners. (List of questions and thoughts may be found at 1-X)

The particular tract that I am talking about is quite large. It is ripe for development, both in terms of ownership and location, at the present time. In this particular instance, we would be talking about a circumstance where the transfer of rights from that parcel to other areas nearby would, in fact, create an area that could be utilized by a significant portion of the potential future population of this particular community. That may not be perfect, in terms of total public ownership, but it certainly is more desirable than the compromise kinds of approaches we have to take to these circumstances today.

ASSEMBLYMAN DOYLE: Thank you very much for your testimony. I hope that, on your way out, you are not questioned too intently by some of the very able real estate brokers in the audience regarding that piece of land.

MR. HOBAUGH: I'll go quickly. (Laughter.)

ASSEMBLYMAN DOYLE: Dr. Nieswand will be the next speaker.

G E O R G E H. N I E S W A N D: I would like to thank the chairman and the other members of the committee for giving me the opportunity to testify before you. My name is George Nieswand. I am associate professor of environmental systems analysis in the Department of Environmental Resources, Cook College, Rutgers University. For the past three years, a major portion of my research time has been spent working with Mr. Chavooshian on the transfer of development rights concept. Recognizing that the committee is faced with a more-than-full schedule, I am going to try to keep my comments very brief.

I would first like to address A-3192, and second, I would like to briefly mention a related research effort in which we are currently involved.

In support of Assembly bill 3192, I would like to say that I am particularly impressed by not only the intent of the bill but also the relative simplicity of the concept it embodies and its tremendous potential for helping municipalities to deal with problems of land use that they face. The bill addresses simultaneously questions of preservation of special lands and accommodation of growth.

I would not be so naive as to suggest that the bill in its present form is flawless. Already, in these hearings, we have heard considerable testimony, much of which has contained specific criticisms and suggestions relative to specific contents of the bill. Many of these are valid. However, I think it important to note that there have not been any serious questions regarding the legitimacy of the intent of the bill and the validity of the concept that it embodies.

I would like to digress, perhaps, for a moment and comment on the relationship between

A-3192 and the Blueprint Commission proposal. I had not intended to do so. I purposely used the word "and" rather than "versus." Unfortunately, we seem to set one up as a contestant against the other. I think this is a very unfortunate situation. The intents of the two plans, if we examine the intent of 3192 and the intent of the Blueprint Commission Report, are significantly different although there are areas of common concern. To this extent, I think that they are compatible with one another. We cannot say that if one is accepted then the other cannot be, or vice versa. So, I think we have to consider them individually.

Since July 1974, the Department of Environmental Resources at Cook College has been involved in a transfer of development rights demonstration project funded by the United States Department of Agriculture under Title V of the Rural Development Act. The overall purpose of this study, which is a cooperative research and extension effort, is to demonstrate the conditions under which a TDR program could be developed and adopted in a selected municipality. The specific objectives of the research portion of this project are: to develop procedures and criteria for delineating preservation and receiving districts, to develop methods and criteria required for the establishment of implementable TDR mechanisms, and to conduct attitudinal surveys both before and after the preparation of a TDR ordinance. The specific objectives of the extension portion of the project are: to establish a TDR plan for the municipality, to draft a TDR ordinance for the municipality, and to support these activities with related educational programs.

Again, in recognition of the time schedule that we are operating with, I will not burden the committee with the details of our study to date. However, I would like to second Mr. Chavooshian's offer that we would be willing to meet with the committee at one of its work sessions if it so desired.

ASSEMBLYMAN DOYLE: Thank you very much. Were you in the audience, sir, when Mr. Berkow testified?

DR. NIESWAND: Yes.

ASSEMBLYMAN DOYLE: He was from the Builders Association and had some thoughts on the bill.

DR. NIESWAND: I heard those.

ASSEMBLYMAN DOYLE: Since some of his thoughts represented a difference of opinion from your comment that everybody seemed to have been in favor of the concept and general implementation of it under 3192, would you care to respond to some of his thoughts?

DR. NIESWAND: I do not have his testimony before me, so I cannot respond to specifics. But, when he was questioned as to whether or not he thought the TDR concept would not work, he did not say that this was the feeling of the Association. Their criticisms seemed to have been directed to specific content of the bill and not to intent, although if I remember correctly, he saw that the intent might be interpreted as stifling growth. When I read the intent of the bill, this is not the impression that I come away with. I come away with the impression that the bill is attempting to deal simultaneously with the questions of preserving certain types of land while, at the same time, accommodating growth.

ASSEMBLYMAN DOYLE: You mentioned an example, and I think it's South Brunswick; we'll hear about that

later. Do you think it is possible, under the existing legislation in this State, to accomplish a TDR ordinance without something akin to 3192 being passed?

DR. NIESWAND: I don't feel that I am qualified to answer that myself, although the legal opinion that our study group has obtained recommended that we assume that enabling legislation of this type would be required to accomplish a program such as that which we are attempting to do in South Brunswick.

ASSEMBLYMAN DOYLE: How large is South Brunswick?

DR. NIESWAND: It is approximately 41 square miles, I believe.

ASSEMBLYMAN DOYLE: How many people live there presently?

DR. NIESWAND: I am not certain of the population.

ASSEMBLYMAN DOYLE: What is the number of housing units?

DR. NIESWAND: If I can call on some of my other colleagues---

ASSEMBLYMAN DOYLE: We are going to have Mr. Hintz testify. Maybe those questions would be better put to him.

DR. NIESWAND: I can comment on where we are, to date, with respect to preservation zones and transfer zones. In terms of a first-cut delineation, we have identified approximately 6500 acres of presently residentially-zoned land which would qualify for preservation. The number of units that would be required to be transferred from this zone is approximately 3600. We have identified, also, a transfer zone consisting of approximately 2100 acres

which would be suitable to accept this transfer of units. We have gone through a lot-by-lot calculation of yield of development rights and allocation of development rights. We are currently in the midst of attempting to establish appropriate densities within the transfer zone. But, looking at the gross figures, one thing that is quite apparent is that when we think in terms of transferring 3600 units to a transfer zone of 2000 or 2100 acres, we are speaking of a gross density increase of something less than two units per acre, which means that the municipality is left with a tremendous amount of flexibility in terms of actual transfer densities that it might want to deal with.

ASSEMBLYMAN DOYLE: How long, to date, have you been into this project.

DR. NIESWAND: We started in July 1974. Our time projection is that by July or midsummer, we will have a program and a municipal ordinance completed for the township.

ASSEMBLYMAN DOYLE: Then you would have, if you had enabling legislation, whatever hearings would be required with specific notice to affected property owners, etc.?

DR. NIESWAND: We are operating under simulated conditions. The assumption is that enabling legislation exists, so we will be conducting public hearings in concert with this activity.

ASSEMBLYMAN DOYLE: So, the whole time framework from day one until you have an effective ordinance on the books will be a little better than a year?

DR. NIESWAND: Approximately one year.

ASSEMBLYMAN DOYLE: Do you think that if we had enabling legislation, and as TDR became better

understood, that year period would be cut in other municipalities, or do you think that time period is going to be pretty much the same?

DR. NIESWAND: I think that it is going to be tempered by the particular situation that you are dealing with, but with respect to our study, I think we should recognize that this is a research effort, as far as we are concerned, in addition to being a demonstration project. So, we are exploring areas that, presumably, might not be explored by other municipalities. Secondly, we are breaking new ground since we do not have existing tools, methodology, and procedures to deal with. Our intent is to publish a technical manual based on our experience in South Brunswick, which should provide considerable short-cuts to those who come at a later date and want to do the same thing in that they will have prior experience to draw on.

ASSEMBLYMAN DOYLE: Has there been a recent re-evaluation in South Brunswick?

DR. NIESWAND: Yes. They had a re-evaluation in 1974, I believe.

ASSEMBLYMAN DOYLE: Are you using that re-evaluation in studying the number of TDRs to be given to particular landowners?

DR. NIESWAND: We are using that re-evaluation to determine the allocation of development rights.

ASSEMBLYMAN DOYLE: Do you know what the present equalization ratio is in South Brunswick?

DR. NIESWAND: I don't recall, and none of my colleagues present do.

ASSEMBLYMAN DOYLE: My thought was that if you had not had a recent re-evaluation, wouldn't you, under the terms of 3192, have to, in effect, conduct one?

DR. NIESWAND: I would think that you would have to do something to alleviate the disparity in assessments that may have evolved due to the time factor.

ASSEMBLYMAN DOYLE: Having seen any number of tax appeals, assessments do not seem to me, unless you have had a recent and effectively done re-evaluation, a fair criterion for determining how many certificates a particular landowner would get. That is why I asked the question. You would agree with that, I presume.

DR. NIESWAND: I would agree, yes.

ASSEMBLYMAN DOYLE: How much has the project cost so far in South Brunswick?

DR. NIESWAND: The funds that are allocated to the project through the Title V program total $28,000 per year. We are involved in a three-year effort, so this first year is costing us $28,000 plus the additional time of researchers whose salaries are not embodied in this $28,000. I would estimate that the total cost for the year would be something between $50,000 and $60,000, perhaps. I would like to qualify that again by saying that there are a number of research elements that are a part of this project in terms of educational programs, attitudinal surveys, and initial development of methodology and procedures which would not be a cost to the establishment of a TDR program at a future time.

ASSEMBLYMAN DOYLE: In other words, you are spending money to do further research and to do it in depth, and this might not be necessary but for the fact that this is a research project.

DR. NIESWAND: Correct.

ASSEMBLYMAN DOYLE: So, the cost might well be reduced in a municipality somewhere down the line

after a number of municipalities have already implemented TDR?

DR. NIESWAND: Correct.

ASSEMBLYMAN DOYLE: The thrust of the last several questions was to see, if we had legislation, what a municipality, perhaps one in Ocean County, should be looking at in terms of time, money, and effort if they were to go this route.

DR. NIESWAND: I think the ballpark within which we are operating gives you some indication of this.

ASSEMBLYMAN DOYLE: Do you think that a municipality could go for TDR with its in-house expertise, or does it need necessarily to call upon someone over and above the local planning board members, citizenry, attorney, and planner?

DR. NIESWAND: I would expect that, depending upon the sophistication of their in-house talent and whether or not they have, in fact, a full-time planner onboard, as does South Brunswick, they most probably would require outside assistance to come up with a final document.

ASSEMBLYMAN DOYLE: Thank you very much, Dr. Nieswand.

The next speaker will be Claire MacMillan, a concerned citizen from Moorestown.

C L A I R E E. M A C M I L L A N: I would like to begin my statement by saying that the Municipal Development Rights Bill represents a concept whose time has come, and I will do all in my power to rally support for its adoption. It is particularly impressive because it provides for municipal level planning and requires careful study of resources, needs, and projections within a community. Because of its adaptive structure, A-3192

should be applicable in municipalities with large agricultural areas as well as being useful in older metropolitan communities who could apply TDR to preserve small districts and redevelop fading industrial zones.

Because my interests are primarily agricultural and historical, and because I am particularly concerned with Burlington County where I live, I should like to raise specific questions relative to these interests.

First, as a tool for historical preservation, I find A-3192 severely lacking. The key to preservation does not lie with use, but rather maintenence of historic buildings. In our area, historical structures are not so much threatened by bulldozers as by disinterest or the high costs of restoration and property taxes. I see little in A-3192 which would ease these problems. I think such purposes are better served under historic districting and/or tax relief codes. Furthermore, historic edifices can maintain their exterior while interior uses are altered. I would rather see an old home converted to a multiple-family dwelling while maintaining the original facade than I would like legislation on density within that building without adequate measures to protect its exterior characteristics.

Second, as an agricultural bill, I think the Transfer of Development Rights concept needs more teeth. As Article I indicates, New Jersey is losing approximately 10,000 acres of agriculture per year. It is my opinion that this situation is so critical to our State that municipalities should be obliged to give farming needs primary consideration under TDR. I feel development rights legislation, as proposed by individuals at Cook College, which calls for 25 contiguous acres and 60 percent of the zone farmland and woodland, or measures suggested by the Blueprint Commission for the

Future of New Jersey Agriculture, which asked for preservation of a stipulated percentage of all agricultural lands in a municipality, would be utilizing development rights to their fullest advantage.

Third, along these same lines, I believe voluntary compliance to a land-use scheme does not serve the best interests of the State as a whole. I am well aware that in several highly populated cities, transferring development rights could be quite complicated, and, for these cities, preserving large parcels of land might be impossible. However, it appears to me that rather than as outlined in Article II, lines 1-5, page 5, ". . . any municipality may, by resolution, establish a commission whose general purpose shall be to determine, within a time specified in the resolution, the feasibility of the municipality adopting a development rights ordinance . . .", the word "shall" should be substituted for "may" which would require each municipality to review its growth pattern as prescribed in section 8 a - f, page 6, and report its findings. Furthermore, in regard to the phrase, "within a time specified in the resolution," I would suggest instead that this legislation set a time within which municipalities must act. I realize others before me have also suggested this. By making study and action obligatory, not only would the State be taking an historic step toward recognizing the land-use crisis, but it would also help balance inequities between those municipalities who do elect a TDR program and those who do not. Briefly, what I am suggesting is that A-3192 should not be saying that a municipality may adopt TDR if it chooses but should be saying that every New Jersey municipality has an obligation to try and implement TDR or prove why it cannot do so.

Fourth, I would also like to suggest that the State should prepare to assist municipalities in their

efforts. Advisors should be available to suggest applications of development rights which may not be apparent to local officials. It should also be the duty of a state regulatory and/or advisory commission to ascertain that a municipality's application of development rights does not conflict with patterns of neighboring communities.

Fifth, finally, I am distressed by Article III, sections 21 and 22, page 13. I hope this is my own misinterpretation. As written, section 22 provides for Farmland Assessment on the land with certificates of development rights "taxed pursuant to the provision of section 21 of this act." Section 21 states - and I'll quote this with deletions - "Certificates of development rights shall be taxed in the same manner as real property is taxed, and the assessed value of each uncancelled certificate . . . shall be equal to the quotient obtained by dividing the aggregate assessed value of all property . . . which is zoned for the particular . . . certificate . . . ." By this, I assume development rights granted for farmland in a primarily residential district would be taxed based on assessed value of similar residential land, and those granted to farmers in an industrially zoned region would be taxed as comparable industrial land. Therefore, up until a farmer sold his development rights, he would be paying "land" taxes under Farmland Assessment and additional "certificate" taxes assessed at regular property rates. Such provisions seem to be in conflict with the principles of Article I.

In conclusion, I would simply like to reiterate my support for the Municipal Development Rights Act as a giant step in a nationwide need to re-evaluate land-use planning on the municipal level.

ASSEMBLYMAN DOYLE: Ms. MacMillan, it's nice to have someone come before the committee who doesn't

have a title after their name, as much as we have appreciated hearing from the titled personnel. Insofar as your second point is concerned, I think you have heard much discussion about the relationship of the Blueprint to TDR, and I am not going to comment on that further. Insofar as your fifth comment about, perhaps, duel taxation, your comments are well-taken. That has been previously noted by the committee's staff, and they are reworking the kinds of changes that you have suggested. Insofar as your fourth item about state help, we discussed that at the last hearing. We talked about extending the effective date of such a law so that there would be time for state help to localities that were interested.

Insofar as your first and third items, let me ask a question or two. In the third item, by mandating, aren't you removing the idea, totally, of home rule and, perhaps, opening the way to statewide zoning?

MS. MAC MILLAN: It has been suggested to me that maybe home rule is an idea whose time has passed. I didn't mean to indicate that. What I am suggesting is not that a municipality be required to participate in TDR, but that they be required to consider it. I don't think that removes home rule. I think that it would definitely be the local governing body who would be studying it. Rather than saying, "Look guys, you might want to try this," you should say, "Why shouldn't you try it?"

ASSEMBLYMAN DOYLE: Under your plan, would a municipality be bound to explain to some body why they did not choose TDR for themselves?

MS. MAC MILLAN: I would like to see that, yes.

ASSEMBLYMAN DOYLE: That would make 3192 a lot harder to pass, I would think.

MS. MAC MILLAN: That is why I am saying that I will support it either way.

ASSEMBLYMAN DOYLE: Insofar as your first item, I made the same observation that, if you took the development rights away from an historical site--- For instance, if you told the owner of a revolutionary era building in downtown Toms River, which is a bicentennial municipality, that he could not build, according to the zoning, but he could build what he could have built there somewhere else, he would not maintain that bluilding.

MS. MAC MILLAN: Exactly.

ASSEMBLYMAN DOYLE: It has been suggested that TDR is not a saver for all situations, and there are, as with every other broad concept, some things that it does not apply to. Perhaps that is one of them, and I appreciate your putting your finger on that.

Thank you for testifying.

MS. MAC MILLAN: Thank you.

ASSEMBLYMAN DOYLE: Is Mr. Davidoff in the audience? (No response.) Mr. Scangarello will be the next witness. He is the town planner for Medford Township.

T H O M A S J. S C A N G A R E L L O:

I have read, Assembly Bill 3192, several times in an attempt to thoroughly understand its concept, design, and applicability.

The concept of a transfer system of development rights is a relatively new one to most people. However, there

are many state professionals, specifically planners and lawyers that are extremely conscious of such a system. In all due respect to these professionals, I feel somewhat less qualified to honestly discuss the concept of such a program or the design of this particular bill.

In a more practical sense, I do feel qualified to briefly discuss the effects that such legislation can have on municipal planning. Specifically, I do not consider it out of place to relate such legislation to the particular municipality that I represent, Medford Township. Frankly, I'm certain that one can easily compare any experiences which I am about to describe to similar municipalities. It is in this vein that I justify the value of my testimony.

> "...the 567 local units of municipal government in New Jersey experience not only the greatest, most immediate and direct pressure for new physical development, but also all the most adverse effects of that development, that the State Government has an obligation to provide

> municipal governments with adequate and appropriate statutory tools whereby these local units, acting within the statutory framework and pursuant to guidelines provided by the State, may respond to the pressures for, and the burdens imposed by, physical development with sound rational and comprehensive planning techniques..."

These remarks were directly taken from the preamble of the "Municipal Development Rights Act." Medford Township exemplifies a critical area which must respond to direct pressures for new physical development at all levels. Medford is currently rehearsing its program for the future; without some statutory tools and the aforementioned sound, rational, comprehensive planning techniques, neither Medford's program nor the programs of other progressive municipalities will be completely fulfilled.

The argument regarding New Jersey's problem of space versus density is a historical one. Generally, the municipalities affected by the New York SMSA and the Philadelphia SMSA regard physical space, or the gradual lessening of physical open space as a major problem. Medford's problem of physical space is coupled by one dealing with a rich natural environment. Medford has spent two years analyzing its eco-system and making an inventory of that system.

Successfully, the township's ecological consultants have plotted areas that indicate where consideration should be given to the applicable natural processes and social values of:

1. Geology
2. Aquifers
3. Hydrology
4. Depth to Seasonal High Water Table
5. Run-off management
6. Soil
7. Potential Soil Loss
8. Soil Nutrient retention
9. Vegetation
10. Recreation value of Vegetation
11. Terrestrial Wildlife habitation
12. Historic Value
13. Physiography
14. Microclimate
15. Scenic units
16. Limnology
17. Wildlife-high value areas
18. Wildlife-hazardous and nuisance species
19. Wildlife-rare and beneficial species

The inventory is complete and its method of use defined, it is now necessary to provide a standard of protection for its implementation. A TDR scheme offers one mechanism or "statutory tool" to seek that protection.

A program such as TDR could sufficiently balance Medford's legislative program. The ordinances in this legislative program were designed and are intended to develop an environmental land use control system. The components of this system, or the suggested legal supplements include the following documents:

1. Cluster Ordinance
2. Historical Zoning Ordinance
3. Forest Conservation Zone Ordinance
4. Subdivision Ordinance
5. Site Plan Ordinance
6. Growth Anticipation Plan Ordinance
7. Flood Prone Areas Zone
8. Noise Control Ordinance
9. Air Pollution Control Ordinance
10. Tree Ordinance
11. Soil Erosion, Land Disturbance Ordinance
12. Soil Erosion Standards

I do not intend to imply that a development rights transfer system will solve the problems affiliated with growth and environmental protection. I again emphasize that it would give planners a statutory tool with which to work.

At this point I would like to illustrate an actual situation dealing with ownership patterns and growth trends, or urbanization.

(Reference to Map A)
(Map A appears in the Appendix on page 4-X)

This map shows ownership patterns and a modified existing land use plan. The grey, tan, and green areas indicate existing uses, including open space parcels. The orange and yellow codes indicate undeveloped but subdivided parcels and those parcels that are (speculatively) owned. Although, approximately twelve percent of the 42 square mile township is developed, one can easily calculate that the use of many prime areas appears to be somewhat predetermined.

(Reference to Map B)

(Map B appears in the Appendix on page 5-X)

Respectfully, map B indicates the patterns of urban development which Medford has developed since 1963. As prescribed by this map and supported by a late population chart (Reference to chart A) it is obvious that Medford's

(Chart A appears in the Appendix on page 6-X)

growth is one of increased rapidity.

(Reference to Maps C and D)

(Maps C and D appear on pages 7-X and 8-X of the appendix)

Conversely, maps C and D indicate, recommended environmental regulations and a prime suitability synthesis. These are simply areas that should not be developed. As is evident, a complex dilemma exists; how does the municipality solve its urbanization problems in line with the restraints of its environmental resources. One method, or solution, and granted one which is not an end in and of itself, is this Municipal Development Rights Act.

As a planner in a rural/suburban area without the aid of a TDR program it is at times, useless to identify those areas which serve as critical natural functions, areas which the ecologists say are necessary to provide for the health, safety, and welfare of the residents of the

municipality in question. For example areas of:

a. high nutrient absorption capacity
b. gravel deposits
c. prime agricultural soils with high nutrient retention
d. seasonal high water table
e. flood prone areas
f. wet lands
g. bogs/cedar swamps/flood plain vegetation
h. water related views
i. regional and local prominences
j. historic sites

The only theory available which closely resembles a TDR concept is the unproven theory of pre-emptive land use. The theory allows the municipality to give priority to certain land uses over others. High priority land uses take precedence over lower priority land uses particularly when both are intrinsically suitable for the same tract of land. A problem with this theory is that value judgments must be introduced to determine the priorities.

Therefore, from the planning front I find no arguments with this bill. The need desperately exists if we are to safeguard sensitive areas within the state. However, I feel that this bill must significantly address itself to the cost, or value of development rights. The bill seems to rely on assessed value of land rather than market value or future market value. As John Costonis

states, "the cost of development rights, must be skewed at levels that generate the revenue needed for resource protection without discouraging new construction within transfer districts. Overly harsh residual densities or zoning trade-offs that offer little financial advantages to the developer may lead either to cannibalization of the program or to development that leap frogs transfer district altogether."[1] There should be a type of financial mechanism considered. Whether it be an objective determination of assessed market value, or a multiplication of "protection land" by incentive factors, as is done by the town of Sunderland, Massachusetts, at this point is not a major concern. But, do not let such a circumstance go unnoticed in lieu of getting a municipal development rights act adopted.

[1] J. Costonis, "Development Right Transfer: Description and Perspectives for a Critique", Urban Land, January, 1975.

ASSEMBLYMAN DOYLE: Thank you. You mentioned John Costonis. He wrote us a letter indicating that he could not be with us. The record will be kept open for documentation that we understand is coming in from those who wish to make their testimony a part of the record.

With specific reference to Medford, am I right in looking at the map and saying that basically, land in the southern tip of the town is state owned, and there is a lot of agricultural open space across the northern tier, and the development seems to fall in the central portion of the municipality, to the degree that I can generalize it?

MR. SCANGARELLO: You can generalize it. The state-owned land is the Wharton Tract, the green area that you are referring to. Naturally, the land to the north is prime agricultural land, although most of it is not agriculturally productive. In other words, the farms are not productive year by year.

ASSEMBLYMAN DOYLE: Would it be mostly that area that you would be looking to preserve? By that area, I mean the agricultural area shown on the Ownership Patterns Map as the tan area.

MR. SCANGARELLO: Conversely, we were advised to protect the lower zones, and our ecological consultants advised us to zone land in the northern part, which is the agricultural district, for higher densities because those soils and conditions are suitable for it. So, there again we are in a predicament.

ASSEMBLYMAN DOYLE: I guess that's why I'm not a planner. It would seem to me that the whole idea of transferring development rights is to protect that area which is already open, and, here, it would seem that the converse has been recommended. Or, am I missing something?

MR. SCANGARELLO: You are not missing something. It's just another problem thrown in; it's just another thorn we have to deal with. This bill would give us the means to do it.

ASSEMBLYMAN DOYLE: If you wanted to preserve the area that the consultants suggested you preserve, as well as the area which, it seems to me, ought to be preserved, you probably wouldn't have enough land to be used as transfer zones to accept the development rights within both my area and the consultants' area, isn't that correct?

MR. SCANGARELLO: If we were to fully implement all the recommendations that the ecological consultants gave us, we wouldn't be able to build anywhere.

ASSEMBLYMAN DOYLE: That's not only happening in Medford. (Laughter.) The reason I asked the last question is this: Can TDR be worked in a number of municipalities, and do they have the inherent resources to provide both transfer zones and preservation zones? Is that not a real problem?

MR. SCANGARELLO: It is a very real problem, particularly for us.

ASSEMBLYMAN DOYLE: There is no question but you feel that the existing state of the law is such that you cannot do the kinds of things you want without this additional tool, is that not correct?

MR. SCANGARELLO: That is correct. We have tried to work out some possible schemes, which I am sure Gerry Haughey, when he gets here, will explain to you, but we have been afraid to do it. We just do not know if it will go or if it won't go. All our township officials and p l a n n i n g board officials are in agreement with this bill and the concept. Not one of them is opposed to it.

ASSEMBLYMAN DOYLE: You mentioned in your statement some concern about the financial matters; that is, what would be the rates of these TDR certificates? Are you not satisfied that the open market would allow them to float at the appropriate level?

MR. SCANGARELLO: It's not that I'm not satisfied. It's that I'm just not sure.

ASSEMBLYMAN DOYLE: If it didn't, what would you do instead?

MR. SCANGARELLO: I don't know. That's a question I have.

ASSEMBLYMAN DOYLE: Neither do I; that's why I'm asking that same question. Thank you very much for testifying today.

That concludes our morning session as we had planned it. Is there anyone who wishes to testify and will not be able to do so this afternoon? (No response.) That being the case, we will take a luncheon recess at this time and will reconvene at 2:00.

(Luncheon Recess)

(Afternoon session)

ASSEMBLYMAN DOYLE: For those of you who were not with us in the morning session, let me indicate that the Chairman of this Committee, Ozzie Pellecchia, an Assemblyman from Paterson, opened the hearing. My name is John Paul Doyle. I am an Assemblyman from Ocean County, District 9. Becauses of illnesses, death, and likewise, we're down to one Assemblyman from the Committee, myself. But, as I said this morning, we have an opportunity, because of the transcript and because of our able staff here, to share with the other Assembly Committee members, who could not be with us today, the thoughts that you will give us.

To the degree that I ask questions, please remember that I am trying to ask questions not only for myself but over this entire and somewhat complicated concept for the benefit of the other members of the Committee, and in the last analysis perhaps the Assembly and the Senate.

With those thoughts in mind, I would like to call John Kolesar as our first witness this afternoon.

J O H N K O L E S A R: Thank you, Mr. Doyle. I want to thank the Committee for inviting me to testify.

I am the Director of the Center for the Analysis of Public Issues at Princeton, which has done a number of studies on the question of preserving farmland and also some studies of the transfer of development rights concept. We are, in fact, just finishing a second report on preservation of farmland and it probably will be published in about three weeks.

I am also Chairman of the Chesterfield Township Planning Board, which is a planning board in a farm community, and we are working on a master plan now which we believe would preserve farmlands, using something like the TDR concept under existing State law.

The bill here I think would be generally a valuable bill. I, personally, would like to see something more sweeping and definitive in terms of particularly preserving farmland, but I realize that these are difficult concepts involved in this kind of legislation and it is not easy to hit a homerun at the first try. This legislation is permissive, it is a local option bill, no municipality has to adopt it if it doesn't want to and, therefore, I would think there shouldn't be much in the way of objection to it. If the towns don't want it, they just don't have to adopt it.

Our municipality happens to want to adopt something like this and in Chesterfield I am sure it would help our situation if we knew that there was State legislation which permitted other towns to do it. One of our biggest problems is the feeling that we're alone adopting our type of legislation at the local level and that we may, in effect, be creating impediments to development, or at least apparent impediments that will scare people off and in effect cancel out development values. The people who own land in the Township have that difficulty. We think we've cured that with the last version of our ordinance.

I would like to go over some specifics in the legislation which I think might cause problems on the basis of my experience both at the local level and in the research on State legislation involving preservation of farmland. Some of the points I would like to raise are minor drafting problems and some of them I think are major problems with the concept of the bill.

The major problem I have with the bill is that it attempts to treat various kinds of preservations in a unified way. As I understand the bill, a municipality could set aside different kinds of preservation areas, one

for preserving open space, one for preserving farmland, one for preserving an historic district, and they would basically apportion the rights generated on a basis of assessed ratables. The assessed ratable problem comes up in a lot of different ways. The assessed value of farmland right now is set under the Farmland Assessment Act and it has no relation to market value. If you merge those assessment values with other kinds of districts you are going to have one kind of assessed ratable compared to another.

In an historic village, which we have in our town and which would be worth preserving, the assessments on the books are market value assessments. In farm areas the assessments are farmland assessments and are artificial. They are low.

The other problem is that you are also comparing developed property with undeveloped property. And while I find the calculation a little baffling at times, it would seem that if you award rights to people who develop property on the basis of assessed ratables, they are going to get more rights than a person with vacant land, yet the person with the assessed ratable has used some of his rights because he has an existing building which is usable in the area. And I think that that would create problems. It would not particularly bother us in our Township because we are concentrating - we have one specific problem, farmland, and we would not have to probably get into a question of a complicated ordinance trying to preserve different kinds of amenities.

I would like to just go through the bill, section by section, and mention the points that I see as problems. As I said, some are small and some are important.

Starting out, Article II, page 6. It provides for the appointment of a municipal planner and municipal

attorney to the Commission. Neither one of those necessarily has to be a resident of the town involved, and it might be a problem to have nonresidents sitting on a commission determining local policy. In some cases, for instance, municipal attorneys work for several municipalities and could wind up sitting on a multiple number of local commissions on the same question.

ASSEMBLYMAN DOYLE: Some of us municipal attorneys are only fortunate enough to represent one town, though.

MR. KOLESAR: All right. But it may not be their home town; they may be from out of town and that could be a problem.

The legislation provides for retaining professional help and that sort of thing, so I would imagine if they need legal help or professional planning help, it could be retained that way. I'm not saying that as a policy matter I would be against it but it might raise a question if you had two board members of the commission who can be from considerable distance away - some of these towns are very local.

In Section 8 (d) on page 6, the Commission is asked to identify the anticipated growth and development of the municipality in the next 10 years. And then, at various times later on in the bill it apparently refers to that specific anticipated growth over a ten year period as the bases for some of the calculations, awarding of rights and that sort of thing. Ten years is a rather peculiar period. In my town, if you just project the existing growth ten years in the future, you get practically nothing. It's a farm town, without sewers and the sewers won't arrive - they may never arrive the way things are going, but within ten years we could not prospect out much growth. If

you calculate development on that basis, you would have very few rights.

Now it's a little vague at times. At times it talks about the maximum potential growth of an area or the growth that would be permitted under the existing zoning plan which would far exceed the growth over the next ten years in some of these municipalities.

So, if the ten year period is to be consequential later on in the bill, I would then think that the period should be stretched, because ten years is not much in rural or even some of the suburban fringe towns. That is not a long period to project much growth in.

Throughout the bill there is reference always to a preservation zone and a transfer zone, as if there were to be one of each. I would think that that wording should be changed to plural all the way through because - at one point it does mention that they don't have to be contiguous which apparently assumes there would be more than one. In several places speaking of them in the singular I think also affects the concept.

In Section 9 (c), which is on page 7, there it speaks of the assessed value of the parcels contained. That is one specific place where I think the question of farmland will become a problem because the assessed value of farmland is the farmland assessment, not a market value assessment. And that is repeated later on in a couple of places.

In 9 (d) it says: "An analysis of the development potential of the land" and that's where it's unclear as to whether it's speaking of the ten year growth period or the full potential of the existing zoning ordinance or what particular period that development potential was to be calculated for.

Then in (g) of that same section, the Commission is supposed to provide a tax map for the transfer zone indicating the assessed and market value of the parcels.

Now, market value in a town that had not had a revaluation in seven or eight or nine years could be an enormous stumbling block.

In Sections 10 and 11, where the Commission report and the governing body's action are incorporated, the time sequences I think might cause some problems. The Commission is required to report within ten days after its public hearings, which is a very short time; then the governing body has sixty days to consider it. I'm not clear whether that means to consider it and take a vote one way or the other.

Then further on, the governing body is required to hold a hearing on the allocation of rights before it adopts an allocation formula. As I get the sequence, they would have to do that before they adopted the ordinance and before they voted on this transfer of development rights ordinance, and presumably that would be within that sixty day period. I think then you would wind up with a massive problem.

So I think the language first should be clarified as to what "consider" means. If they have to say yes or no, definitively, one way or the other within that sixty day period, that does seem to be short if they also have to work out the allocation formula and hold hearings on it.

That would also raise a question as to when this Commission's life terminated. If there were no vote, if the Township Committee just simply looked at it and said, "Gee, it's complicated. We'll have somebody take a look at it for us" I think this could stretch on and on for months.. Master plans, for instance, get recommended

by planning boards to township committees and sometimes just lie there, never adopted or voted down or ever heard of again.

In Section 13 (a) 3, one of the things that is allowed to be preserved is "an integral economic asset." I don't know what an integral economic asset is. "Economic feature" is listed among the definitions and it might be the same thing, but I don't know what that's intended to save there. It could be interpreted to save a large factory or something like that. I'm not sure if that's intended by the drafters.

Right after that, 13 (b) it says: "The location of the zone is consistent with, and corresponds to, the master plan and zoning ordinance of the municipality if they so exist." In most municipalities there are existing master plans and zoning ordinances. But I would doubt that very many of them are very easily made consistent with and correspond to a transfer of development rights ordinance. Most municipalities try to preserve open space or farmland now with large lot zoning which is a fairly artificial device. If they had the ability to use the transfer of development right ordinance, probably they would not have ever drawn the original zoning ordinance they have now. And there's nothing, for instance, to stop a municipality from, first, preparing a new zoning ordinance and then weaving a TDR ordinance into it. But that's an entire master planning process, very much like what Chesterfield Township has gone through now. But the use of existing master plan and zoning ordinances, which is referred to here several times, do create, I think, some very serious problems.

The same problem pops up in 14 (b). It says: "The density of each transfer zone is increased beyond the density otherwise permitted as a matter of right under the zoning ordinance of the municipality, if one so exists."

I can use as a specific case my township. We now have uniform half-acre zoning throughout the Township which would, if anyone ever conceived of carrying it out - would provide for some twenty-some odd thousand housing units in a town that has 750 existing. And to transfer that entire load of 20,000 units while saving any quantity of farmland would provide for a very high density construction if the State's Blueprint Commission, for instance, recommended saving 70% of the farmland, which is not outlandish. In our town that would cram 20,000 housing units on about 3,000 acres, which is a very high average growth density. Because you would not subtract streets and things like that out of it, that density would be achieved. And this seems to be a fairly clear, specific designation that you must use the same density you have now in the switch from a preservation district to a transfer district.

In 14 (f). One of the goals of this transfer zone is that it shall offer the most lucrative site possible and available for the transfer of development rights.

I would seriously question the establishing as a goal for what amounts to a master planning process as the creation of a most lucrative development possible. First of all, it really should not - it does not necessarily coincide with the community's or the public's interest to create the most lucrative real estate values. It is a peculiar word to see in a statute anyhow.

ASSEMBLYMAN DOYLE: Particularly nowadays.

MR. KOLESAR: Particularly now. I mean, there are a lot of ways to create lucrative development.

If the intention here is to sort of get around the Fifth Amendment stricture against taking property without compensation or something like that, I would suggest that that be embodied in a flat negative statement,

that the ordinance shall be drawn so that it does not violate any of the provisions of taking without compensation. That doesn't really contribute because ordinances can't do that anyhow. If you've got a constitutional right, you've got it, no matter what an ordinance says. But it can be taken as a directive in what amounts to a planning process spelled out in this law that there be some financial equities recognized. But I would not want to go so far as saying you've got to make it a very lucrative deal.

In Section 15 it provides for amendment and appeal to the ordinance where the owner of a property can demonstrate that he was prevented from reasonable use of his land provided that the amendment can't be granted if it would destroy, change or otherwise alter the nature and characteristics of the preservation zone.

There is no provision in here for an amendment or change process from the other standpoint which is the question of the public's interest in change or amendment. Fundamentally, you have a situation here where you would adopt an ordinance and it would become darn near unchangeable. Now, if it substantially changed people's rights under the thing, you wouldn't be able to adopt it. But it seems to me that there are plenty of areas where one of these ordinances were drafted in the beginning and adopted and then after a few years it was seen that something was not happening the way the calculations were intended, and that in the public interest there should be some change or amendment and that not only the individual's harm but the public's harm could also be taken into an appeals process.

Again in Section 17 there is a reference that: "Certificates of development rights shall be allocated to the various portions of the preservation zone on the basis

of the uses permitted in each such portion of said zone as a matter of right under the existing zoning ordinance." And, as I said, the existing zoning ordinances are generally not in good enough shape to use them as the basis for awarding rights.

Presumably a TDR ordinance drawn under this statute would have to be drawn in a way that it did not take away people's property rights without compensation. But that doesn't mean that they might not lose some rights which they have under existing zoning. It's not uncommon for property under existing zoning to be commercial and to be changed to residential, in which case it loses some of its potential market value. But that hasn't been held to be a taking and should be permitted, where this would seem to say that you can't do that. If someone has built in a potential profit under existing zoning this statute seems to say that you cannot lower it anyhow, you might be able to raise it but you couldn't decrease it. And that might make it very difficult to draw up some ordinances in some towns.

In 17, in the last part of the paragraph on page 12: "The total number of certificates of development rights so allocated shall be equal to and deemed to represent the full and total development potential of all land in the various portions of the preservation zone as a matter of right under the zoning ordinance."

Now there it seems to drop that idea of ten years of projected growth and suddenly talk about all the development that could possibly take place under the existing zoning ordinance. I think that's a more practical way to do it. I think the best way to do it would be to start with a full development plan and allocate the rights on the basis of it even if some are quite distant in time,

and not worry about whether they will happen in ten years or twenty years or something like that.

But, again, I would think that the existing zoning ordinance is not the best base to do that.

In Section 18, we come now to where the assessed value of the property as a proportion of the total assessed value of all property in the preservation zone is now used as the method of allocating the rights. And that's where the Farmland Assessment Act begins to be a problem.

In Section 20 there is a discussion of conversion of rights, I gather from one use to another, a translation of residential rights into commercial rights by some sort of formula.

It seems to me that a simpler way to allocate these rights is to allocate rights to owners without differentiating between whether they are residential, commercial or industrial or whatever and do the weighting between those various classes on the other side in terms of how many are needed to obtain extra density or extra floor space or whatever methods are used. If the proportion between them is maintained properly then if it takes five development rights to develop a certain amount of commercial property, they can be purchased whether they are residential rights or not. They're just worth five times as much as residential rights but you have to buy five times as much. In that way, I think you would relieve some of the difficulties, particularly with preserving different sorts of districts. One person lives in an historical preservation district and another one lives in an open-space preservation district, I think you would get into some very difficult calculations in trying to weight existing zoning against potential development in developable area against the different kinds of things being preserved in the different districts.

I have not tried to work out the calculation in this because it does get very difficult for me. But I would think if people were just given a numerical number of rights and the weighting was done on the different usages that could be made of them in the developable area that it would not make any difference what kind of rights a person purchased. If he needs five for the commercial lot, he buys five; if he needs one for a development right, he buys one. The total number of rights issued should equal the total number of rights needed to develop the area for all the different usages.

And the process spelled out in Section 20 could be used to maintain the proper balance between the number of rights needed for commercial, industrial and residential development.

In Section 22 there is a provision that certificates of development rights allocated to farmland should be taxed as in the previous section.

As I read that, that would mean that as soon as they were awarded to farmland they would be taxed immediately which would raise farmland property tax assessments to market value. First of all, I think that would violate the Farmland Assessment Amendment and it would also mean that you couldn't adopt --

ASSEMBLYMAN DOYLE: We're aware of the problems with that section that you are referring to and changes will be made.

MR. KOLESAR: O.K. Then, finally, in sections 25 and 26 the municipality is permitted to buy and hold and trade development rights in the best interest of the municipality.

That could produce some bad results if a municipality bought them up and just started to use them as an exclusionary device to keep out development. I would suggest that

it might be better to specify a public purpose for the purchase of development rights rather than just something for the best interest, which can be construed in a lot of different ways.

Those are the specific questions I have about the legislation. Overall, reading it from the standpoint of being a Chairman of a local planning board trying to put it into operation, I must say that the calculation and award of the rights is a problem. I don't know exactly how we would go about that. I don't even know in what terms we would express a right. Would it be expressed in residential units or bedrooms or square footage, or would it be in units of one, or would it be in percentages with a lot of zeros after the decimal point of the total of the area? That's kind of unfair and it sounds almost as if each municipality would be allowed to invent its own kind of method which could be pretty confusing in the county court house.

ASSEMBLYMAN DOYLE: We probably should have a specimen as a part of the bill, if the bill is going to get any further, which would indicate exactly what form this should take so that there is a standard form.

MR. KOLESAR: Yes, something that would tell you they shall be expressed in such terms. I would assume that if the legislation passed one of the State agencies might draw up a model ordinance, or something like that. But that might be well down the road and also doesn't have to be followed.

ASSEMBLYMAN DOYLE: In the interest of time, we did set a fifteen minute time limit and we've been going with you 25 minutes, I'm going to ask some questions.

As the Chairman of a local planning board, amongst your other credits, would you think that this setup of

the Commission is fair or should the Commission not be set up but just let the planning board set up a TDR ordinance?

MR. KOLESAR: You mean eliminate the Commission and just have the planning board do it?

ASSEMBLYMAN DOYLE: Yes.

MR. KOLESAR: Well, in my own case I don't think it would be much different. I think it would be almost the same people. Our planning board is constituted an awful lot like this commission you specify here.

ASSEMBLYMAN DOYLE: You don't have too many citizens in Chesterfield, right?

MR. KOLESAR: No, we don't have that many, and I think we have more members of the Planning Board than we have citizens interested in planning. And when you go around in a small town to pick out people, it's a short list and you wind up with pretty much the same people. And our Board, the composition between the Commission and the Planning Board would not be much different.

I don't think that's particularly a crucial issue. If you just specify the planning board, I don't think it would harm the legislation.

ASSEMBLYMAN DOYLE: You mentioned that the bill should be passed because it's basically permissive and those towns that didn't want to adopt it didn't have to adopt it, but it would be there for the Chesterfields in the State. As a former Statewide reporter, I believe --

MR. KOLESAR: Yes.

ASSEMBLYMAN DOYLE: And having statewide connections would you think that many towns would adopt this kind of ordinance?

MR. KOLESAR: I think there are a fair number that would want to adopt it. The ordinance we're working

on has drawn interest from at least ten other municipalities and --

ASSEMBLYMAN DOYLE: Mostly rural?

MR. KOLESAR: Well, we're dealing specifically with farmland so it is towns that are interested in farmland that have contacted us. And I would think that once our ordinance is adopted there probably will be others that will pick it up, and unless it collapses or fails entirely it will be adopted.

ASSEMBLYMAN DOYLE: You mentioned the word "lucrative" site, your objection was mostly to the word "lucrative", wasn't it?

MR. KOLESAR: Yes, sir.

ASSEMBLYMAN DOYLE: But the concept that the transfer zone should be that which was most likely to be acceptable for higher destinies than otherwise most developable from an economic standpoint should be in the transfer zone, won't you agree with that?

MR. KOLESAR: Well, one of the problems I have with the legislation is there is nothing in there to say exactly how you pick the transfer zone except that it be economically lucrative. I should think that the transfer zone should be drawn as broadly as possible in a municipality, that you should not - I would not like to see some very specific small area picked as a transfer zone and then rights allocated on that basis and, for instance, a large portion of the municipality left out of both the preservation zone and the transfer zone because one of the chief advantages of TDR is that it provides for averaging of the potential profits from development, in terms of escalation in land value, and the narrower that development area is drawn and the narrower that preservation area is drawn the less averaging effect you have and you wind up with something

like the present zoning system in which a small area is designated for a very high use and someone gets a very large windfall.

ASSEMBLYMAN DOYLE: Or a wipeout.

MR. KOLESAR: Or a wipeout. And I think that's throwing away one of the major advantages of TDR. I would think, for instance, that a municipality that was saving farmland, that all the land in the rest of the municipality that could be developed should be the transfer area. That's our intention. We never considered, for instance, narrowing the developable area to some selected. We simply took all the vacant land in the township and put it in a developable area.

ASSEMBLYMAN DOYLE: It has been suggested, earlier today, while TDR is a good concept as drawn in this bill it could conceivably be another weapon in an arsenal of exclusionary zoning for a municipality. Would you think that?

MR. KOLESAR: Only if that provision for a municipality to buy the rights and retire them were in and construed by courts - I'm not sure that a court would construe even that phrase to allow a township to buy them for exclusionary purposes. I would think that you would get a very strong court case to say they were buying them to keep people out. But actually the experience with the TDR concept that we've had is the exact opposite. It lends itself to flexible building requirements. For instance, in our ordinance we have provisions for the use of these development rights to build garden apartments and town houses in a municipality that has no such provision now. And it gives builders flexibility to build in clustering design which you don't normally have.

ASSEMBLYMAN DOYLE: I will be interested in seeing

whether in a half dozen years, if you do adopt it, there is housing going on in Chesterfield of a multi-dwelling nature.

MR. KOLESAR: We expect it in one year.

ASSEMBLYMAN DOYLE: One year? In any event, it will be interesting.

We have a duty to maintain open spaces and many of the speakers have addressed themselves to that fact and how this bill helps that. I think we have a corresponding economic and social need to maintain decent housing and to employ people in the construction market that that building would do. Do you think this bill does enough for that aim of society?

MR. KOLESAR: Which one, now, the building or the open space areas.

ASSEMBLYMAN DOYLE: I'm satisfied it does with the open space, I've heard enough on that; I'm talking about the other thrust.

MR. KOLESAR: My opinion is that TDR is the best mechanism I've seen come along that permits sensible development. First of all, it doesn't cancel any development out, as for instance the Blueprint Commission plan would have by buying and retiring rights, and because, as I said, you necessarily have to permit flexibility. If you allow increased density, as part of the TDR statute you cannot pass zoning restrictions as ironclad as we have nowadays and you necessarily write an ordinance with a lot of flexibility which is very good for people who want to develop housing and commercial facilities.

ASSEMBLYMAN DOYLE: Thank you very much, Mr. Kolesar.

Mr. Furguson. We are now 54 minutes behind schedule.

MR. FURGUSON: Then I will let Mr. Goldberg speak.

ASSEMBLYMAN DOYLE: Mr. Goldberg.

E D W A R D L. G O L D B E R G: Thank you, Mr. Chairman:

I am Edward L. Goldberg, a licensed real estate broker with offices in Trenton and Pitman.

I appear before you today as First Vice-President of the New Jersey Association of Realtors---a trade association with a membership of over 13,000 real estate licensees in all 21 counties.

The New Jersey Association of Realtors appreciates the opportunity of appearing before you today to discuss Assembly Bill 3192.

A-3192, designated the "Municipal Development Rights Act", is the first attempt in New Jersey to reduce in bill form a land use program that heretofore has only been discussed on an academic level.

Unfortunately, because of the revolutionary departure from acceptable land use practices it is not possible at this time for the N.J.A.R. to present a comprehensive statement incorporating a legal point of view. The Association's General Counsel, a firm with considerable experience in the zoning and planning field, has indicated it would need at least a month to properly present an objective overview of A-3192.

As a layman with considerable experience in urban, suburban, and rural

real estate I have reviewed A-3192 and my immediate reaction to the bill is "it is a planner's delight and a property owner's nightmare".

The concept upon which the "Municipal Development Rights Act" is based may be valid in a vacuum, however, N.J.A.R. questions the practical application in New Jersey, now or in the foreseeable future. N.J.A.R. feels the statement contained in Section Two of the bill, wherein New Jersey's size, population density and other unique features are spelled out, clearly indicates our state can ill afford more theoretical experimentation.

The statement made in Section Two that "the period is long past when uncontrolled, unplanned, unregulated and unrelated physical development could be undertaken without regard for the aforesaid physical fact", indicates the sponsor is not in touch with current practice in New Jersey.

Anyone who has tried to create a building project of any kind in

New Jersey in the past five years will tell you the above statement is not fact but merely legislative rhetoric.

Real estate development in New Jersey at the present time is over-regulated to the point where it is becoming economically unfeasible to build.

Additional regulations in the so-called "public interest" are unwarranted and counter-productive.

In reality, New Jersey should step back and look at the myriad of rules, regulations and obstructions that government has created which fosters concern about our future.

The wide range of authority granted to municipalities under Section Two of the bill should be carefully scrutinized.

Frankly, the municipality would have such latitude, that a small clique could virtually impose their personal dictates on the community.

The "haves" against the "have-nots" will be the bottom line if A-3192 becomes law.

While it is not N.J.A.R.'s intention at this time to review the bill section by section, I would like to point out one glaring problem that is apparent in reading Section eight.

In this section, the Commission is given at least six areas that must be studied. However, there are no requirements that the results of the studies be made public, rather in Section nine, the Commission is merely obligated to "formulate its recommendations and prepare a report."

One of the problems we now face in New Jersey is the lack of regional concern in current zoning and planning practices. A-3192 does not correct this problem. Rather it compounds the problem.

We would ask the sponsor to give serious consideration to the shift in tax burden which will result if a municipality adopts the "Development Rights" program.

In many areas of the state a serious tax shift will amount to confiscation of real property, particularly for those living

on low or fixed incomes.

Forgetting future requirements for the time being, there is no incentive in A- 3192, nor in New Jersey's existing zoning laws which encourages the necessary residential development that our current population needs. To embark on a new program that will not solve the dilemma of the past is folly.

Let's be honest, the majority of our communities have used the power to zone as a tool to limit or even restrict school age children.

A-3192 only perpetuates this charade.

The New Jersey Association of Realtors feels strongly that the economic and social problems created by the passage of A-3192, will be monumental.

N.J.A.R. is concerned over New Jersey's economic future, which looks gloomy under A-3192.

Let's be realistic for a moment. During the 1974-75 Legislative

Session, a number of important land use bills have been introduced, all of which are receiving serious consideration.

The end result, no matter how well meaning the sponsors' intentions are, is to cloud and confuse the solution to New Jersey's long range land use problems.

The present administration, thru an aggressive campaign to attract new industry, is attempting to cope with our high unemployment rate, while at the same time we are discussing a bill which has the potential of labeling New Jersey as "OFF LIMITS" to industry and the housing needs of its residents.

A-3192 will not work in New Jersey.

N.J.A.R. would urge the Assembly Municipal Government Committee to declare a moratorium on all land use bills until such time as a Legislative Study Committee can be created whereby all interested groups could be represented. The purpose of the study should be the creation of a master plan for our State's land resources, taking

into consideration the economic and social needs of our residents. Presently, everyone from the Department of Agriculture to the newest member of a local zoning board thinks they have a solution for the portion of the problem visible to them. All of these lack the foresight and overview necessary if New Jersey is to survive as the most urban state in the nation, still a desirable place to live, work, and play.

THANK YOU.

ASSEMBLYMAN DOYLE: You are the first witness that we've had that has not only rejected some or most of the language behind this bill but also the concept of it. With that thought in mind, let me suggest some questions that you might want to respond to.

Do you think there is any duty upon the part of the municipalities and the counties and regions or of this State to preserve some open land?

MR. GOLDBERG: I feel that this is being done through many of the other legislative matters which are presently law.

ASSEMBLYMAN DOYLE: I would mean directly as opposed to the indirect results of Wetlands, CAFRA, local moritoriums and ordinances.

MR. GOLDBERG: If it's done on a statewide basis, I

would think we might have some situation where you could do this, but when you're doing it with 567 municipalities who may, if they wish, go through with the program, which may or may not work, it would appear to me that while the premise of preserving more open spaces along with the other programs may possibly be needed. But we're saying here, let's get everything together, let's see the big picture, let's see the broad picture. What's the federal land use program going to be, because there are federal legislative programs being worked on. How will that affect New Jersey? What will that do to us? What are all these programs? Having more and more just individual programs without tying everything together, I think creates a problem.

ASSEMBLYMAN DOYLE: To agree that we can preserve open lands on a statewide basis, isn't that an introduction to statewide zoning?

MR. GOLDBERG: Not particularly, if you're allowing each community to do as they feel, not saying that they must but they may, you're not saying to each community you must or you shall, you're saying may.

ASSEMBLYMAN DOYLE: Do you think this bill would be an exclusionary instrument of a municipality?

MR. GOLDBERG: It could be used as such, it could be.

ASSEMBLYMAN DOYLE: You don't think it's possible it could be used to encourage building?

MR. GOLDBERG: Depending on the municipality and their attitude as to whether they want to. It again goes to whether they feel they should or they shouldn't. There are those municipalities who would prefer remaining small and open raw land and there are those municipalities who look for developing areas and would love to develop.

ASSEMBLYMAN DOYLE: This bill, as I understand it, would allow municipalities to preserve some of its open land by allowing greater development than otherwise would take place in other areas; to the degree that they're not condemning or zoning in a bad fashion, doesn't that allow at least some building to take place where they would allow higher densities than otherwise would have been allowed?

MR. GOLDBERG: Again, you would have to know the community and what was required in the community, what would have to be done with the community.

ASSEMBLYMAN DOYLE: In the last several answers you indicated you would have to look at the municipalities. Proponents of this bill indicate that that's why they're putting the bill in because some municipalities might want it and others might not want it and others it might not be applicable to and others might use it wrongly. To the degree that there are some municipalities, and we've got a lot of them, probably too many of them,- that there might be some of them that might want to use it and may if they use it rightly, doesn't it at least do that much?

I know Mr. Furguson is also from the Realtors and he told me before that perhaps some of the questions he might want to respond to after your statement and I think this might be one.

MR. FURGUSON: Assemblyman, municipalities that have these good intentions can carry them out right now under existing State law. They're not doing it. I don't see how a new concept is going to change the basic problem, and the basic problem is real estate property taxes in New Jersey. And there is nothing in this bill that's directed at the real problem. I can't see that a municipality is going to change its philosophical attitude on land use because of a new piece of legislation

ASSEMBLYMAN DOYLE: Well, from all the testimony we've had, current land use legislation does not allow what this bill would allow. From all the testimony we've had, it would indicate that there are vacuums in land use planning that should be filled so as to allow open spaces, so as to encourage building and to do it in a way that doesn't mean condemnation. That is what the proponents would suggest, in summary fashion, this bill would do and the hole that it would fill.

MR. FURGUSON: It's good theory and at this point I would say we'll be back with further study of our own but I think it's right now just theoretical.

ASSEMBLYMAN DOYLE: We'll be having workshop sessions and when your Counsel, whom I know to be competent in the area comes back I would hope he will come back to our able staff and we will distill and digest your thoughts. Thank you very much.

MR. FURGUSON: Thank you.

ASSEMBLYMAN DOYLE: Gerald Haughey.

G E R A L D E. H A U G H E Y: Gentlemen, I have prepared a statement which I have submitted. It is a model of clarity and brevity, and I would like to ask that somebody read it. (See p. 9-X)

I feel a little bit like a loving parent who has to discipline a child. This is the most historic piece of legislation in my memory that has come along in New Jersey. There's a lot wrong with it. I think if I wanted to make one point in the time I'm given here, that is the point. The point is that you have before you legislation which can change the future of American landscape for the better.

I am not here to quarrel with the last speaker because I agree with much of what he said. A lot of it is pure piffle but there's a nugget of truth. And one

of the terrible disadvantages of this bill, as it's now written, is that it is as vulnerable as he suggests, in my view, from an exclusion standpoint.

I should begin by commenting that I have been privileged to be asked to comment and to be a speaker in a lot of land use seminars in this State and others because I've been involved in what many people believe to be a revolutionary attempt at a new land planning concept in Medford, New Jersey, and because I also am a land use lawyer, representing, among other people, brokers and developers.

I carry exclusionary cases to the courts and I think I've gotten something of the overview that the last speaker made reference to.

My first criticism of this bill that I admire so much is that insofar as it does not suggest or require a commitment to a full market housing responsibility on the part of the municipality adopting it, it will fall. It will fall because as such it is, as Professor Krasnowicki at Penn has commented, a mere image of a tax on the incoming citizen. He's paying for the open space.

On the other hand, if a municipality is committed to a growth management system that is adjusted through a realistic regional housing responsibility, which is relatively easy to do, by the way, - I think we know how to do it - then, in that event, a landowner who hires me or some other Attorney to go to court to claim that he should get more density - density is the name of the game, as you well know - will be met with an obvious response and that response is that insofar as he's trying to get density, once we have committed ourselves to a 100% of the fair share of market responsibility in the area. If he wants another unit, he's taking it away from somebody else.

So the argument that was always addressed to the governments in the history of - the sorry history of unreliability in our planning system now can be addressed to the landowner who chooses to attack it on an exclusionary basis.

That is my first criticism and this and other criticisms I believe can be corrected - rather, defects can be corrected rather easily.

Secondly, I'm not sure whether we need to manditorily prohibit land use within the preserved district. It seems to me that what we're starting out to do is not to create a right but to recognize an existing right. And insofar as we are doing that, if we make the preservation of the land mandatory, we're doing something superfluous. It seems to me that if the right exists and we're going to pay for it, we need not make it mandatory.

Third, I do not believe that it is necessary to include ecologically critical areas, such as flood plains, within the preserved zone for purposes of this regulation because the Supreme Court of this State recently indicated it would follow the historic case of Just vs. Marionette in Wisconsin, in recognizing the validity of land use regulations in ecologically critical areas regardless of the economic impact on the land in question.

Also, insofar as flood plain is concerned and other critical areas are concerned, I would suggest that the use of this kind of legislation, as well as the other kind of legislation we worked on in Medford, for example, would incorporate an encouragement of flexibility of design that would permit design around the ecologically critical areas.

Another comment that I have made in this brief paper is that the determination of the preserved land should be done by a natural resource inventory which could be done for the whole State at the cost of less than a tenth of a mile of interstate highway. If it can't be done that inexpensively by the State, which I think should do it and provide it to the municipalities, it can certainly be done by the municipalities themselves at varying costs.

I, like John Kolesar, am troubled by the language "most lucrative site". That's the seventh comment I've made on this. You asked a question about the selection of the transfer zone and implicit in the question which I think was somewhat rhetorical was your answer, which I think I agree with, if this is it. I think that economic suitability is something definitely to be considered and that is reflected in market values, but I also have found, we have found in studying it and observing it that economic suitability generally where there's any kind of realistic zoning system tends to follow ecological suitability and sociological suitability as well.

I also have suggested in the sixth comment made that an incentive provision might be - of what I call Section 14 (d), and I didn't have the printed version before me at the time -- an incentive provision might be revised to encourage voluntary development rights transfers by the allocation to the farmer - I mention specifically, a modest increase in transferable rights over those existing and likely to be realized without a transfer system.

I don't understand why the bill prohibits subdivision of lands within the preserved district if they are being subdivided for agricultural or other open space purposes.

And, finally, I suggested that a fundamental weakness lies in the allocation system in its reliance upon existing zoning. And I have a feeling from your comments that you might agree. I would prefer to give a great deal of weight to market value. Existing zoning is absolutely nonsense. It's the core of the failure of our planning system and in many cases it distorts values artifically and unfairly. I would consider the existing zoning system; I would prefer to see it revised in each municipality that adopts this. I don't think it's absolutely necessary but I certainly would not make it the fulcrum or the cornerstone of any allocation system. I would suggest that market value is a very important criteria and that ecological suitability, which generally will follow market value anyway, is something else that ought to be looked at. And, finally, the existing zoning.

Someone just suggested - this is the last couple of comments I have - I am trying to save your time and mine -- somebody suggested that municipalities may buy development rights to keep people out. And that, to me, is the easiest law case that I could ever be hired to take before the Superior Court of the State of New Jersey on a prerogative writ because it will have this bank of development rights that it's sitting there holding. I can't think of an easier target for injunctive relief.

ASSEMBLYMAN DOYLE: All the zoning cases in the world are not that easy, unfortunately.

MR. HAUGHEY: I'm afraid that's true. But that would be a direct and clear attack, I think.

Again, I do agree with the comment that this ought to be based on a market commitment, a regional fair share of market commitment, but then all planning and zoning should be and will have to be anyway, shortly, if the courts are followed.

ASSEMBLYMAN DOYLE: Shortly might be within a week.

MR. HAUGHEY: That's right. It might be any minute.

The last speaker suggested that New Jersey should step back and look at its existing land use rules. I agree with them that they badly need help, but I also think New Jersey should step back and look at New Jersey. I think what was described as a property owner's nightmare in this bill is only a reflection of a reaction to an attempt to deal with what is in fact an esthetic, sociological and economic nightmare.

I suggested finally in my brief paper that a non-mandatory TDR system could be installed immediately to see whether it would work or not, that a housing demand analysis is a key ingredient, that a natural resource inventory is fundamental to the use of the TDR system. And, again, that the strict regulation of environmentally critical areas can be accomplished right now. The case, incidentally, that I mentioned was the AMG Associates case that was recently decided. The opinion was written by Justice Hall and there was a footnote referring to that question of law.

That's my comment. I would again say, if I might just take one more moment, that in dealing with this I would strongly urge that the Committee bear in mind the revolutionary nature of the legislation and how badly it is needed because it at last comes to grip with what has been one of the two fundamental weaknesses in the whole planning system in this country, and that is its failure to deal with the taking issue as it's described by the legal authorities on the subject. It does deal with it directly and it attempts to follow the American tradition by compensating the property owner.

ASSEMBLYMAN DOYLE: What is the other failure?

MR. HAUGHEY: The exclusionary aspect.

I think there are two failures - both constitutional. First is the taking issue, which has been the fundamental failure. It's so long before we thought of exclusion. Secondly, the exclusion area question.

My own personal thesis is that good planning and good growth can be accomplished by strict regulation and that the TDR system is the way to do it. I don't think it can be done without it. And most importantly, I'll say it again, until we come to grips with those two constitutional issues, all of the planning and zoning that we attempt to do is a waste of time. And it's no wonder that the builders hate the planning boards, the planning boards hate the builders, and everybody in the public hates both of them.

ASSEMBLYMAN DOYLE: How do you preserve the integrity of the preservation zone if you do it on a voluntary basis?

MR. HAUGHEY: I would hope that if the system works in identifying the preservation zone - take for example agricultural districts -- I don't know whether we're going to preserve integrity. That's a new word in this field, integrity. I do know that we are attempting to compensate the farmer. If we are really going to do that, he is going to have an incentive to sell us his development rights, is he not? We're going to pay him money. If we're not paying him enough money, have we really recognized his right?

ASSEMBLYMAN DOYLE: And if that development right is not worth enough, not because of the municipality's doing, but the pressure of the market has not raised the price of that certificate, then what happens,other than having what you want to preserve developed and, if it is developed, then you have accomplished nothing.

MR. HAUGHEY: I would hope that the incentive system that I suggested later in this little paper would accomplish that. I would really probably compensate the farmer a little bit more than perhaps 20% - to use a number - more than his development rights are actually worth at any level of the market.

I think the direct answer to your question is that until there is a market, until there is market pressure, there isn't much of a development rate, is there?

ASSEMBLYMAN DOYLE: No, there isn't.

You mentioned about regional federal problems, constitutional problems. How do we respond to those by what's merely a municipal tool, that is to be administered on a municipal level?

MR. HAUGHEY: I don't think - I quarrel with the question, if I may, and admit doing it.

ASSEMBLYMAN DOYLE: Sure.

MR. HAUGHEY: I think that you're raising the regionalism. I think any planning system which has fundamental failures, the failures that you and I have just discussed, is going to fall, it's going to falter whether it's at the local level, the county level, the regional level, the watershed level, the state level or the federal level. Any planning system which does come to grips directly with those two constitutional flaws is going to succeed.

Now, it seems to me there are two or three regional concerns of paramount importance. They are ecological concerns. They are housing concerns. Those are the two that come to mind immediately. Transportation and other "regional" matters do tend to resolve themselves one way or another, I think. But certainly housing and ecological impact are of regional concern. My belief is

that local governing bodies and local planning boards are much more capable of taking into consideration matters of regional importance and even federal importance, if you want to put it that way, national importance, than we've given them credit for. What we've never done is provide them with the information and knowledge they need in order to do that. Ecological facts are regional in nature and a municipality can recognize those facts and may be compelled to under the law. Social housing responsibilities are regional facts and municipalities are being compelled to recognize them.

Now, I would suggest that a planning system setting out to recognize those responsibilities can operate as well at the municipal level as at any other level. I would also suggest that it's not indefensible to suggest that a municipality might have a right to an identity, to a character. And having that right to identity and character, I don't think gives it any license to keep people out. I think it does give it a license to use sane and rational land use controls. But I don't know whether anybody has raised yet a legitimate argument in favor of regionalism or regionalization of our land use controls that faces what the fundamental defects of the planning system have been.

ASSEMBLYMAN DOYLE: Not by way of question, at some time I would like you to explain to the residents of Bedminster Township how he maintains his identity by letting people in. But thank you for your time.

MR. HAUGHEY: When I'm invited, I'll be delighted to.

ASSEMBLYMAN DOYLE: Thank you very much.

MR. HAUGHEY: Thank you very much. I appreciate the opportunity.

ASSEMBLYMAN DOYLE: Our next witness is Professor Mark E. Singley.

M A R K E. S I N G L E Y: I have prepared a statement that I would like to read into the record. I am here wearing two hats, so to speak. First, I am a Professor of Biological and Agricultural Engineering at Rutgers University, and also I would like to represent experience I have had as a former member and chairman of the Planning Board of Hillsborough Township in Somerset County.

I want to thank the Committee for giving me the opportunity to testify concerning the importance of this legislation. I believe it is one of the most important additions to the existing legislation in the field of community planning. I say this because there has always been a serious defect in the original enabling legislation for planning and zoning. It offers no guidance regarding the inclusion of extensive land uses in community planning. These uses are those that if zoned for on the zoning map would constitute a taking of value unless the owners were compensated by the community for value lost. This legislation enables extensive uses to be included in zoning and those land owners zoned for the extensive uses compensated through value gained in another part of the community resulting from the transfer of the vacated development potential. An important attribute is that the transaction involved is done at

the timing and convenience of those owners who wish to buy development rights and those who wish to sell. Nothing is forced and the community is not involved in the transaction. And that is a very important point, because anything the community does in planning and zoning is under great suspicion by the residents today. In addition, the community can begin with a modest program and enlarge it as development pressures change. Land owners outside the immediate pressure areas need not be involved. There is a very important point there. There are many land owners outside these areas that we are talking about that have no development potential and should not be included in the beginning, and therefore they would not be involved. You don't need to enlarge the community to the point where you involve everybody.

In reading the ordinance, I have concluded that there is no reversion clause included for land placed in the preserved zone. I would support that feature, but point out that at some future time undoubtedly some correction will be necessary. These, in my estimation, are the most important points that have been learned through experience. I want to emphasize that. This has been learned by experience.

My background in community planning has been as a planning board member and chairman of the Hillsborough Township Planning Board, Somerset County. That particular board has tried to be innovative in solving some of the pressing problems in

planning, particularly regarding the inclusion of open space. It adopted the first Cluster Zone to try and accumulate modest amounts of open space for use by the citizens who lived in the area so developed. It adopted one of the earliest P.U.D. ordinances to attempt to develop a community center in a rural township using the allowable higher densities offset by the inclusion of recreational and open space land for use by the citizens who lived in the area so developed.

It also attempted to adopt, to my knowledge, the first and only development rights program in the State but failed. The program was designed to include 5000 acres of farmland in the community design by purchasing the development rights from the farm owners. This would have been beneficial to all other residents of the community. The Green Acres Legislation had a provision for less than fee title purchase of land and the Federal Government had a program offering matching funds. Even though the two granting agencies agreed to the program, we were unable to sell it to the farmers. We agreed that if we didn't have support from the farmers, we would not impose the program on them. We learned as a result of that experience that the program was defective and premature. We didn't have answers to

some of the hard questions that only a landowning participant could raise. They pointed out that we had no reversion clause in the program. They opposed the simultaneous purchase of the development rights for the whole acreage which would have had to be done since it was grant money. This opposition stemmed largely from the anticipated Federal Income Tax payment that would have had to be made on the lump sum payment. They also objected to their loss of right to speculate on their own land and sell at their own timing. We were not entirely prepared to determine equitable values for the rights to be purchased.

The Municipal Development Rights Act should largely satisfy all of these objections. Unlike our experience, it is not a premature piece of legislation. Through thorough study over several years by very competent people, through testing using an entertaining T.D.R. program, and through a comprehensive demonstration program the details have been examined and the program assembled. It is a most ingeneous solution to the extensive land use problem for those communities where development potential flows out to remote corners. Without it, development will continue to know no bounds, farmland will disappear or at the least its value destroyed by proximity to random development. Like farmland, other natural assets and man made improvements will be lost through continued unguided development without passage of this ordinance.

I have one recommendation I would like to make from an agricultural standpoint. That recommendation deals with letter "o" under the definitions in the proposed bill. Where it gives the definition of "farmland," I would like to see included "Class IV land."

In other words, to that phrase that says, "undeveloped land included in the categories of Class I, Class II, and Class III land," I would like added, "and Class IV land where found in conjunction with these three classes." That is important, because much of the grass land in this state lies on Class IV land.

Now, one would not suggest that a viable farm would exist on only Class IV land, but where it does exist in conjunction with the better classes of land, it should be included. Without that, some municipalities are going to interpret it that only Class I, II or III land can be included in this zone.

ASSEMBLYMAN DOYLE: Professor, you have touched on one point that I do not think any other witness has touched on, and that is, in your experience in Hillsborough, farmers were against this proposed bill because there is a question of a Federal income tax payment?

MR. SINGLEY: Yes, sir, and that is very important.

ASSEMBLYMAN DOYLE: There are a number of questions of a Federal nature, such as security, tax consequences and the like that I think are genuine problems. We are not able to answer those questions because we are not the Federal government, and I don't know how to respond to those questions, but you did put your finger on a problem that no one else has addressed themselves to.

MR. SINGLEY: You recognize that a farmer who sells his farm for fee value can, within one year, reinvest that land in another farm in another location of the country. Now, if he is subjected to different treatment regarding his development rights, he has lost some of that attribute, and one has to be very careful with it.

Now, the reason that I say this program should largely satisfy that is that the farmer under this program could distribute his development rights over a long period of time and take whatever tax advantage would accrue to him as a result of that.

Now, if he had to do it in a lump sum, I don't think you would sell it to any farmer in the State. He could not possibly afford to do it. It would be a loss that would be irreparable.

ASSEMBLYMAN DOYLE: Thank you very much. Mr. Carl Hintz?

C A R L H I N T Z: I would like to thank the committee for inviting me here today. First of all, my name is Carl Hintz. As you know, I am a licensed professional planner in the State of New Jersey. I am employed by the South Brunswick Township as the Director of Planning and Development.

First of all, I would like to apologize to the committee for not having a written statement here for you. As you are probably aware, from the testimony of Mr. Chavooshian and from the testimony of Dr. George Nieswand, approximately one year ago the South Brunswick Planning Board and the Township Committee both agreed to work with Mr. Budd Chavooshian on the Transfer of Development Rights Concept.

This agreement will result ultimately in the creation of a model TDR ordinance with public hearings for more complete input. Already there have been questionnaires

sent out to people requesting their opinion, including farmers, and they are almost completely in favor of it.

The South Brunswick officials have long been interested in the TDR concept, prior to Mr. Chavooshian coming and asking for our cooperation, since it has been evident for some time that no matter how good our master plan and our zoning ordinance can be, they cannot provide the measures to preserve all the important ecologically sensitive areas, including prime agricultural land. And they cannot acquire all these areas through out-right purchase, fee simple, or through the purchase of easements.

I feel that the Bill 3192 is a necessary one to give municipalities an additional needed tool to solve its planning and growth problems. Flood plain ordinances and tree removal ordinances, both of which we have in South Brunswick, and also sedimentation and soil control ordinances, zoning and subdivision ordinances, et cetera, cannot insure preservation to the degree that would be possible through the TDR enabling legislation.

TDR is just, because it provides for the preservation of ecologically sensitive characteristics which are vital to any growth that may not only occur in the municipality they are enacted in, but in a regional context as well. The acquifer especially is important to note in that regard. At the same time it provides for growth that would have occurred in a preserved area by allocating those housing units to another area, and hopefully there will be some municipalities that will try to, as we are hoping to, utilize the technique with industrial land.

The bill refers to sound planning principles on which to base the transfer districts and the preserved

districts. This should be emphasized, because the unsound zoning or planning will create great problems with TDR enactment just as it does now. I think other speakers have brought out the need for updated or sound zoning ordinances as a starter.

The key elements of the sound planning should be a natural resource inventory or ecologically sensitive characteristics analysis, or whatever you want to call it, an inventory of facilities and a determination of housing needs and goals.

It should be emphasized that the bill will not provide all the answers to all the complex issues of planning. It provides one additional tool. Since it is permissive and not mandatory, it will provide many municipalities with the mechanism they would like to use but are hesitant to proceed with in the absence of any state enabling legislation.

You have had testimony today from the townships of South Brunswick as well as Plainsboro, Hillsborough, Chesterfield, et cetera, who have all been considering modified forms of this concept. I am sure, if there was enough time given to all the municipalities and if they were aware of this hearing, there would be many others that would be willing to use the concept.

Another point to emphasize is that a viable market is part of A-3192, and required of a municipality to apply when reviewing and adopting the TDR. Most builders are looking to save money in construction by building at higher densities, so that they can benefit from economies of scale. So immediately the transfer areas where you are putting the units for the higher densities become a boon to the developers, since they can now achieve higher densities that they would like to

without going through the various processes and all that that implies under typical planning and zoning games.

I have also found in my experience and studies that the land factor is the cheapest part of the development cost to the builder. The street improvements and the utilities can run as high as $50 to $60 per front foot, meaning that on one acre of land, it could be as high as $12,000 to develop that one acre. That is not the raw land cost. The raw land cost could be $6,000 on top of that for that one acre. So you see it's the improvement cost that is expensive, obviously.

If this were a transfer area that we might be considering, we would cut the cost in half by building two houses, let's say, at $6,000, if we had a density of two under the transfer. The development right purchase does not carry with it the improvement cost of the land, only the raw cost of the land. If you are purchasing a transfer right, you are purchasing it from an ecologically sensitive area or you are purchasing it from an agricultural district. You are purchasing it from areas that have no utilities at all, no street improvements, so all you are doing when you are buying that development right from that farmer or from that land owner of that sensitive area is transferring the raw land price, not the improvement cost, and there is the key, I think.

There are minor flaws or questions that come to my mind as I go through and examine A-3192, but I don't want to bore you or take up any more time.

I do wish to state that I would be willing to sit down with the committee and your staff and discuss some of these details further, as I am able to from our experience in South Brunswick.

Again, I thank you for the opportunity to be able to speak here. I again beg your indulgence for not submitting a written statement to you.

ASSEMBLYMAN DOYLE: Thank you, very much. The South Brunswick experience is going to have to be indicative of what is going to happen, because it is the only one that has probably gone as far as it has in this State. To the degree that it has had public awareness, does the public know what is going on?

MR. HINTZ: Yes, they do. Since the beginning -- well, first of all, we enacted a new master plan and a new zoning ordinance last year based upon the so-called sound planning principles that you are supposed to come up with. One of the things that several of the property owners raised at some of those hearings was, why can't we use something such as the TDR concept? People are aware of it. It has been in the papers now for as long as Mr. Chavooshian has been with us.

ASSEMBLYMAN DOYLE: How many people are in South Brunswick?

MR. HINTZ: According to the 1970 Census, there are 14,058, but my estimates now put it around 16,500.

ASSEMBLYMAN DOYLE: Is it served by a daily newspaper, its own?

MR. HINTZ: It is served by the New Brunswick Home News, and it is also served by a weekly, which is its own.

ASSEMBLYMAN DOYLE: Thank you very much.

MR. HINTZ: I have just one last statement. I found that page 13, section 26 has been referred to, and fears have been raised about the exclusionary methods that a municipality can use in acquiring these rights.

I think that there needs to be some language in there - and I think this is very important - that it is in the best interest of the municipality to identify for some reasons the acquisition of those rights to be used towards the provision of low and moderate income housing or towards the provision of housing, et cetera, something such as that. One of the things that we have been working on - and this is separate from our work with TDR - in a grant we have from the Department of Community Affairs is to see how we can implement low and moderate income housing within PUD areas. We have enacted our specific areas for PUD.

One of the things that has come up as a result of our studying this is that in order to achieve that low and moderate income housing within the PUD we need a mechanism or some way of giving that developer of that PUD area a bonus or something that will get him to build that low and moderate income housing in the absence of the necessary financing of the State or in the almost total absence of financing from the Federal government, without going to tax abatement or such things like that which we found are still not going to put the low and moderate income housing on the ground.

If you use those rights, or if the municipality were to acquire them, and they could use those rights to give to developers and say, "Okay, if you build low and moderate income housing, we will give you the rights that we have accumulated." Maybe we can do that. I think that is important. If we can use them in that way, it is an excellent tool.

ASSEMBLYMAN DOYLE: Thank you very much. We are going to give the staff and the reporters a recess. We will be back in ten minutes.

ASSEMBLYMAN DOYLE: We will get started now.

Mr. Steen, please.

C H E S T E R A. S T E E N: I won't belabor you with a lot of time-consuming discussion.

I have presented to you a resolution.

ASSEMBLYMAN DOYLE: I have always known Township Clerks to be very efficient and not time-consuming.

MR. STEEN: I am representing Mayor Simonson of Plainsboro Township. We would just like to place in the record the resolution we have passed.

Our main concern here is, we have a rural community. We have been under the planning of Middlesex County considered to be the low density area of the county, and we concur in that. But we are running into economic pressures from people who want to take a slice of this economic pie, if you will, and the land has become quite valuable for developers. We have presently a developer who is interested in the concept of TDR. And I was amazed to hear the realtors speak so positively against it. Our experience has not been that.

We would like to go on record that we would like to see some enabling legislation to help us achieve this particular type of planning.

I would like to just comment too that once you take and put all this valuable farmland, of which we have considerable left in Plainsboro Township and in the Cranbury area, about which Carl Hintz commented before -- once you put that under housing or pavement or what have you, it is replaceable. It never will be returned to farmland. It is impossible. I think we have a duty to consider our future generations in this respect.

I think enough has been said about the mechanics of the legislation. I am not qualified nor would I attempt to be a critic of that. However, I do feel that the township

has studied it enough to feel it will be helpful. After the people who are qualified smooth the rough edges of the legislation, I am sure it will improve our possibilities in orderly planning in Plansboro Township.

If there are any questions you have, I will try to answer them.

(Resolution adopted by Plainsboro Township can be found on page 15-X)

ASSEMBLYMAN DOYLE: Thank you very much. I hope you will deliver back to your Township Committee the fact that I and the Committee are very interested that they have taken an interest, themselves, in State legislation. That doesn't happen too frequently. Rather it would seem that groups are interested in it and municipalities merely echo what somebody else has suggested to them. But to the degree that you are an innovator, may you bring back to Plainsboro my hope that they will send not only certified copies of their resolution to the people mentioned in the resolution, but also to, if not all the municipalities of the State, which might be somewhat cumbersome, at least the municipalities in their county and perhaps similarly situated communities throughout the State. I would be most appreciative if other municipalities start to think whether this is a good or a bad idea, not necessarily that they will adopt a similar resolution, but at least they will think about it. You bring that back to them. Thank you very much.

We are going to take witnesses out of turn. I have been advised of certain time and geographic considerations. I hope all of the witnesses will be understanding of that fact.

Mr. Woodbury, please. I have been derelict probably throughout this in not identifying witnesses. But let me take occasion to say that Steven Woodbury is the author of "Transfer of Development Rights: A New Tool for Planners," which appeared in the Journal of the American Institute of

Planners. I mention that because that has been part of the library our staff has made available to us and one of the things I have used most in questioning the witnesses. It is good to have you with us.

S T E V E N R. W O O D B U R Y: Thank you.

I am grateful for the opportunity to present some comments on the proposed legislation.

My name is Steve Woodbury. I am a doctoral student in City Planning at the University of Pennsylvania. Over the past year, I have been surveying proposals for transfer of development around the country, trying to evaluate the strong and weak points of various approaches. This work is continuing. As you mentioned, the first stage of this appeared as an article which I gather has been available to you.

I have a brief note - it is not really in finished form - on land development financing and its implications for transfer of development rights - if this would be useful to the Committee, I can include it with my testimony - looking a bit at how developers finance land acquisitions and merely adding to the list of problems that transfer of development rights legislation has to address or consider.

It seems to me that TDR offers an exciting opportunity for accepting and guiding growth, while preserving desired low-intensity land uses. It holds out the prospect of compensation for those landowners who may be prevented from exercising development rights on their own land. I am well aware of the many problems involved in designing and implementing a TDR scheme. Any state enabling legislation must take account of these. Further research, probably coupled with assistance to municipalities in some form, will have to be ongoing after passage of the legislation, in order to implement it properly. Some of the problems may be difficult to resolve, but I am convinced that the potential benefits can more than repay these efforts.

So I am not here to discuss the desirability of transfer of development rights. I am here with the hope that the New Jersey Legislature will establish a sound framework within which municipalities can adopt fair, workable, and legally defensible TDR programs.

A workable program must be one which is not too unwieldy for municipalities to adopt and administer. A workable program must be one which is not too burdensome for developers to work within. A workable program must be one which is not easily undermined by a few, out of short-sightedness or selfishness, at the expense of the population as a whole.

A legally defensible program is one which provides the landowner whose land is restricted with a reasonable use for his development rights. If he cannot exercise them, he must be able to sell them. It is not necessary that he be guaranteed the same return as he might get from developing his own land without regard for the benefit of the community as a whole; it is quite permissible under the police power to reduce the value of land without compensation. We do this all the time through zoning regulations. But the value must not be reduced too much (how much is "too much" seems to vary widely as the courts interpret it), but the courts will hold this to be a taking of private property for public use without just compensation, in violation of the Constitution. Second, a legally defensible program is one which is not exclusionary. TDR must not be seen as a means for municipalities to avoid their fair share of growth. It is rather a means for guiding this growth to the most suitable areas.

With this framework, I am really considering how the legislation can be strengthened so that the townships who do want to adopt it in good faith can go through a planning process and adopt legislation that will stand up when it inevitably gets into court. I am not a lawyer, so I guess

I am free to raise all sorts of questions and make all sorts of assumptions. But I have made a number of suggestions regarding the legislation, a number outlined in the written testimony,and I won't bother you with them now. Some of them are very minor drafting questions, etc. Many of them have been alluded to.

I want to briefly discuss a few of the points and return to what I see as the central issue, the establishment and maintenance of a market for development rights.

The proposed legislation establishes a framework within which municipalities can tailor a variety of TDR plans to their particular needs. Such flexibility should be encouraged, within the substantive and procedural guidelines established by the state legislation.

I think it is important that townships be able to adopt transfer of only residential development rights or to include commercial, industrial or what have you, depending on their situation and how complex a plan they can reasonably develop and administer.

I believe it is essential for development rights to be taxed as real property. I don't know the legal problems involved with treating them as real property with regard to federal taxes and other things. I think this has to be addressed. But I think the bill is sound in taxing development rights derived from preservation land presently under farmland assessment. A recent U.S. Department of Agriculture study of "State Programs for the Differential Assessment of Farm Land and Open Space" put it well: "Anyone who owns land on the rural-urban fringe is, by the force of circumstances, speculating." Where the goals of preserving farmland and farming can be met through transfer of development rights, there seems to be no equitable reason for the public at large to subsidize the farmer's speculation in development rights by not taxing them. Some research

should be done, however, on the possibility of phasing in this tax over several years. It is conceivable that immediate imposition of this tax would force farmers in the preservation zone to sell their development rights immediately, glutting the market and driving down the price to the point where the courts might well hold that a taking had occurred.

The essence of a TDR scheme is that a developer can build, by right, at a certain density in the transfer zone. If he owns the requisite development rights, he can build, by right, at a specified higher density. Unless there are safeguards, however, this provides the developer with every incentive to try to change the zoning in some other part of the municipality. He could then build at a higher density, without purchasing development rights, and the development rights would drop in value. Perhaps there would be no market for them at all. This would undermine and destroy the TDR scheme. What may be required is a provision that any rezoning or variance in the remainder of the town - the part not in the preservation zone or the transfer zone - must be conditional on the presentation of the appropriate number of development rights.

It seems to me it is similar to the situation of the little child playing in a stream. If you build a dam in the middle, sure enough, the water goes around the end. The pressure is going to be on the area where it is going to be cheapest and if it is going to be cheaper to try and break the zoning than it is to build and buy development rights, then that is where the effort is going to be directed. This is perhaps inviting trouble.

Some of my comments have already touched on the necessity for creating and maintaining a market for the development rights. I think this has been addressed a number of times and I don't think its importance can be over-emphasized.

If the courts hold that there is a taking, then at least the transfer development rights ordinance, or perhaps even the state legislation, could be held unconstitutional.

If there is an uncertain market for development rights, owners may insist on selling their development rights for cash, and be unwilling to take back a purchase money mortgage, as is currently common in selling land. This would raise the costs to developers of assembling a suitable package of land-plus-development-rights in order to build.

If the value is uncertain, in the case of some farmers who have a mortgage on their land for the value of their land plus the development potential, which is certainly part of the market value, the banks may wonder if their loan is secured by anything more than some pieces of paper. I raise these issues, but I don't have the answers.

If a market for the development rights is not reasonably assured, then probably the plan won't even be passed in the first place because of the opposition of the landowners in the preservation zone.

So I think the state enabling legislation has to address this issue directly and explicitly. In designing a development rights ordinance, the study commission and the governing body should be required to:

-- specify densities in the transfer zone which will provide an incentive for developers to purchase development rights, and

-- specify the size, location and densities for the transfer zone so as to give substantial assurance that a market for development rights will be created and sustained.

This is really just passing the buck. It is saying, "We don't know how to do it, but we know it has to be done." And a municipality in order to work within its framework has to address the issue. I think this has to

be made clear within the legislation.

In the written testimony, I have included a few further comments. One issue that was raised brought to mind a further question, which isn't in the written testimony, and I don't know if any study has really looked at the question of how these development rights are to be recorded in the County Court House, analogous to land or other real property.

A study of the possibility of using transfer development rights in Philadelphia, included the observation that, at least in Philadelphia, the system is not tight enough to prevent development rights that have been sold from one parcel or density bonuses or whatever from being sold again.

It seems to me these are somewhat less easy to keep track of than land, at least it is not moving around, and that this is a question that someone who is familiar with how land deeds, etc. are filed and how this could be handled needs to address, so it can be handled in a uniform fashion.

I would be glad to answer any questions you have. I am very grateful for the opportunity to testify.

(Written statement submitted by Mr. Woodbury can be found beginning on page 16-X)

ASSEMBLYMAN DOYLE: Thank you very much.

As to your last point, while it might seem more mechanical to an attorney who does real estate closings, it is an important point and I have instructed our staff to talk to the County Clerks' Association and the New Jersey Title Abstractors' Association to look at some of those administrative problems.

In so far as your comments just prior to that about the necessity of maintaining a market, that has been a question I have been asking consistently throughout the day and you have raised it, but unfortunately you

haven't provided me with an answer either. I don't say that accusingly or negatively. It is an extremely difficult problem. The thought just popped into my head and probably it should have popped right out, but let me ask you this: If the transfer of development rights were to be seen as a holding action, if you will, much as we can file in this State a plan which would preserve certain lands for one year, which case law has held has to be treated as an option and that option paid for -- if that transfer of development right was held in effect to be an option that was redeemable at the amount of money the land was valued, less the retention value of it - that is, without the development rights - and if the certificate were not sold by the landowner within x months or probably years, then it would be redeemed at that rate plus interest. Do you think that would work?

MR. WOODBURY: You are essentially saying that in providing an incentive for the municipality, you design this so that developers are going to buy these or you are going to be faced with buying them.

ASSEMBLYMAN DOYLE: It would work two ways. It would provide an incentive for the landowner to know that it is worth it because he is either going to be able to sell these rights or he is going to be able to get it back from the town. Now, he might have had a good purchaser and not sold it and waited around for the town. That is a problem you would have to deal with. But it would also provide an alternative for the town not to have to lay out the capital to provide sufficient higher density in the transfer zone, so that the market pressures do come to bear. I don't know; it was a thought.

MR. WOODBURY: As you outlined it, the same thing could be accomplished by a voluntary program, it seems to me. In other words, if it is going to be equal to the total

amount that the preservation landowner can get now by developing his own land, if you are guaranteeing this, it seems to me you could just use a voluntary program.

ASSEMBLYMAN DOYLE: A voluntary TDR, you mean?

MR. WOODBURY: Yes, by allowing high enough densities to permit this. It seems to me that a mandatory scheme is required where you are admitting to the landowner in the preservation zone, "You may not get the full return you could get by developing your own land, especially if you did it first and everybody else didn't, or whatever, but we are providing some reasonable compensation. We are not trying to say it is exactly identical." I see this is the problem: You are committing yourself to a lot more if you say, "Well, we are going to guarantee a return equal to what you could get on the market."

ASSEMBLYMAN DOYLE: I don't know that it is a good idea. I throw it out only to point out that it seems to me that something has to be done to maintain the market, and it might have to be done in the enabling legislation with such specificity so that you wouldn't be bottoming the market on words and on theory. It was just a thought.

You mentioned one other idea that was somewhat new, at least in so far as the witnesses who testified, and that is the possible prohibition of obtaining variances in other portions of the municipality not covered by the transfer zones or the preservation zones, and I can understand the thrust, being that if you allowed variances and got the higher density there plus the normal density from the transfer and preservation zone mix, you would wind up with more density municipalitywide than you would have wanted. I think that was the thrust of your remarks. Aren't you going to run into some constitutional problems about equal protection under the law if certain landowners can go for a variance and others can't or do you think

that the possible purchase of TDR certificates by the people prohibited from getting a variance would satisfy that question?

MR. WOODBURY: I don't know. That is why this is a tentative suggestion to meet what I think is a real problem. The variance provision is in the zoning law for good reason, and it has been abused to the extent that rather than rezoning -- you know, if the zoning doesn't really mean anything, then the TDR plan is not going to hold water. If you are giving it away, why is anybody going to pay for it?

ASSEMBLYMAN DOYLE: Variances are not easily given away for higher density uses in these days. Usually it takes somewhere around the level of the Superior Court, Appellate Division, to get one if it is enough multi-family. But I understand the point.

MR. WOODBURY: There is often a negotiating process between here and there to get some higher density or threaten to take them to court, it seems to me. And if the municipality either can't justify its existing zoning or, in fact, isn't going to stick with it, then you have no incentive for developers to buy development rights and build in the transfer zone.

I think this is part of the economics that has to be looked at if a township is going to develop a realistic study that holds out the realistic expectation that land-owners can sell the development rights and that someone is willing to buy them.

ASSEMBLYMAN DOYLE: To that end, you mentioned in the early part of your statement - I wished to take it up at that time, but I will now - that you have an unpublished paper on "Land Development Financing and its Implications for Transfer of Development Rights." We would like it if you would make that available to the Committee.

MR. WOODBURY: I would be happy to.

ASSEMBLYMAN DOYLE: Fine. Thank you very much.

MR. WOODBURY: Thank you.

ASSEMBLYMAN DOYLE: Thomas Norman, please. By way of introduction, Mr. Norman is Attorney to the Planning Board of Madison Township; Consultant to Cook College; and editor of "New Jersey Trends," published in 1974.

T H O M A S N O R M A N: Thank you.

First, I am going to read a statement which was given to me by Richard A. Ginman, who is Director of the Division of State and Regional Planning in the Department of Community Affairs.

ASSEMBLYMAN DOYLE: If I may and if the staff raises no objection, we are not going to question you on somebody else's statement, but we would like to have it in the record. Can we just include it in the record by incorporation, without having you read it.

MR. NORMAN: All right. Fine.

(Statement of Richard A. Ginman, Director, Division of State and Regional Planning, Department of Community Affairs, can be found beginning on page 22-X)

We had worked this out so I could follow up on Mr. Ginman's statement with a keen observation.

ASSEMBLYMAN DOYLE: Please make the keen observation.

MR. NORMAN: The last aspect of the statement was that caveat is necessary in the area of TDR with respect to exclusionary zoning. I wish to address that question in part by indicating the fact that we used South Brunswick as a demonstration project, which I understand you heard about earlier today.

ASSEMBLYMAN DOYLE: On a couple of occasions, yes.

MR. NORMAN: The one point I wanted to note with regard to South Brunswick is a decision of the Superior Court by Judge Deegan, involving Laurie Gardens versus the Mayor and Township of South Brunswick, in which the

ordinance in its totality was challenged as invalid. One of the findings of the Judge was, and I quote, "Essentially South Brunswick is a growing community, coming quickly into the twentieth century. It has intelligently addressed itself to its need for comprehensive planning to meet its fair share of regional housing needs." This is in his statement of conclusions and it is a conclusion he comes to.

I make this point only to indicate that we were operating with a zoning ordinance in South Brunswick which was found to be reasonable and providing for its fair share of housing. So all of the calculations are based on some notion of equity within the region.

With that in mind, I simply want to go over South Brunwick again very briefly to give you facts that I believe are salient in order to set the stage of TDR. The township has 26 1/2 thousand acres. According to the standards used in the project, which standards incidentally correspond to the standards generally in the bill, so that in my mind the demonstration in South Brunswick is essentially a demonstration of how the bill would operate in South Brunswick.

There are 26 1/2 thousand acres. Sixty-five hundred of those acres or approximately 25 percent would be preserved. This land is worth approximately $18 million, according to assessed value as of 1973. From that, 3600 development rights will arise and they will be accommodated in a receiving area of approximately 2,000 acres. In a review of the landowners within the preservation district - and there are approximately 695 of them - the greatest number of rights possessed by any one owner would be 186. And generally - well, an average is really irrelevant - the number tends to run between 1 and 10 rights per property owner. So the first point is that there is no grand monopoly.

Secondly, the rights, themselves, at least on initial calculations, seem to approximate a value of $5,000 per right. It is not an insubstantial amount; it is not a $25 right.

With this in mind, I think you have to conclude that all property owners will be very conscious of each and every right, every fraction of a right, because of the value in those rights.

In this context of approximately 700 property owners, 3600 rights, and an area which is going to have to be zoned for a density higher than the density presently existing, the trading will take place.

Following up on your questioning of the last witness, I feel, personally, that because of the demand for housing in Middlesex County in that particular area and knowing what developers are willing to pay for building permits, there is a market for development rights. And I think they will be willing to pay a number of dollars which is equal to what they would pay for a building permit.

What you have is a situation where you have two individuals, one with a development right and one with the property, and they are going to have to negotiate between themselves and with the developer. The three of them are going to have to come to some sort of an understanding in order to develop. The key to this, in my mind, is that the development permitted in the transfer zone has to be of a nature that allows the developer a reasonable profit, given reasonableness in the market at the particular time he is purchasing those development rights. I think that has to be extremely clear in the enabling legislation. There can't be any doubt as to that. I don't think the town can set up a receiving district and set up a density which is totally unrealistic. It has to be realistic from the market point of view.

I think over a period of time for some unexplainable reasons if there are no transactions, there ought to be a requirement that the town change the densities. From my own experience, they would have to up the densities, allow a greater intensity of development within the district. But they must continually try, perhaps on a yearly basis or some time period, to insure marketability in the transfer zone. They have to do that, possibly review other zoning districts within the municipality and possibly downgrade those, in order to make that receiving district the most lucrative area for a developer to move into. I think on that basis development rights will have value.

In my own mind, if you move further along the horizon, you may reach a point where they are permitting 30 or 40 units per acre, which is ridiculous. Once you reach that point, you are outside your comprehensive plan or any reasonableness in the area of zoning. I am not quite sure what you do then. There may have to be a "buy back" provision of some sort, whether it is financed at the municipal level or at the State level. I prefer not to see that. The negotiations between the developer and the property owner have to take place in the free marketplace. If either one knows that ultimately there is a "buy back" provision, you will destroy that relationship. I don't think the concept will be viable. I think what you have to do is put them into the marketplace and allow them to function with the responsibility on the part of the municipality to continually revise where it has to on the basis of experience lack of transfers, in order to create marketability. I think that is essential.

If it doesn't work, it doesn't work. I think you were faced with the same kind of proposition at the time zoning came along. There was a serious question whether zoning made any sense in the 1920's when they started to

fool around with it.

In any event, I think that the key to this is a constant re-evaluation by the developers and by the municipalities.

ASSEMBLYMAN DOYLE: You have touched on some of the things you have heard me touch on. With reference to your example in South Brunswick, no landowner in the preservation zone then wound up with very many development rights?

MR. NORMAN: That's right.

ASSEMBLYMAN DOYLE: So by necessity they had to enter into a combine --- well, you haven't had it come to pass yet. They would have to or a builder would have to come and pick up some here and some there and put them together into a package, I think it is called.

MR. NORMAN: Right. Well, it depends on how many units he wants to build and the timing of development. If he wants to build over ten years, he may want to pick up a hundred rights every year, which is what you would do in the stock market if you are interested in buying in on a corporation.

ASSEMBLYMAN DOYLE: Pick them as you can.

MR. NORMAN: Yes, pick them up as you go along.

ASSEMBLYMAN DOYLE: You mentioned you might have to look back at what you have done. There is no provision in this legislation, I think, for a continuing review or at least not significant in my eyes and in the eyes of some of the witnesses. I think you pointed that out too. That has been mentioned.

You also mentioned in South Brunswick you just had a comprehensive zoning ordinance that passed muster on judicial review. That was gratuitous though, was it not?

MR. NORMAN: Gratuitous?

ASSEMBLYMAN DOYLE: Gratuitous in the sense that a number of municipalities could adopt TDRs that haven't had

a comprehensive zoning ordinance that was recently adopted. To the degree that that is a significant part of the preliminaries to adopting a TDR ordinance and you didn't have it, you would have to adopt one.

MR. NORMAN: Right. I am only pointing that out to show that the figures in the demonstration, itself, were based on something valid, that our figures aren't warped.

ASSEMBLYMAN DOYLE: I see. But it shows the figures. In so far as expenses to a municipality that did not have a recent re-evaluation, did not have a recent comprehensive zoning ordinance, and to the degree that many witnesses have mentioned it should have a natural resources inventory, and didn't have one of those either, they have a lot of preliminary work to do before they are even in the stage to look at TDR.

MR. NORMAN: That is right. I agree with that. I would also point out, however, that many municipalities with which I am familiar in Middlesex County - too bad, Mayor Flynn isn't here - are going through these expenses now because of litigation. It seems to be an expense these days that you simply can't avoid unless you intend to lose all your cases.

ASSEMBLYMAN DOYLE: It is my experience that the adoption of a comprehensive zoning ordinance might signal the beginning of litigation, not necessarily the end of it.

MR. NORMAN: It depends.

ASSEMBLYMAN DOYLE: Or perhaps be a half-way point. Thank you very much.

MR. NORMAN: Thank you.

ASSEMBLYMAN DOYLE: I would like to call James J. Seeley, Professor of Law at Rutgers University Law School, and Director of the New Jersey Center for Land Use Law.

J A M E S J. S E E L E Y: Thank you. I have a prepared statement, but I don't intend to read it at length. (Prepared statement appears in the Appendix, page 28X.)

I might also say that I am the municipal attorney for a small rural community in Cumberland County.

ASSEMLBYMAN DOYLE: Which township?

MR. SEELEY: Greenwich Township. Although I don't purport to speak on behalf of either Rutgers University or the township, I can at least claim a small amount of experience with the municipal government end of this business.

First of all, I thank you very much for having me here today to testify on this very important piece of legislation. I consider the concept that is embodied in the transfer of development rights very necessary to the regulation of land use in New Jersey and extremely important to addressing the kinds of problems which are found in the legislative findings of fact portion of this piece of legislation.

The difficulties of population density and the urban growth rate, and the percentage of urban land in New Jersey are well known and well documented. I think your findings of legislative fact in this statute set this forth very well. I think that there are values within the health,safety and welfare interest of state government which would clearly support, from the point of view of state legislation and the constitutionality of state legislation, this sort of transfer of development rights bill. They include things like insurance of food supply, protection of ground water, absorption of storm water, hydrology-type concerns. I think there are other

values from an economic point of view and a social point of view which are also protected by legislation of this kind. The recreation industry, outdoor recreation and outdoor sports, in New Jersey represents one of the most significant - it is either first or second, depending on how you compute the figures - dollar industries in New Jersey. I think it is appropriate for State government to be concerned in protecting the amenities which make that kind of recreation industry a realistic economic possibility.

One other aspect of your legislative findings which I found most interesting and most commendable was the recognition that a scheme of this kind which de-emphasizes the incentive to develop raw land has the likely impact of encouraging redevelopment activities in the urban centers or close to the urban centers. I think there are a lot of social benefits and economic benefits to be derived from that.

In Camden County, for example, in the city of Camden, there is a vast amount of what is essentially raw, vacant land within the city limits, within a mile of the center of the city of Philadelphia, sitting there empty. There are no buildings on it. There are many more acres that have uninhabitable buildings on them, and that land is essentially sitting as raw, vacant land. It is not being used now. It is not being put to any constructive economic purpose.

Development regulations and a development scheme that would tend to limit the extension of new development into raw land or undeveloped land, I think, would have a natural consequence of re-focusing development activities on land closer to the urban centers. I think from a social point of view there are great benefits to be derived from that, because these centers now have depressed

economies, if they have any at all. These are existing economies that people have been dependent on. We are not talking about creating a new one for people to be dependent on. We are talking about bailing out existing economies.

Redevelopment of the cities has the advantage, from an economic point of view, of being able to use existing central sewerage facilities, existing utility lines, existing transportation lines. In a period of time when energy consumption is critical, redevelopment activities are closer to employment centers, thereby involving less energy to provide transportation to work. There are also existing municipal utilities, water and sewer. All the utility benefits that one achieves from any kind of clustering and any kind of density are achieved to the greatest extent in the urban center kind of situation, because you already have the utility services there.

I recognize that that perhaps is not the direct thrust of your transfer of development rights legislative proposal, but it is something you recognized in your findings, and it is an impact which I think the adoption of a statute of this kind might be anticipated to have.

Well, perhaps I better return to the actual legislation and what you propose. I will just enumerate some of the positive benefits I see, and mention just very briefly some small problems from a drafting point of view that might be helpful to note. I think from the point of view of land use planning, and the point of view of ensuring equitable compensation to land owners for losses in potential use of their land, the transfer of development rights scheme offers some advantages over at least what the conceptual framework of present zoning is.

Some communities in southern New Jersey with which I am familiar are attempting to deal with heavy development pressure and are resorting to large acre lot size. They are adopting development districts, not with the concept of TDR, but singling out districts for high density usages, and they are also singling out other districts in the community for lot sizes as high as three and four acres.

Of course, there are potential constitutional problems with that, and we know that from some of the instructions we have been getting from the courts. On the other hand, these municipalities are not unsophisticated in their representation, and their approach to that is to say, "We provide for a large number of multi-family units and housing types of various varieties in our development district here. We are doing our fair share." And the fair share concept does not mean that every acre in the municipality must be subjected to the possibility of someone being able to put the fair share there.

I think where that kind of situation is developing, politically, a transfer of development rights scheme offers a better deal to those land owners, because rather than being victimized by that kind of attempted open-space approach to preservation zoning, through that kind of device they have the opportunity to receive compensation in dollars and cents for the constraint being put on their land.

Now, another side of the coin in terms of the use of the zoning power, which troubles me, is the economic windfall which the zoners' magic wand can confer upon particular property when that property is selected for some very valuable and probably very intensive use. We have seen this in the use of the variance power, and also in the use of comprehensive planning, where districts of relatively

limited size were selected for things like shopping malls or very high density uses. When the zoner touches that property with that use, the value of the property can increase ten-fold, and the location of a use of that kind in any one municipality, if it is a very intense use, may represent the only place in that municipality that the zoners will be willing to place that kind of use. And if it is a sufficiently intense use, and there is a sufficiently reasonable demand for diversity in that municipality, limiting that one area to that intense use may be a reasonable exercise of the zoning power.

So you have a situation where one land owner has enjoyed a windfall, and others may indeed not enjoy the benefit of development at that potential certainly, and at no potential even bearing upon the potential development capacity of their land, where you have an intentionally restrictive situation.

I think the opportunity for compensation through the transfer of development rights scheme is a far better approach than present zoning to that problem.

When you talk to farmers who are land owners about this problem, they want to know, "Who is going to buy this development right? Do you think anybody is going to buy one? Point to a situation where anyone has sold one or made some money from one. Show us that this will work." And that is probably the most intense problem with this whole concept.

I know of some situations where I personally believe that developers who own land and who have been struggling mightily to get some kind of permit to do something, and who are paying the meter of interest that is running on that land, and it has been running on that land for three and four years without being

able to get any planning or zoning approvals -- these developers would be willing, today, in those communities to buy development rights in order to go ahead. I know that personally from factual situations with which I am familiar. These kinds of communities tend to be right on the borderline between already developed suburban areas and the sort of rural fringe areas where there is a lot of pressure for development and there is a lot of political resistance to any kind of development activity right now.

Numerous municipalities in southern New Jersey have had a year long moratorium on any kind of major subdivision, and these have been sustained. For developers who find themselves in that position, I think they are going to be willing to buy the first development rights that hit the market. What happens after that time is what worries me. When this initial set gets sold, then there may be a lag in the marketability of the rights. But that is a lag that ought to have either a market made for it or not made for it by the pressure on land in that area for development. If it is in a really closely located fringe area, there should be continued pressure for new development at a fairly substantial density,and there should be transactions in those rights. If there is not, at least to insure against the possibility that people will not end up losing their property value and suffering a taking under this concept , a back-up fund of some kind might be proposed, or some form of green acres funding to provide a fund to purchase development rights out of is one possibility or to levy a a new realty transfer tax for an additional percent to raise the state support to fund either municipal or state acquisition of these rights; that is also a

a possibility.

Another beneficial aspect of this kind of regulation, which I can imagine - and this has to do with my own perceptions and experiences of the problems of land developers - is that a lot of land developers would really be in favor of a scheme of this kind, because it would lend to them certainty with respect to attractive land, instead of having to deal with an extremely difficult local political situation, and having to go in and fight and negotiate with a municipality for densities, and threaten lawsuits and end up with lawsuits, and end up in the Appellate Division with their lawsuits, and then wait around for the Supreme Court to dispose of their lawsuits. Many people who are business men and are trying to develop land would be grateful to know that in a transfer zone they can build; and with a requisite number of rights, they can build the units that they want to design and that they want to build. So that they will not have to plan and then re-plan, and re-design sites and sit around for years to wait until they can use them.

I really do think that if the benefit from this side of it is understood by the housing industry, a bill of this kind should not be viewed as any kind of economic detriment to construction employment in the the State of New Jersey or the land development activity. At least in the short run, and over a fairly substantial haul in the short run, I think it is going to be beneficial by lending certainty.

One of the problems that I perceive with the present legislation has to deal with the zoning which is imposed within the transfer zone, and I can imagine that some communities, particularly communities which are entirely

rural and basically undeveloped, might have in mind to put their land into only two districts, the transfer district and a preservation district, the reason for this being the desire to avoid some alleged inequality in treatment between the land owners in the transfer district and land owners in an unregulated district which,where the land is relatively fungible, creates a problem, I think, from the rationality of the zoning point of view.

Where you have that situation, it seems it might be necessary to zone within the transfer zone for a variety of housing types, to zone for a maximum density as the statute provides, but also perhaps to zone for a mandatory density from which one could not depart down and use fewer rights. Two benefits from doing it that way, it seems to me, are you can ascertain how many development rights you are going to have to create in the preservation district, and you can be sure that you have created, for usability purposes, that many rights to be used in the transfer zone. If you let somebody build at less than the density you have set in the transfer zone, they may not use up all the rights.

I realize the proposed legislation is to expand the zone. One other approach to it is to require building at a mandatory density. Now, I would be the first to say that that should be keyed into market demand and rationality and the need of the housing market and the sellability of those kind of units in that community at that particular time. All of this has to be based on the premise that regulations are going to be rational and reflective of a reasonable market situation, and they will concur with that in full.

One other small point in the drafting which comes to my mind has to do with the agricultural tax assessment and what is going to be done about property that happens to be in the transfer zone in a community which is virtually undeveloped, but which nevertheless thinks it is avante guarde and goes down the road and adopts an ordinance like this. Should that land which is presently continuing in agricultural usage, even though it is in the transfer zone, and which predictably will continue for some period of time in a rural area and with that kind of usage, should that land no longer be taxed under the agricultural tax assessment statute? I tend to think not, although there are a lot of arguments about the effectiveness or ineffectiveness of the agricultural tax.

If you are going to continue to provide the benefit of that treatment to land owners in the preservation district, as the statute requires, and if you are going to tax their development rights, it seems that land owners in the transfer zone who are not in a market situation where they can either develop or sell their land for development should be able to keep their land under the agricultural tax assessment program, too, and be assigned a hypothetical number of development units, based on the same formula that land in the preservation zone is assigned development units, and then be taxed on those units, those development rights, in the same manner that people then in the preservation zone are taxed to equalize the tax situation between the two groups, but those development rights should be assigned to those within a transfer zone being non-severable from the land and purely hypothetical for purposes of imposing the tax.

With those small, few, technical observations, I want to applaud the drafters of the legislation for doing

an excellent job with difficult and controversial subject matter. I have some other small, technical suggestions which I can pass on to your staff. I would be happy to personally be of assistance to the staff in reviewing the legislation, bringing the staff's attention to these problems, and making the services of the Rutgers Land Use Law Center available to the staff to the extent that it will be helpful.

ASSEMLBYMAN DOYLE: I would think that anything from Rutgers would be available, having graduated from that instituion twice. I appreciate your offer, and we will make use of it.

Let me go back to Camden. Without respect to Camden, because I don't know that fine city that well, but take any urban area, because any urban area in this state probably has a lot of vacant land in the middle of some very dense building, whether by urban renewal, riot, or whatever. I presume that that area would be your transfer zone, unless you are going to preserve that as a park. If that is going to be the transfer zone -- am I correct in that assumption?

MR. SEELEY: Well, that is one approach you could take. My remarks previously about encouraging development in that zone do not go directly to the mechanics of this legislation in shifting development from some preservation district in Camden to a transfer zone in Camden.

ASSEMBLYMAN DOYLE: Well, my question was going to be ---

MR. SEELEY: Well, let me just follow that up for a second. All I am saying in my general remarks is that to the extent that you limit the amount of expansion into raw, rural land, which is the inevitable result of setting aside

preservation districts, you tend to encourage development in urban centers, which may not have any municipal development rights ordinance in effect, and probably would not because they have no preservation zone.

ASSEMBLYMAN DOYLE: You don't know whether you would be doing that unless you could relate what was happening in the rural areas to the urban areas, and this being a municipal tool and not a regional tool, you might not be able to do that except by the forces of the general market?

MR. SEELEY: Exactly, and these are the forces I am talking about.

ASSEMBLYMAN DOYLE: You think they would work?

MR. SEELEY: I think they would inevitably work, to the extent that you would cut down the availability of raw acres to build on and you would re-focus on other available raw acres to build on.

ASSEMBLYMAN DOYLE: Let me go to those raw acres again in Camden. First of all, if they were going to be a transfer zone, there would have to be a preservation zone. In all honesty, I don't know whether the urban areas of this state have much by way of historical integrity, architechtural excellence, or open spaces toward being called the preservation zone.

MR. SEELEY: Again, as I was saying, I am not suggesting the application of transfer of development rights to Camden or to the cities. I am merely making what I consider an economic observation that limiting the availability of raw land inevitably will result in re-focusing upon presently unused land, whether it is all in one municipality or not.

ASSEMBLYMAN DOYLE: I realize that the thrust of your remarks was not to the urban areas. By this question I am trying to find out whether you think there

is any application of this bill to a city, because if it does not have much of a preservation zone, and you take that vacant land and use it as a transfer zone, I question whether a builder who can now build 8 units to the acre in Camden would want to build 24 or whatever, because zoning is not only the fact that you can build units but portends some social and other types of sociological considerations, crime considerations, other aspects other than pure economics, and I am wondering whether you will ever develop that, unless you go right up again, and then you are only creating, I think, that which has already run into a lot of obvious problems?

MR. SEELEY: If the thrust of your observation is that urban land because of social problems is not economically viable right now for redevelopment, even though it may be open, and people are not rushing there to build luxury townhouses because they do not want to live in the heart of Camden for social reasons, I would have to concur with that. I think part of the formula, though, that results in that land sitting there vacant and unused has to do with the economic viability of developing other land elsewhere in a way that is attractive to the market. There is an economic formula operative which underlies the social formula.

Just for an example, take an area like Society Hill in Philadelphia, which is within a mile of the area of Camden that I am talking about, within one mile. That is an area which was in a physical circumstance quite similar to the area of Camden, and in some respects it was worse at the same point in time, 15 years ago, and which by virtue of the scale of redevelopment, the scale of the economic activity there, it has become a very desireable living area. It is not a living area that has the kind of housing mix,

which probably from a planning perspective or a social perspective we would most desire, but certainly it is an attractive and very economically viable residential area in the city. It was redeveloped from a very decaying area, so there is my object lesson.

ASSEMBLYMAN DOYLE: On that note of optimism I will thank you very much for your testimony. I appreciate your coming to this hearing today.

Ms. Esther Yanai, a concerned citizen, will you care to testfy?

MS. ESTHER YANAI: In view of the late hour, I will submit my written statment in lieu of oral testimony. (Prepared statement appears on page 38-X.)

ASSEMBLYMAN DOYLE: That is quite all right. Thank you very much. I am glad you have been interested enough to stay and listen to everyone else.

Mr. Byron Kotz, please? By way of introduction, he is an Ocean County realtor, welcome.

B Y R O N K O T Z: I realize the lateness of the hour, and I do not want to take up a lot of time. I have listened to part of the testimony here from people who are involved in the different aspects of land planning. I have to arrive at the conclusion that a lot of this testimony is applicable to the bill that we are discussing here, but I think a lot of these people are theorists in their conclusions.

I feel that the marketplace in this State dictates a lot in the way of action that should be taken. And the reason I say that is you can take the so-called transfer of development rights, the preservation zones and so forth, and really, unless the marketplace dictates certain land uses, and the availability and the viability of these uses, I don't think that this law, in my opinion, is going to solve

anything. I think you are opening a Pandora's box here on a lot of technical situations. You are going to create a lot of inequities. I think the first thing you are going to have to do is educate the planning boards and the boards of adjustment and the township committees in every municipality in this State. Now, that in itself is a monumental job.

I also think that this bill leaves a lot of doors open, as far as abuses are concerned. I think that you have basically an unworkable bill, and I don't have any credentials in land planning, and I don't have any credentials in any other field, as the former speakers do, but I think I have a realistic approach to the marketplace.

Now, to give you an example, the environmental laws that have been passed in New Jersey, such as the laws dealing with the wetlands, CAFRA, basically, I think what has happened, even though the intent of these bills was realistic, they have created a slow-down in the residential market. As a result of this, they have created a lot of problems economically, in light of the conditions that we live in today. And a lot of people do not take this into consideration.

I will give a specific example. Let's say a person wants to come in and start a project, whether that project is residential, professional, or commercial. He goes through the normal procedures of the municipality, the county, and sometimes the State, and he is in a limbo position for maybe 2 or 3 years. During this time the clock runs. He has expenses. He has taxes, legals, architecturals,

newly married and people who live in an apartment and have established a small savings account, these people want to go out and buy houses. They are entitled to buy houses. But because of what has happened in this State, such as restrictive zoning, where the towns now are requiring additional improvements in the land, larger lots, longer periods for development, you have effectively locked these people out. Now, unless the state wants to subsidize these people where they want to upgrade the zoning and they have effectively taken the ability to buy houses in this kind of a market, and they want to subsidize these people after they implement these regulations, fine. But effectively what you are doing here is you are going to make residential, commercial and professional construction a lot more expensive. There is no question about that. Because anybody that has taken a project through, as I have taken several, from the municipal level to the Federal level - because some of the projects are now under Federal control - know, it is a 3-year grinding process. Unless you are in the financial position, and you have the means, you will never make it to the final conclusion.

I just want to touch on a couple things that I think are important in this situation. I am trying to address myself to this over-regulation. There is another bill, Mr. Doyle, that is pending now that attempts to regulate so many feet along each major highway ---

ASSEMBLYMAN DOYLE: Wait a minute, Mr. Kotz. I am aware of that bill. That is not the subject of this hearing. There are a number of bills on land use, many of which you might disagree with, many of which I might agree I might agree with you in your disagreement,

but we can't focus on your unhappiness with all of the land use regulations in this one hearing.

MR. KOTZ: I would just like to touch on one thing, then. I think that these transfer of development rights that they are speaking of in the bill -- you can take these so-called rights from one part of a town to another part of town and say to a builder, "Look, you can't build here for 'A' reason or 'B' reason or 'C' reason, but you can build over here." That land may be economically viable to build on, and that is beautiful planning. But when the builder builds over there, what are his chances of economic success?

You know, the marketplace today dictates the economic viability of any project. You can put all the regulations you want, and you can take builders from one part of town and put them in the other; you can take them from one part of the county and put them in another, but that does not mean that that project is going to be a success because zoning dictates it. The best example I can relate to that is, you have highway zoning on Route 70 in Ocean County. Let's take the area west of the Garden State Parkway and Route 70. You have highway business zoning all the way to Manchester Township. You have highway business zoning west of Lakehurst. It is all highway business, and yet in that stretch of territory there, where you can build shopping centers and commercial facilities, I don't think that in a stretch of 8 or 10 miles there are maybe 6 commercial entities involved there. That is very simple. The market does not dictate commercial development there. So effectively what this bill says, " You can't build in an area where you can rent the stores and people will

come to you. We are going to take you from that area and we are going to put you where we want to put you."

Gentlemen, all I can tell you is you are creating a false atmosphere.

ASSEMBLYMAN DOYLE: Let me make some comments. You mentioned the marketplace. I do appreciate your practical knowledge of the marketplace, but isn't it possible that zoning can make the market rather than the market having to make itself?

Let me give you an example that I think you are familiar with. If we were to take a parcel of land here in Toms River that was on the river and let's say that we will change its zoning so that you could put an 8-floor high rise on it, I would venture to say that the value of that land would go way up rather quickly and we would have affirmatively through zoning created a market.

So that zoning sometimes has positive aspects and can make the market, can't it?

MR. KOTZ: On a very limited basis.

ASSEMBLYMAN DOYLE: To the degree that perhaps on a limited basis it can, let me suggest some of the applications that are possible perhaps within this bill.

This State has by regulation caused the ceasage of use in certain areas. The wetlands regulation is one. Say on a state or municipal basis, instead of saying you can't build on wetlands unless you do x,y,x, which takes three years, they were to say, in a municipality like Lacey Township, perhaps, where there are some wetlands areas, I believe, east of the Parkway, in the bay front area, "You can't build there," which they are now saying in effect through

wetlands, CAFRA, and the whole host of other regulations. But we know that you could have formerly built there 4 to the acre. Now, you can build west of the Parkway presently 4 to the acre. But what we are going to let you do now, is take the 4 to the acre you could have built west of the highway, use the 4 to the acre you could have built east of the highway that you can't build on now, and we are going to let you build 8 to the acre west of the Parkway, and you can do it with single-family detached and you can do it cluster, or you can do it multi-family.

Wouldn't that have affirmatively helped the market?

MR. KOTZ: No, not necessarily, because when you say east of the Parkway, you have a lot of amenities there. One of them is the waterfront, one of them being accessible to transportation, one of them being accessible to shopping. And you would take that buyer and say to him, "You can't build on that lagoon lot. But we can take you back in the Lacey Township area and we will give you double privileges, because that's what we think you ought to do." And if this man goes out in this area that I am familiar with, and you give him double the density or double the privileges or whatever you want to double, he is in a lesser position than he was if you had let him do it at his location with lesser density. That's exactly what my argument is.

Your example on the river was fine, because you are right in town. Water today is magic. That is a prime example where zoning, yes, would be applicable. But, you know, if you look at the development in this area, and I am talking about Ocean County, your concentrated development is east of the Parkway.

ASSEMBLYMAN DOYLE: Let me give you another suggestion. Let's go back to Lacey Township, only because

I have a little familiarity and I think you do too. Let us say that the municipality wants to preserve some of that bay front it has east of the Parkway. And it knows a couple of things. It knows that it cannot condemn it because it just does not have the money. It knows that if it says there will be no more development there forever, somewhere along the line, some court of law -- if they do it even under the scheme of some zoning that is so exclusionary that obviously somewhere along the line it is going to be declared illegal and there will be some builder who will come along with hopefully the financial viability to say, "You can't sell that."

So, knowing they can't go on either of those courses, they say, "Well, what if we could do this: Let's say we can preserve half the bay front, so at least we would have that much. We can take the 4 units to the acre that the former owner could have had there and we will allow him to build 8 to the acre on the other half of the bay front which we have to sacrifice to preserve some."

Wouldn't that help the market in an affirmative zoning way?

MR. KOTZ: No.

ASSEMBLYMAN DOYLE: Why not?

MR. KOTZ: Knowing the metabolism of most townships and the political atmosphere of most townships, I don't think that you can make a judgement to take and make that kind of a transfer and say to a person, "You can't build here, but we are going to take you 'x' number of miles away, and give you double." I don't think that is going to work.

ASSEMBLYMAN DOYLE: I said just on the bay front in this example.

MR. KOTZ: I still don't think it is going to work. I don't think you are going to dictate to people

as to where they want to live in relation to the density. I don't think the township is going to be able to dictate this to anybody in a realistic manner.

I think the entire theory of the law is totally unworkable. I don't think that you are going to be able to accomplish this concept. I do understand what you are trying to accomplish. You are trying to accomplish certain things by preserving certain areas. I think it is a good concept, but I think as far as these development rights and some of these other things that this bill is trying to implement, it is totally unworkable.

All this does basically is take viable land away from development and keeps it in a limbo state. Because basically that is what has happened with CAFRA and that is what has happened with the wetlands and so forth.

If I want to live on the river in Toms River, or if I want to live in a certain section of town and you are going to tell me that I can't live there, but I can live here because that is what zoning dictates, I can tell you that this is not the answer to your problem. I don't think you are going to dictate to the people that way.

ASSEMBLYMAN DOYLE: Much less the market.

MR. KOTZ: Much less that market. Let me tell you this, Mr. Doyle. You can go into Columbia, Maryland, and Reston, Virginia, which are planned communities by the so-called theorists and planners. They were going to take population, and they were going to make it a Utopia, with proper density and planning. Every one of those communities is in financial trouble today. If the government does not step in and subsidize those so-called model communities, they will go bankrupt. These were funded by Arland Properties,

Gulf Oil, Alcoa, and American Standard, which are pretty well the heavyweights of the American industry, and with all the planning and all these theories that they have, they can't make them fly. There is your best example.

If you want to take the Assemblypersons of New Jersey and take them to the model communities that have done in essence what you are trying to do here, I think that would be an idea. They said to this community in Columbia, Maryland, we are not going to let you develop the farms the way you want to. We are going to tell you which tracts you can develop, but all the other tracts are going to stay farmland. This community is equidistant to Baltimore and Washington. They are in financial trouble. Do you know why? Because people do not want to live there.

They are about 75% off projections as far as completion and occupancy.

ASSEMBLYMAN DOYLE: Any controversial piece of legislation generally should have powerful and able proponents as well as opponents. Your testimony has indicated that we have some of both. Thank you very much.

MR. KOTZ: Thank you.

ASSEMBLYMAN DOYLE: Mr. De Vincens?

J O H N J. D E V I N C E N S: Good afternoon or good evening. My name is John J. DeVincens. I am with the firm of Giordano & Halleran, and I am here today on behalf of the New Jersey Shore Builders Association.

I would first like to thank you for the opportunity to be heard today, and I was sorry that I was not able to attend the entire hearing due to previous c o u r t commitments. So, please bear with me if I repeat some of the observations made by other witnesses which I have missed.

I have basically taken the approach of analyzing A-3192 as written more than I have the concept because, frankly, until we received this bill, and until we did some preliminary research, it was a totally foreign field. I think it remains very much that way for me at the present time. But, I think both the bill as written and the concept are very significant to the entire package, needless to say.

This morning I was here, and I would like to thank, at this time, Mr. Chavooshian, who spent the better part of an hour this morning answering certain of my inquiries and clarifying certain other matters. However, for the record, I am going to go on with my observations of the legislation as it exists and as it is written rather than what was intended.

It is my understanding that the concept of transfer of development rights is really, basically, an instrument to control growth. It is also my understanding, as I have stated previously, that it is in its infant stages. My hurried research in the matter indicates that there is one already-implemented plan, but I do not think it bears a very strong analogy to A-3192. I refer specifically to the Chicago Plan, which was primarily designed for

urban development and, at least in its initial approaches, preservation of urban landmark sites.

It appears that the concept of transfer of development rights is to sever the value of the land in its natural state from the value of the land for developmental purposes. A-3192 attempts to do exactly this and then to prohibit any development whatsoever in the designated preservation zone. To compensate the owner of the preservation zone, he gets transfer development rights to build in an area designated as a transfer zone. I am not reiterating this to you at the present time because you are not familiar with it; it's just basically because I want to make sure that I am understanding it entirely as it exists.

Basically, the plan does substitute the marketplace for government as the determining factor of private land-use decisions. A-3192 is a bill based upon a theoretical concept, which concept is yet to be tested in either the marketplace, in the courts, or in basic feasibility tests relative to the economies and planning techniques involved.

I had the opportunity to listen to Mr. Kotz's entire presentation, and I would also favor the implementation of a pilot program to work out these tests and to see if they are workable prior to doing it on an entire statewide plan. I am afraid that the implementation of this bill on a statewide basis would contribute to certain abuses. I believe that a reading of the bill by municipalities would indicate, at first blush, that it was basically to do nothing else but to control growth in certain areas. I take, for example, the master plan in Lacey Township, which was recently proposed - it was to have been adopted in December, but it was beaten

back by the citizens - which indicated that everything west of the Parkway would be a land bank to be developed when the township felt that it should be developed. I take that as an example of a non-master master plan to which, I am afraid, this bill would help contribute.

As I see the bill, there are several inherent and crucial problems to which I would like to address myself. The basic problem, as I see it, is the compensation factor. The compensation for the taking - and I am thoroughly convinced after reading the bill that it is a taking - is in the form of those transfer development rights.

In analyzing the bill, I took it down to its most simple basis, and for simplicity purposes, this is the example I have derived: Builder A, three years ago, purchased a 300 acre tract which, according to the comprehensive plan and zoning ordinance, could be developed with 600 units or two to the acre. The municipality now determines this to be a preservation zone and issues 900 residential transfer development rights to Builder A on the basis that the Act indicates that it should be done at a higher density than what was done in the preservation zone. The transfer zone upon which these development rights can be exercised is deemed by the municipality to be a 300 acre farm owned by Farmer Jones. According to the reading of the bill, as I read it, three things can occur: 1) Farmer Jones can purchase the development rights from Builder A; 2) Farmer Jones can refuse to purchase the development rights from Builder A; 3) Builder A can offer to purchase Farmer Jones's land from him. In number 1, a form of compensation to the taking of the preservation zone exists. The compensation is from the private sector in the marketplace and will hopefully approach the

development potential of the lands taken. In number 2, which is where Farmer Jones can refuse to purchase the development rights of Builder A, the transfer development rights are valueless to Builder A. Farmer Jones continues to farm the 300 acres; Builder A has a valueless piece of paper and cannot develop his originally owned land but continues to pay taxes on the land taken on the original assessed value. In number 3, Farmer Jones can reap a windfall in forcing Builder A to purchase his land from him at inflated prices. As can be seen by this simplistic example, two of the three possible alternatives are, I feel, distasteful. The latter two examples above, which I feel are distasteful, might well provide a glut of development rights on the market place, and some rights could become worthless and result in the fact of compensation of property without compensation. Additionally, it may well deprive the builder from pursuing his basic profession.

The municipality, as the bill is written, does not have to be part of the marketplace. I would advocate that the bill, if it is to be implemented, should have a mandatory provision in it that the municipality be part of the marketplace. I mean, from that standpoint, that if there is a glut of certificates, or if we reach the 40 per acre development as Mr. Seely indicated, just compensation be given to the individual who cannot sell his development rights. I believe that is the obligation, at that point, of the municipality. I do not think that they should just be allowed to come into the marketplace. I believe that it should be mandatory for them to be in the marketplace so that they could either retire these development certificates, purchase them outright, or purchase them and renegotiate a sale of their own

after a certain time limit given the individual to try, with due diligence, to get rid of his development rights or to negotiate for the purchase of land.

The part of the Act that I had the most trouble with was the taxation part. It really does indicate that no concessions, so far as I am concerned, are made for taxation. There is no consideration made as to the severance of the right to develop the land and the preservation of the land in the natural state. Indeed, according to the bill, the taxable status could be increased by the marketplace value of the certificates. There is a definite diminution of the value with no recognition of that lessening. The taxation portion of the bill is extremely vague. For instance, there is no indication that the land will be assessed at its agricultural value. There is a statement that "the preservation zone shall be eligible for assessment at its agricultural value" so long as it meets the statutory requirements of the Farmland Assessment Act. If it does not meet these requirements, what will the assessed value be to the owner who no longer has the property to develop under its development potential? Why does not the Legislature contemplate a new tax status for TDR preservation-zoned lands to reflect the difference between the value of the land in its natural state and the value of the land for developmental purposes? This would eliminate compliance with the Farmland Assessment Act and further provide definite standards for taxation at the lowest possible rate, considering the lowest possible use of the land.

Legally, the only case that I could find which even comes close, or even deals with a similar situation, is Fred R. French Investing Company v. City of New York. That is really, basically, a case that deals more with the Chicago Plan that I mentioned

before rather than the plan as indicated here today. I have not had the opportunity to get the full text of that particular case. I am relying on an article published by Urban Land Institute, dated January, 1975, to which Mr. Chavooshian was a heavy contributor.

There are certain legal questions, as I indicated to Mr. Chavooshian earlier, which I have specific interest in from the legal standpoint, and I would like to express these questions. I do not intend to offer the solutions, nor do I think that the statute has the solutions. These questions are legal questions which, as I indicated, come from that Urban Land Institute article. For instance, how will foreclosure of development rights be handled? Can a development right be condemned by a public body? What will happen to existing vested rights once the TDR ordinance is passed? With that particular question, I would like to get into one other aspect of the bill.

As Mr. Kotz so vividly explained earlier, it becomes more and more difficult to plan a development and to carry it through to the time that you put your first spade into the ground. It becomes increasingly more difficult, especially in the area with which I am more familiar, that is, Monmouth and Ocean Counties. For example, you might have the situation where you are subject to the Coastal Area Facilities Review Act, CAFRA. You would have the Pinelands Environmental Commission with their rules and regulations. You would have your various planning boards, your riparian grants, your Corps of Engineer approvals, your stream encroachment approvals with the Department of Environmental Protection, your wetlands problems, and your marshlands problems. As Mr. Kotz explained earlier, the situation can go three years from the date that you

decide to buy a parcel of land until the time that you can first put your spade into the ground. This is, I would say, a mild estimate of the time that can be involved.

My problem exists with the vested rights situation. Let's say that a builder has undergone all these approvals. He is just now ready to get his first final. The planning board then designates his land as a preservation zone. He has expended a considerable amount of money; he has expended a considerable amount of time. If he is at all able to buy lands in the transfer zone, he might well have to seek these approvals again thus necessitating an increased amount of time and an increased amount of money again, for which he might not be compensated, depending upon the marketplace.

I think that there should be definite standards, if this bill is to be implemented, indicating the vested rights portion to be accorded an individual developer.

One of the major problems that I do have - and I am not saying that it does not exist already - is the possible abuse of this particular power. I am afraid that the bill as written would lend itself to certain abuses, not that the zoning act or the planning act do not. I would like to see, if the bill is to be implemented, a very much more strengthened situation as it applies to what a municipality can or cannot do.

As the bill is presently written, all factors considered, I would have to say that the New Jersey Builders Association, at this time, could not support it.

ASSEMBLYMAN DOYLE: Thank you. Let me just make some observations. As to one of your

last points about waste or loss of soft cost; that is, those costs expended before a building permit. Under present zoning, the very same thing could happen. I'll cite Donadio v. Cunningham, 58 New Jersey. You don't start to build substantial reliance until the building permit. Insofar as the market value of the preserved land, without the development rights, that value will probably go down, and should go down, and will be assessed at its decreased value. You mentioned Farmer Jones and Builder A and the 300 acres that could be built two to the acre and that he would get, normally, 600 units, so he should get 900 certificates. The encouragement, as I understand it, would not take place in the number of certificates he gets based upon the land in the preservation zone, but would be based upon the increased density that would be allowed in the transfer zone.

MR. DE VINCENS: I agree with that. What I am talking about should not be interpreted as transfer development rights. What I am talking about is what he is able to build in the transfer zone, vis-a-vis density in the preservation zone which was taken and density in the transfer zone. According to the way I read 3192, he should be able to upgrade the density in the transfer zone over what he would have been able to develop in the preservation zone. I don't want to confuse it. I was using "transfer development rights" akin to "units."

ASSEMBLYMAN DOYLE: Do you think the objection of the Shore Builders Association is based upon this bill or the entire concept?

MR. DE VINCENS: That I really could not say at the present time, Assemblyman Doyle. We are having a legal action committee meeting this evening, which you are to attend, and I am going to broach that subject

there. I hesitate to make any representations on behalf of the New Jersey Shore Builders Association other than my analysis, from a legal standpoint, of the bill as particularly written, which I feel qualified to do. As to the concept, Mr. Chavooshian has agreed to come and speak before the New Jersey Shore Builders Association, and we will try to arrange that. We will let them make their own determination as to the concept.

ASSEMBLYMAN DOYLE: We would like to have the continuing input, not only as to the language which you set forth ably as an attorney, but also the thoughts of your members and the group as a whole as to the concept.

Thank you very much for your testimony.

MR. DE VINCENS: Thank you, Assemblyman Doyle.

ASSEMBLYMAN DOYLE: That concludes the second day of hearings. I want to thank our reporters and staff for an able job and all the people who testified. I hope we have done what we tried to do, which was to provide a good record for the committee and the Assembly and for anyone else who may have an opportunity to read it. Thank you very much.

(Hearing Concluded)

Questions and Thoughts For Consideration
A-3192 "Municipal Development Rights Act"
Submitted by R. Lee Hobaugh, President, Herbert H. Smith Associates

1. Should the definitions in this Act be consistent with those in Senate No. 3054, "Municipal Land Use Law"? Should both bills be passed, consistency of definitions would be helpful. I do not believe they are now consistent.

2. Article I, paragraph 4. i. "Density," fourth line: should "of building" be inserted after "square feet"?

3. Article II, paragraph 6: should a minimum number of members be stated and an odd number of members specified to avoid tie votes?

4. Article II, paragraph 6 and 7: the municipal planner and attorney may be serving on a time related, fee basis. Paragraph 7 requires members to serve without compensation. Should one or the other paragraphs be changed? Both persons may be requested to serve for technical advice but could not be paid as written. Possibly paragraph 6 refers only to full-time employees.

5. Article II, paragraph 10: ten days is probably not enough time for the commission to report. Securing a transcript, especially of a lengthy hearing, would be difficult within that time frame.

6. Article III, paragraph 12 b.: should "hearing of applications and complaints" read "hearings of appeals from a decision of the Planning Board"? The phrase "applications and complaints" appears in preceding paragraph a, potentially creating confusion.

Questions and Thoughts For Consideration
A-3192 "Municipal Development Rights Act"
Submitted by R. Lee Hobaugh, President, Herbert H. Smith Associates

7. Article III, paragraph 13 e.: if rights are to be assigned on basis of value, is this paragraph necessary? In any event, it is unclear to me when subdivision would be required.

8. Article III, paragraph 14 e.: should the wording of this include "private improvements"?

9. Article III, paragraph 17: what if the municipality has a poor zoning ordinance? Would it not be better to have assignment of rights based on commission study which might alter "existing zoning ordinance"?

A REALTY TAX
— On Excess Profits

By David F. Moore

The fact that the second Green Acres Program is now underway with $80 million to spend on open space should not lull New Jersey residents into believing open space problems are solved in this state. Not while an infinite demand drives up the costs of the limited amount of open space that remains.

What New Jersey needs is a constructive program to stave off this inflationary spiral. The time is ripe, in view of general interest engendered by the recent report of the State Tax Policy Committee, to propose a tax program which could alleviate some of New Jersey's growth cramps.

A graduated real estate excess profits tax would tend to disenchant fast-moving land speculators who drive up land costs in certain areas, and could raise the money to retire the new Green Acres bond issue while providing extra funds to extend that land acquisition program.

Money would be collected through the same machinery which now handles property transfer taxes. All receipts from the tax would be dedicated funds, to cover both principal and interest on Green Acres bonds and to establish a continuing fund from which the state would acquire other open space. The existing Green Acres foremat of outright state purchases and 50 per cent matching grants to counties and municipalities should be continued.

A real estate excess profits tax should allow a landowner a fair profit when he sells his land. That portion of the profit over and above the established amount (15 per cent, for example) would be taxed. The greater the excess profit, the higher the tax percentage taken from it. The base against which the profit is judged would be the purchase price, if the land were bought within a given number of years, such as 20 for another example.

If the land were owned by the seller longer than 20 years, the base should be the assessed valuation in some earlier year when assessments were realistic. Such an assessment criteria should also apply if the owner got the land through gift, bequest or some other manner which failed to reflect a realistic base upon which to compute a profit.

Such a system would allow a landowner an equitable profit when he chose to sell, but would tend to erode the excess profits of the speculator. It should be borne in mind that sudden real estate price rises in any given locality generally are caused by highway or other public improvements which have already been financed by all the taxpayers. There should be a provision to limit taxation on undeveloped open space, and to give credit for excessive taxes paid by the owner of such land prior to his selling it.

From the open space standpoint there should be some weighting of the regulations so that matching payments toward municipal and county purchases would not necessarily be on a flat 50-50 basis for state aid. An extra percentage of state aid should go to areas showing the fastest population increases, for example. At the same time, care would have to be exercised not to overly penalize those rural areas where the most open space remains and where the land value increases would be the most dramatic.

Although some will argue that this proposal is merely a step toward more inflation, with the home buyer getting the excess profits tax passed on to him in the price of his building lot, I believe the land speculators would be put into an inferior competitive position this way. This would slow down their development of open space and would tend to equalize land sales over a much wider area instead of encouraging hot spots to develop.

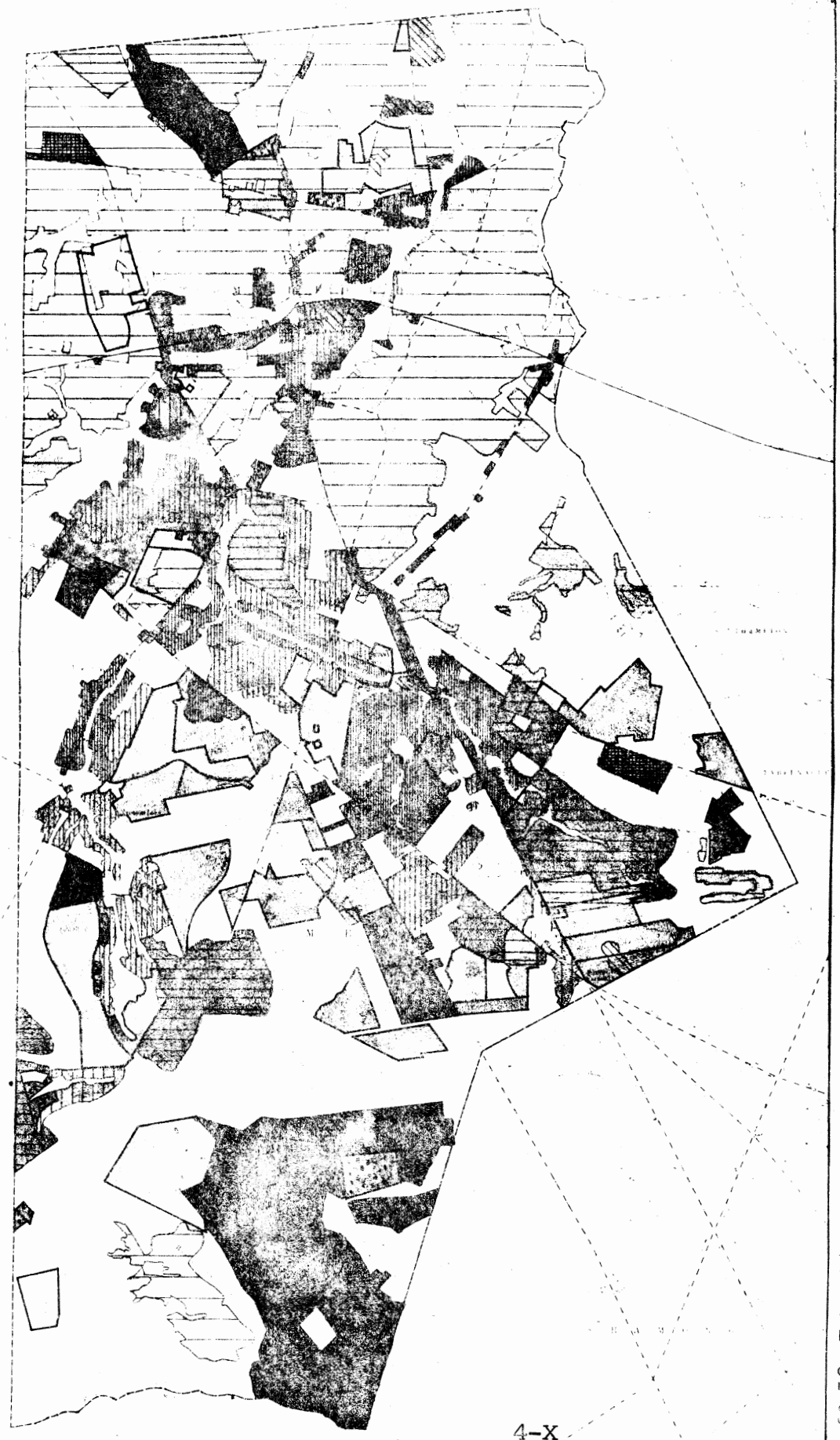
Maybe someone else will advance a more equitable and more workable plan that meets the same ends. This idea, though, calls for serious consideration. The population of New Jersey continues to grow by nearly a dozen per hour, and with it sharpened land hunger and cost increases.

FOOTPRINTS

Winter, 1972 - Vol. VI, No. 1

New Jersey Conservation Foundation

MAP A



OWNERSHIP PATTERNS

SOURCE: Aero Service - Aerial Photographs 1970 plus New Subdivisions (re approved) 1970 -74

S.F. RESIDENTIAL <1DU ACRE

S.F. RESIDENTIAL 1-2DU ACRE

S.F. M.F. RESIDENTIAL >2DU/ACRE

COMMERCIAL

INSTITUTIONAL

INDUSTRIAL

AGRICULTURAL

PRIVATE OPEN SPACE

PUBLIC OPEN SPACE

S.F. = Single Family
M.F. = Multi-Family

UNDEVELOPED BUT SUBDIVIDED PARCELS (generally 5 acres or less)

SPECULATIVE OWNERSHIP (parcels 10 acres or greater)

DATA SOURCE:

1. Burlington Co. Planning Commission
2. Medford Twp Tax Records

AN ECOLOGICAL PLANNING STUDY OF
MEDFORD TOWNSHIP, NEW JERSEY

CENTER FOR ECOLOGICAL RESEARCH IN PLANNING AND DESIGN 1971-72

DEPT. OF LANDSCAPE ARCHITECTURE AND REGIONAL PLANNING
UNIVERSITY OF PENNSYLVANIA PHILADELPHIA, PENNSYLVANIA

URBAN DEVELOPMENT PATTERN : 1963 – 74

1963
1967
1971
1972
1973
1974

SOURCE:

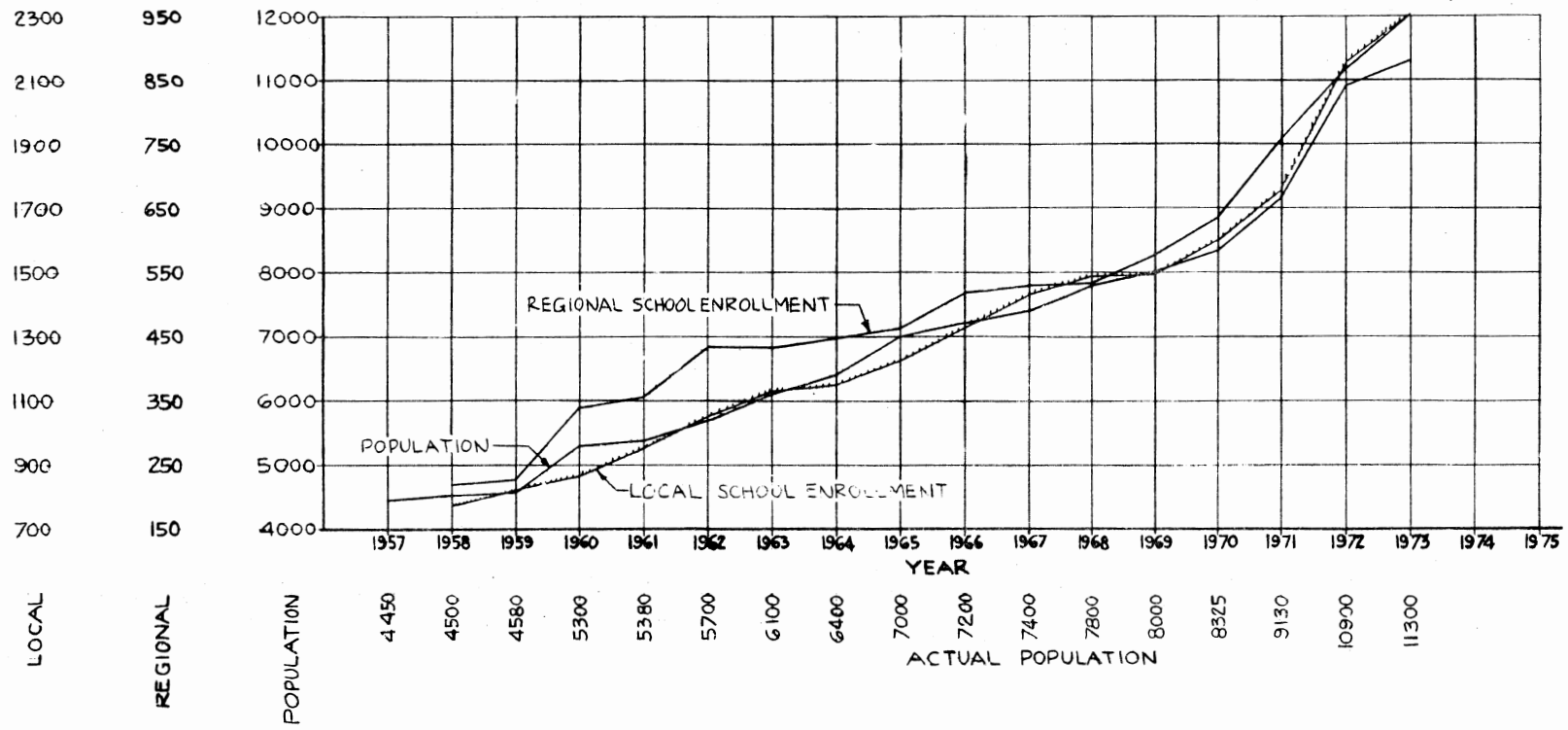
1963	PINELANDS REGIONAL PLANNING BOARD: NEW JERSEY PINELANDS REGION, Nov. 1963
1967	USGS TOPO MAP 1967
1971 ~ 74	BURLINGTON COUNTY PLANNING COMMISSION MAP

AN ECOLOGICAL PLANNING STUDY OF
MEDFORD TOWNSHIP, NEW JERSEY

CENTER FOR ECOLOGICAL RESEARCH IN PLANNING AND DESIGN 1971-72
DEPT. OF LANDSCAPE ARCHITECTURE AND REGIONAL PLANNING
UNIVERSITY OF PENNSYLVANIA PHILADELPHIA PENNSYLVANIA
NAOKI KUROKAWA

CHART A

PHASE 1
POPULATION TRENDS



RECOMMENDED REGULATIONS AS PER MEDFORD REPORT

- STREAMS & LAKES
- FLOOD PRONE AREA
- Hw WETLAND
- DEPTH TO SEASONAL H. WATER TABLE
- BOG
- LOWLAND SUCCESSIONAL MEADOW
- CEDAR SWAMP
- SPECIMEN TREES
- NUTRIENT RETENTIVE SOILS
- STATE LANDS
- PRIVATE PRESERVES & CAMPS

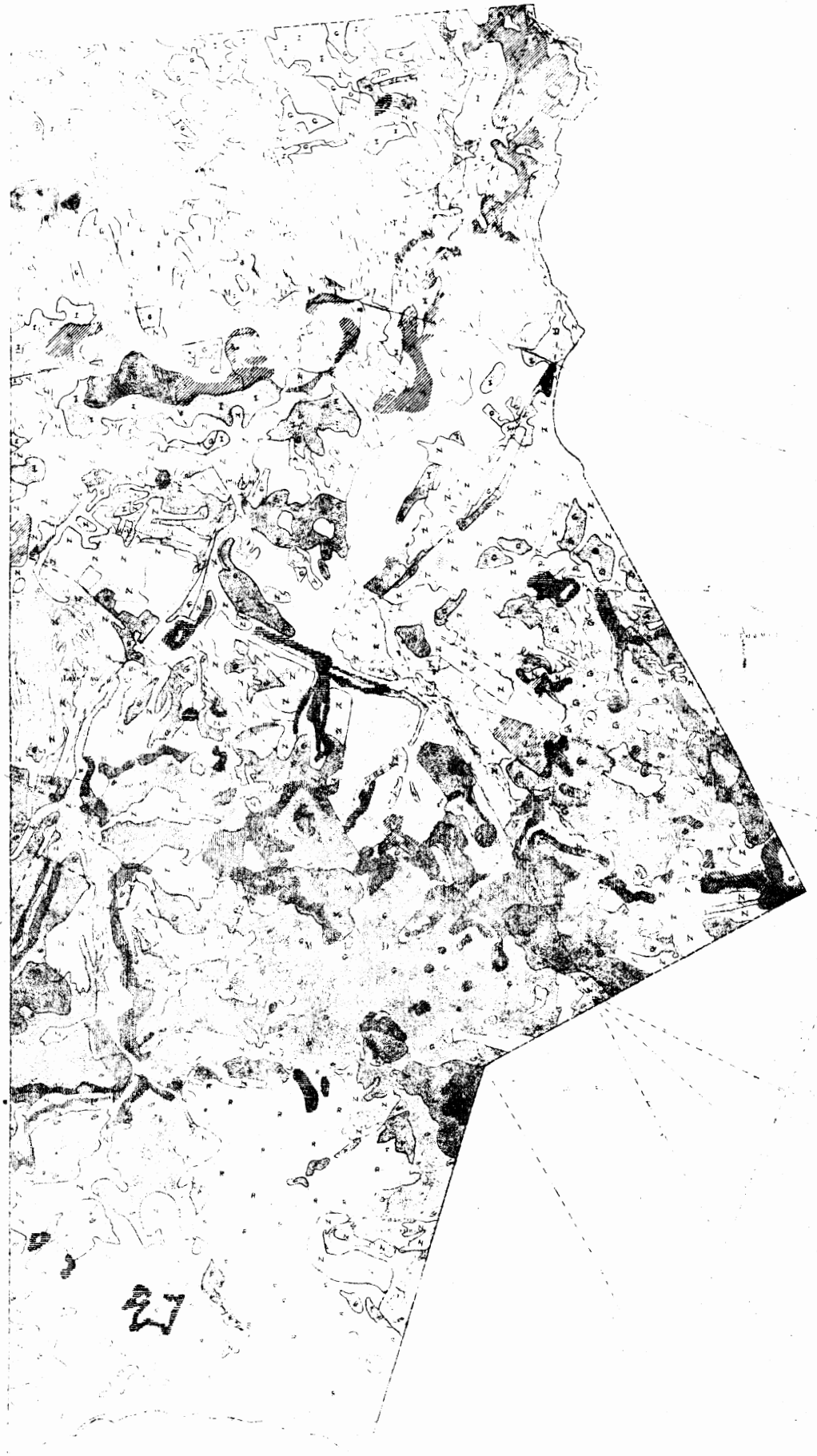
feet 2000 500 0 1 mile 1:2

100 acres 50 25

OPEN SPACE ANALYSIS

FOR MEDFORD TOWNSHIP

L.A. STUDIO 701B FALL 197?
DEPT OF LANDSCAPE ARCHITECTURE AND REGIONAL PLANNING
UNIVERSITY OF PENNSYLVANIA PHILADELPHIA PENNSYLVANIA



PRIME SUITABILITY:
synthesis

- GRAVEL DEPOSIT
- NATURAL RECREATION
- AGRICULTURE
- INTENSIVE RECREATION 2
- INTENSIVE RECREATION 1
- GENERAL RECREATION
- FORESTRY
- ANIMAL REFUGE

- URBAN
- CLUSTERED SUBURBAN
- SUBURBAN
- RURAL URBAN

NOTE: URBANIZED CATEGORIES ARE NOT PREEMTIVE OF OTHER CATEGORIES.

feet 2000 500 0 1 mile 100 acres 50 75

OPEN SPACE ANALYSIS

FOR MEDFORD TOWNSHIP

L A STUDIO FOR
DEPT OF LANDSCAPE ARCHITECTURE AND REGIONAL PLANNING
UNIVERSITY OF PENNSYLVANIA PHILADELPHIA PENNSYLVANIA

NEW JERSEY ASSEMBLY

MUNICIPAL GOVERNMENT COMMITTEE HEARING ON A-3192

MARCH 19, 1975

COMMENTS BY GERALD E. HAUGHEY, ESQ.

I am honored to have the opportunity to comment upon Assembly Bill 3192 before the Municipal Government Study Committee.

As an attorney engaged in a land use practice primarily on behalf of land owners and users, and as a citizen actively participating in an innovative municipal effort in Medford, New Jersey to reassess and more rationally apply the governmental power to regulate land use, I am particularly interested in the bill before this Committee.

Whatever may be the specific merits or weaknesses of Bill 3192, those merits and weaknesses must be analyzed in a realistic context.

In the face of a disastrous history of ecological degredation of the landscape, in the face of immeasurable public costs from irresponsible or unwise land use, in the face of the economic destruction of our cities, in the face of broad social inequality through land use regulation, in the face of all these realities, from flooding through air pollution to social exclusion, it would not seem to be too audacious to face abruptly and openly an obvious fact:

Our system of land planning has grossly failed on all fronts

and in all ways.

Those of us involved in what the President's Council on Environmental Quality calls "The Quiet Revolution in Land Use Control" often feel like the child in the nursery tale about the emperor's new clothes who alone recognized naked facts and said so. Gentlemen, the emperor is naked. One need only look around to realize that the planning system has failed. That is the reality in which this legislation must be assessed.

Whatever may be the internal merits of weaknesses of Bill 3192, it is historic in confronting the failure of the planning system at its root causes. The existing system has failed and will continue to fail constitutionally. The existing land use system has run afoul the constitutional imperatives by failing to recognize rights of private property, on the one hand, and individual protections against regulatory discrimination on the other.

It has failed to recognize its importance to confront the taking issue in the face of rising land values, (which, incidentally, is the only circumstance in which a planning system <u>needs</u> to work), and in fact has contributed to its own visceral inadequacy by artificially affecting land values. Worst of all, it has permitted us to delude ourselves in the professions and governments and to delude the public into believing it could do what it cannot do. As if to suffer the system plaguing us forever with geometric

progressions of failure of increasing impact, there are signs that we may permit ourselves the ultimate delusion - that the disease can be cured by raising it to a regional or State level, roughly equivalent to curing a cold by spreading it in a crowd.

This legislation focuses on the key flaw of the two fundamental structural flaws in our planning system. It is imperative that it be implemented, but before it is implemented these defects in the legislation must be corrected:

(1) It should not mandatorily prohibit land uses within the preservation zone. The purpose of this legislation is not the creation of or elimination of rights but rather is the recognition of existing property rights. Our objective is to pay for what we take. Therefore, there is no need to <u>compel</u> a landowner to participate in the program if he desires not to do so. If providing compensation to the landowner does not provide sufficient incentive to participation, then we have undervalued his rights. If we have valued them fairly, he will not need compulsion.

(2) The operation of the TDR system would more clearly be predicated upon a municipal commitment to accept a fair share regional housing responsibility, an acceptance of growth potential. Market demand for housing units is a key ingredient of a development rights formula. Where there is less than a complete market commitment TDR is only a means of taxing newcomers for openspace

acquisition. Where there is a full market commitment then any challenge to the TDR zoning system by a developer demanding more dwelling units will fail as an attempt to aggrandize market units already allocated to another parcel of land. The key to legality and fiarness is allocation of 100%, not less, of units in demand.

(3) Preserved land should not include ecologically critical areas already capable of control by regulation. As courts all over the country have come to recognize, there is no development right in flood plain or wetland where that development would cause serious adverse impact on the public health, safety and welfare. The owner whose rights need protection is the owner of developable land, the farmer and woodland owner.

(4) The determination of preserved land and of "developability" or preserved and transfer lands simply can't be accomplished without a proper Natural Resources Inventory identifying a wide hierarchy of suitabilities and unsuitabilities for development. Many prototypical inventories already exist, in New Jersey municipalities and already have resulted in great savings of tax moneys. Such an inventory could be provided to all the municipalities of the State for less than the cost of one-tenth of a mile of interstate highway. At the very least, the municipal commission to study TDR required by Article II should be required to consult a landscape architect or other trained ecologist capable of guiding the land analysis to real intrinsic suitabilities for uses.

(5) Subdivision of preservation zone lands for agricultural or conservation purposes need not be prohibited as it is by the bill.

(6) The incentive provision of section 14d should be revised to encourage voluntary development rights transfers by allocating to the farmer a modest increase in transferable rights over those existing and likely to be realized without a TDR system.

(7) The meaning of "most lucrative site" in section 14f is obscure.

(8) A fundamental weakness in the allocation system is its reliance upon existing zoning, adjusted by assessed value in allocating "rights". In a rising land value situation, with typical irrational use of holding zones such as large "agricultural" or "industrial" zones, zoning and tax assessment simply do not realistically recognize economic values and rights, and this failure has been fundamental in the failure of the zoning system. Market value is the only fair determinant of "rights".

I propose that this legislation be amended and passed immediately to permit municipalities to use a non-mandatory TDR system for developable land based upon regional housing demand analysis where the municipality has accomplished a Natural Resource Inventory and already strictly regulates environmentally critical areas.

In conclusion, I would underscore the vital importance of this legislation. With TDR we will at last begin to come to grips with the root cause of the degredation of our landscape, and do so in harmony with, rather than in defiance of, our constitutional heritage.

Plainsboro Township
Middlesex County

RESOLUTION SUPPORTING PASSAGE OF ASSEMBLY BILL # A-3192

WHEREAS, Plainsboro Township Committee of the Township of Plainsboro in the County of Middlesex is desirous of maintaining open space; and

WHEREAS, the preservation of prime agriculture land, if not checked, will result in the destruction and permanent loss of one of New Jersey's assets; and

WHEREAS, Plainsboro Township has a considerable amount of this prime land remaining in agriculture; and

WHEREAS, urban development pressures accompanied by economic opportunities are threatening the rational and comprehensive techniques of planning and zoning; and

WHEREAS, enabling legislation is required to allow the adoption of a development rights ordinance; and

WHEREAS, Plainsboro Township Committee believes that "development rights" would be an effective method to preserve this land for our future generation.

THEREFORE, BE IT RESOLVED THAT THE Township Committee of Plainsboro Township in the County of Middlesex does and hereby declares its support of the passage of Assembly Bill # 3192; and

BE IT FURTHER RESOLVED that the Municipal Clerk be and hereby is directed to forward a copy of this resolution to members of the Committee on Municipal Government of the New Jersey State Assembly, Assemblywoman Rosemarie Totaro, Assemblyman S. Howard Woodson, Jr., and the Middlesex County Planning Board.

Chester A. Steen

Chester A. Steen, Clerk

Testimony on
New Jersey Assembly Bill 3192
"Municipal Development Rights Act"

before the
The Municipal Government Committee

Toms River, New Jersey
March 19, 1975

Steven R. Woodbury

Good afternoon, and thank you for the opportunity to present some comments on the proposed Transfer of Development Legislation. My name is Steven Woodbury, and I am a doctoral student in City Planning at the University of Pennsylvania. Over the past year I have been surveying proposals for TDR around the country, and trying to evaluate the strong and weak points of various approaches. This research is continuing. The initial stage of my work is summarized in an article which recently appeared in the Journal of the American Institute of Planners. I would be happy to make copies of my article, and of an unpublished paper on "Land Development Financing and its Implications for Transfer of Development Rights" available to the Committee, if you would find them useful.

Transfer of Development Rights offers an exciting opportunity for accepting and guiding growth, while preserving desired low-intensity land uses. It holds out the prospect of compensation for those landowners who may be prevented from exercising development rights on their own land: these development rights can be sold, and development directed to more suitable locations. I am well aware of the many problems involved in designing and implementing a TDR scheme. Any state enabling legislation must take account of these. Further research, coupled with assistance to municipalities, will need to continue after passage of enabling legislation. Some of the problems may be difficult to resolve, but I am convinced that the potential benefits can more than repay these efforts. So I am not here to discuss the desirability of TDR. I am here with the hope that the New Jersey legislature will establish a sound framework within which municipalities can adopt fair, workable, and legally defensible TDR programs.

A workable program must be one which is not too unwieldy for municipalities to adopt and administer. A workable program must be one which is not to burdensome for developers to work within. A workable program must

must be one which is not easily undermined by a few, out of short-sightedness or selfishness, at the expense of the population as a whole.

A legally defensible program is one which provides the landowner whose land is restricted with a reasonable use for his development rights. If he cannot exercise them, he must be able to sell them. It is not necessary that he be guaranteed the same return as he might get from developing his own land without regard for the benefit of the community as a whole; it is quite permissible under the police power to reduce the value of land without compensation. We do this all the time through zoning regulations. But the value must not be reduced too much (how much is 'too much' seems to vary widely) for the courts will hold this to be a taking of private property for public use without just compensation, in violation of the Constitution. Second, a legally defensible program is one which is not exclusionary. TDR must not be seen as a means for municipalities to avoid their fair share of growth. It is rather a means for guiding this growth to the most suitable areas.

I have a number of suggestions--or in some cases questions--regarding the proposed legislation. These are outlined in the written testimony I have submitted. Right now I want to briefly discuss a few of these points, and then return to what I see as the central issue: the establishment and maintenance of a market for development rights.

o The proposed legislation establishes a framework within which municipalities can tailor a variety of TDR plans to their particular needs. Such flexibility should be encouraged, within the substantive and procedural guidelines established by the state legislation.

o I believe that it is essential for development rights to be taxed as real property. I support also the bill's taxation of development rights derived from preservation land presently under farmland assessment. As a recent U. S. Department of Agriculture study of "State Programs for the Differential Assessment of Farm Land and Open Space" put it, "Anyone who owns land on the rural-urban fringe is, by the force of circumstances, speculating." (Economic Research Service, USDA, Agricultural Economic Report No. 256, p. 15) Where the goals of preserving farmland and farming can be met through transfer of development rights, there seems to be no equitable reason for the public at large to subsidize the farmer's speculation in development rights by not taxing them. Some research should be done, however, on the possibility of phasing in this tax over several years. It is conceivable that immediate imposition of this tax would force farmers in the preservation zone to sell their development rights immediately, glutting the market and driving down the price to the point where the courts might hold that a taking had occurred.

o The essence of a TDR scheme is that a developer can build--by right--at a certain density in the transfer zone. If he owns the requisite development rights, he can build--by right-- at a specified higher density. Unless there are safeguards, however, this provides the developer with every incentive to try to change the zoning in some other part of the municipality. He could then build at a higher density, without purchasing development rights. The demand for development rights would drop; perhaps there would be no market for them at all. This would rapidly undermine and destroy the TDR scheme. What may be required is a provision that any rezoning or variance in the remainder of the town--the part not in the preservation zone or the transfer zone--must be conditional on the presentation of the appropriate number of development rights.

o Some of my comments have already touched on the necessity for creating and maintaining a market for the development rights. If there is no market for the development rights, or if the demand is very low, then the landowner whose land is restricted may argue that there has been a taking of his property without just compensation. If the courts agree, then the TDR ordinance, or perhaps even the state legislation, could be held unconstitutional.

If there is a very uncertain market for development rights, owners may insist on selling their development rights for cash, and be unwilling to take back a purchase money mortgage, as is currently common in selling land. This would raise the costs to developers of assembling a suitable package of land-plus-development-rights in order to build.

If a market for the development rights is not reasonably assured, then the plan will not be acceptable to landowners in the preservation zone, and the ordinance might not even get off the ground.

So I believe that the state enabling legislation should address this issue directly. Indesigning a development rights ordinance, the study commission and the governing body should be required to:

--specify densities in the transfer zone which will provide an incentive for developers to purchase development rights, and

--specify the size, location, and densities for the transfer zone so as to give substantial assurance that a market for development rights will be created and sustained.

This doesn't tell how to do it; that question must be answered in each specific case. But it seems to me that this requirement should be clearly stated, and should guide the development of specific TDR ordinances. If there is no market for the development rights, they

cannot be sold. If development rights have no value, the ordinance is likely to be thrown out as a taking of private property--if in fact it ever is approved in the first place.

In my written testimony I have included some further comments about specific portions of the proposed act. Rather than discuss these now, I will submit them for your consideration. At this point I would be glad to try to respond to any questions you may have.

Thank you very much for the opportunity to testify this afternoon.

o Section 4(b) line 1 ff: I suggest ""Agricultural use" means the use of substantially undeveloped land ~~devoted to~~ for the production ..."

o Section 4(c) Perhaps this should read "...waterbearing ~~rock~~ geologic formations ...". Many aquifers in New Jersey are composed of unconsolidated sediments. It is probably a legal rather than a geologic question whether these are properly characterized as "rock".

o Section 4(h) Does this refer to two concurrent uses of the same property, or to uses of adjacent parcels?

o The use of "development potential" and "developability" in sections 4(j) and (k), 8(e) and 9(d) seems to raise more questions than it answers. "Development potential" as used in 8(e) should be independent of present zoning, which may be inappropriately high or low. "Development potential" in 9(d) should certainly not allow more than is permitted under present zoning, which presumably represents a valid constraint on development. The definition in 4(j) is at worst meaningless and at best it ignores the fact that "developability" cannot be defined for a parcel in isolation. Many of the elements which enter into a determination of "developability" are only defined for a given parcel when the characteristics of the surrounding parcels are specified.

o Section 4(u) I assume assume that this is a legally sufficient definition, consistent with other legislation. Should it also include the term "bog"?

o Section 4(cc) As a definition, this seems totally inadequate. The specific purposes for which a parcel of land is zoned, for which it is designed, and for which it is occupied, could represent three completely different "uses" simultaneously. What is meant??

o Section 8(d) I would add a requirement to clearly state the assumptions which form the basis for "the identification of anticipated growth and development...".

o Section 8(e) "Development potential" seems ill-defined; see above. The gist of section 8(e) should be to require consideration of the natural characteristics of the land, the demand for different types of development, and the costs of different types of development, for all areas of the municipality.

o Section 8 should require identification of any regional or county-wide housing allocation plans, and their implications for the fair share of growth appropriate for the municipality.

o Section 8 should require that the results of the study, where not incorporated in the report of the commission, shall be available to the public.

o Section 13(b) Does this require that the master plan be amended before a development rights ordinance can be adopted? Does it imply that the zoning ordinance must be amended before the zoning ordinance can be amended by a development rights ordinance?

o Section 13(c) This section seems fuzzy; what is the purpose? Is it simply an attempt to be non-exclusionary?

o Section 14(f) "Developability" is ill-defined, see discussion above. I don't think it is necessary to require the "most lucrative site". The most lucrative site may in fact be someplace you want to preserve. I think this section could be dropped, if the legislation specifies that the densities in the transfer zone shall be set so as to create an incentive for the purchase of development rights, and that the zones shall be specified so as to create and maintain a market for the rights, as discussed above.

o Section 17, line 18, should be corrected to read the same as the earlier reference: "...ordinance, or, <u>in the event no zoning ordinance is in effect,</u> on the basis ...".

o Section 18 Should a municipality also be permitted to distribute certificates in proportion to the ratio of development value of a property to the development value of all property in the preservation zone, if a municipality chose to try this? This represents a theoretically more sound, though practically more difficult, approach.

o Section 20 It is not at all clear from this section, or from the definition of "use", whether the act permits, or even requires, discrimination between, say single-family residential and multi-family residential (or rental versus condominium for the identical unit), as opposed to discrimination between, say, residential and commercial, as being "differing uses" requiring a conversion schedule.

o Section 26 "...in the best interests of the municipality" seems too general. As with land banking, development right banking offers possibilities for abuse. It seems to me that the goals are to achieve the preservation of certain assets of the municipality, and to guide necessary development in the interests of the citizens of the town and region, subject to constitutional constraints on taking and exclusion.

o The legislation has no discussion of issuance of development rights to State or Federal landowners. Does this pose a problem?

o There is no discussion of taxation of development rights held by non-profit tax-exempt institutions. I believe that these should be taxed (see my discussion of farmers, above) since speculation in development rights is not essential to the conduct of the religious, educational, or other activities which are the basis for the tax exemption.

Steven R. Woodbury

Department of City Planning
University of Pennsylvania
Philadelphia, Pennsylvania 19174
215 243-5784

307 Chapel Avenue
Claymont, Delaware 19703
302 792-1668

Remarks Addressed

to the

MUNICIPAL GOVERNMENT COMMITTEE

of the

NEW JERSEY GENERAL ASSEMBLY

regarding

A. 3192 - THE MUNICIPAL DEVELOPMENT RIGHTS ACT

by

Richard A. Ginman, Director

Division of State and Regional Planning

Department of Community Affairs

March 19, 1975

MR. CHAIRMAN AND MEMBERS OF THE MUNICIPAL GOVERNMENT COMMITTEE

Thank you for the opportunity to comment on Assembly Bill 3192, the "Municipal Development Rights Act." It gives me special pleasure to be able to participate in what can be a landmark piece of legislation that could serve as the model for the rest of the Nation. We at the Division of State and Regional Planning have been actively involved in encouraging the development of this concept ever since Mr. B. Budd Chavooshian saw the possibilities of what such a device could mean to New Jersey and took on the job of fine-tuning it.

The police power/eminent domain controversy, as it arises in our increasingly environmentally-conscious society, typically puts the owner of a low-density resource against government, which strives, without compensation, to prevent the resources conversion to a higher density. Many of the bold environmental and land use programs being advocated and adopted throughout the country will bog down because of their inattention to economic realities. We cannot realistically address physical and social planning goals and ignore their economic impact on landowners, a view too dominant in current land use thought. Many ambitious land use measures adopted a short time ago are beginning to result in second thoughts. Proponents of these programs are finding themselves up against what has been characterized as the "second generation problems of environmentally based land use regulation" because they must now deal with the tough economic trade-offs required by these laws.

We believe the concept of transferring development rights (TDR) could help to bring existing land use practice in line with economic realities. TDR permits an owner of a threatened resource to sell his land's unused development rights for use

elsewhere, the purchasers of the rights being allowed to build more intensively elsewhere -- hence, more profitably -- than would normally be possible under traditional zoning regulations.

We needn't take any time in pursuing the idea that property ownership is not absolute nor is it a singularly held item. Rather, it is a relative interest in a "bundle of rights" which has the ability to be separated, i.e., mineral rights, riparian rights, air rights, etc. Also, the practicalities of moving these separated rights from the conceptual to the operational is not new to New Jersey. Witness for instance our experience with riparian rights and the Natural Resources Council, the Farmland Assessment Act which for all intents and purposes already separates agricultural value from development value and the Green Acre Act which specifically authorizes the purchase of just such an interest as development rights. We see, then, that the concept is not new just the packaging.

We believe that the context in which TDR is to be used has the better chance of being misunderstood than the concept itself. Assemblywoman Totaro assures us that this is not a substitute for current planning and zoning practice but a supplement -- an additional tool to be made available for towns to use in achieving their goals for a better community. We agree. Much of the criticism leveled against local land use planning and regulation is unwarranted. Why -- because we must be fair when sitting in judgment that the accused had adequate means at their disposal to do an effective job given the will to do so. In New Jersey we have an economic good which serves as our precious resource -- that item is land. While simple averages can be misleading, they can serve to establish a relative numerical appreciation of the subject matter. In New Jersey the average 1973 cost

per acre of land was $12,670.* It is obvious that land ownership in this State is big business. We are an integral part of the first and fourth largest metropolitan areas in the United States and, therefore, hold out the prospect of prosperity for business, industry and people. We are a major attraction for development and there are no near- or medium-term signs that a major change is in the offing. We believe that the statement made in The Taking Issue, that "the regulation of land, if reasonably related to a valid public purpose, can never constitute a taking"** is an extreme position in need of modification through the systematic recognition of the economics of land use regulation. The key word here is "systematic." TDR does systematize the economic dimension of regulating development, a dimension previously left largely to the hapanstance of developer-municipal negotiations. It does so via an innovative compensatory technique which can be utilized in a manner which is simultaneously respectful of community goals and of capital risks. Putting all the eggs in the police power basket is not strategically wise, not even with a "sure thing;" and land use regulation can hardly be characterized as a sure thing.

TDR does not sweep away the judicial gains made over the last thirty years, and particularly in the last half decade. Rather, it builds on them and offers a complementary technique to help stabilize them by not making it necessary for these decisions to bear the complete weight of future land use planning and regulatory programs. TDR will not, nor is it intended to be the solution for

---

* Division of State and Regional Planning, Trends in New Jersey Land Value, Trenton, January, 1974.

** F. Bosselman, D. Callies, & J. Banta, The Taking Issue, 1973, p. 238.

all land use problems, nor is it a substitute for sound planning and equitable regulation. The device, as proposed here, is directed toward resource-protection goals. An independent planning process must be set in motion both to identify the goals to be served and to accommodate those goals with other worthy community interests.

TDR does not come without a price. Public officials must understand that they will be required to shoulder new land management responsibilities. While certain qualified lands will be reserved, the receiving areas will be subject to higher densities than may have originally been perceived. Good planning and design, important as they are, take on still greater importance since the quality of our lives is to be enhanced at these higher densities. This should not be viewed as a problem but as an opportunity to accommodate varied styles and preferences for living, knowing a reasonable portion of our land will remain in its natural or near-natural state. TDR provides municipal governments with an additional tool that will enable them to carry out appropriate land use responsibilities at the local level if they are so disposed.

I would be remiss in my responsibility if I did not leave you with at least one caveat. There are inherent dangers in any land reservation measure that they may be misused for exclusionary and anti-growth purposes. This would be extremely unfortunate since its correct use can result in great benefits to the entire array of interests regarding our land and its use. To the degree possible, I would ask the Committee to explore inclusion of possible safeguards against such misuse. While the probability is no doubt small, the spectre of possible widespread abuse could be critical in developing support for this legislation.

In summary let me say that the view that severs physical planning from its economic consequences is slowly giving way to recognition that bold physical planning programs conceived in an economic vacuum are prime candidates for the scrapheap. New Jersey is running out of time. Our State does not have to serve as a case study on how not to do it for the rest of the Nation. The Legislature has the opportunity to be the national leader by passing such legislation.

New Jersey is approaching a point where its land use programs will have to be corrective rather than proactive. The Legislature now has the opportunity to postpone this crossroads and I am confident the Committee will recognize this and report the bill to the General Assembly.

Statement of James J. Seeley
on the
"Municipal Development Rights Act"

I am James J. Seeley, Professor of Law at Rutgers University Law School, Camden, and Director of the New Jersey Center for Land Use Law, which is a project of the law school.

Let me begin by saying that it is a pleasure to have the opportunity to testify before this Committee today on an extremely important piece of land use legislation. I have some general comments about the transfer of development rights concept, and this particular legislation, and some specific observations about particular language. Let me begin with the general information.

I consider the concept embodied in this legislation to be extremely useful in accomplishing a very necessary land use regulation in New Jersey, and more economically equitable among all property owners than the present approach to zoning.

The legislative findings of fact recited at the beginning of the legislation indicate in excellent fashion why this approach to land use regulation has become essential to New Jersey. New Jersey has the highest population density, the largest percentage

of urban land and a very rapid growth rate. The loss of agricultural land, and other open space, at a dramatic rate would soon ensure that the entirely of the land space of New Jersey would be dedicated to urban land use. Thus, in order to maintain some diversity in the use of land, and in order to insure some continued agricultural activity which supplies fresh food commodities to the region, some program for regulating and ~~rotating~~ allocating urban growth has become essential. The maintenance of some open space for agricultural land not only insures food supply, but provides areas for absorption of storm water, recharging of the ground water supply, replenishment of oxygen through the process of photosynthesis, and numerous outdoor sports and recreation related activities. Open space and recreation values are not only beneficial socially, but are an extremely important aspect of New Jersey's economy. The resort and recreation industry represents one of the largest dollar industries in the State today. Thus, it becomes a reasonable health, safety and welfare related interest of the state government to provide for land use planning which will preserve some open and agricultural land.

Another aspect of ~~the~~ new legislative findings of fact which relates to the need for redevelopment in New Jersey is of equal significance. The application of a transfer of development rights law need not be viewed by those interested in maintaining a high level of construction activity for employment purposes ~~from the State of New Jersey~~ as at all inconsistent with their needs.

There is presently located within New Jersey in and adjacent to urban areas close to the centers of transportation and employment a vast amount of land available for development. This land has the benefit of already having central sewers, of already having all utility services, and of being located within the shortest commuting distance to employment areas. Many, many acres in the City of Camden, for example, have been cleared for redevelopment and sit as raw, vacant land. Many more acres are presently occupied by substandard structures in need of replacement or rehabilitation. The need for additional housing units and for stimulation of employment in the construction industry can be greatly assisted by the redevelopment of this type of land, in and close to urban centers, which has fallen into a state of disuse. A concept of encouraging new development as opposed to development of raw and outlying lands will have the benefits of eliminating substandard and unhealthy housing conditions, reducing demands for energy in connection with commuter transportation, reducing the use of energy in providing water, sewer and utility services by utilizing existing facilities rather than extending new ones, and will stimulate business and economic activity in areas where existing economies are in a depressed state. I think it is certainly time, in light of all the energy and natural resources related problems that have recently surfaced, for all of us involved in zoning, planning, building and development to

recognize that the recycling of land which has presently fallen into disuse is highly viable from a social and an economic perspective. I applaud the recognition of this need in the legislative findings of this bill.

Let me now address myself to what I consider the direct benefits of this transfer of development rights legislation. In addition to providing some methodology whereby necessary protection of land for open space and agricultural uses is achieved, as I discussed previously, legislation of this kind has the benefit of compensating landowners ~~through~~ for restrictions imposed on use of their land. It also avoids the windfall economic impact of the present use of the zoning power. For example, when a property owner who happens to own 100 acres of undeveloped land in a rural but developing area receives high density zoning for that tract, the value of that land, as a result of government regulatory action, is multiplied by manyfold. There is very likely to be other land of similar characteristics in the community for which such zoning cannot be obtained. The community's legitimate governmental interest in regulating densities and providing for a diversity of housing types and a diversity of commercial, residential and industrial uses, means that not all land, even where it might be similar, can receive the benefit of the most financially valuable zoning classification. Therefore, some tracts

of ground will, under the present system, be dramatically increased in value by the touch of the zoners magic wand, and the high classification of such tracts will result in the unavailability of that same economic benefit to other property owners in the community. The transfer of development rights concept recognizes that high intensity land uses on a particular tract require support in various ways from the entire community, and that since a limited number of such high intensity uses can be accommodated by a community, the economic benefit of such uses should devolve to all of the property owners in the community whose property ownership supports and makes possible the high intensity use at one particular location. Since transfer of development rights would require, for such high intensity uses, the acquisition of development rights from other landowners in the community, the windfall effect would be avoided, and other property owners would be compensated for the loss of opportunity to develop their property in a high intensity fashion.[7] An important part of the legislation, which I believe makes an intelligent approach to a difficult problem, is Section 8 of Article II and the criteria it sets forth to be utilized in computing the amount of development rights to be created for land in the preservation district. These criteria take into account both the physical development potential of the land, which should include consideration ~~of~~ of avoiding sensitivity areas such as flood plains, steep slopes and other land use building constraints, as well as the market

based suitability of the land for development. This market based consideration is quite important because it would be unrealistic to think that the law would require compensation of a farm owner for the value of his farm as a site for a high rise office building, merely because the ground is physically capable of accommodating such a structure. Fair compensation depends directly on the potential market uses of the land, as Section 8 recognizes. Ultimately the number of development rights finally created depends on the then existing zoning ordinance if one is in effect at the time the development right scheme is adopted, and on the Section 8 factors where no such ordinance is in effect. If the ~~benefit of~~ present zoning ordinance is a reasonable and well considered one it should take into account factors like those in Section 8 ~~and~~ in establish in its own land use patterns, so the result should be quite similar. Should the ordinance not be based on factors like those in Section 8, my opinion would be that the Section 8 factors are a better method of establishing the number of development rights to create.

Another aspect of the development rights concept which should make it attractive to the building and housing industry, is the certainty it can lend to the planning and construction of new facilities. The political reaction to somewhat haphazard land use regulation in the past has been felt throughout New Jersey. Numerous municipalities have imposed moratoria on

any new construction pending revision and re-evaluation of municipal land use plans. Communities are presently seeking to zone out or resist forms of development based on the fear that they will be overrun with a particular form. The transfer of development rights approach will establish a zone for development activity and will provide the developer with great flexibility as to density. It will also ensure that development at the rate established and in the area set aside will be permitted to occur without many of the political problems now experienced. The scheme will also assist in providing for a diversity of housing type ~~that~~ with higher densities with their increased efficiencies in construction expense ~~and~~ utilities ~~in~~ energy usage.

With respect to some specific provisions in the bill, I would have the following suggestions. It would seem useful to have a number of subzones or a zoning plan for a variety of uses within the transfer zone. This could be accomplished in a way similar to that done with present zoning ordinances. While nothing in the present legislation seems to preclude that approach it might be useful to expressly recognize that such planning of the transfer district is permissable and sometimes desirable.

The question also arises with respect to the applicability of the Farm Land Assessment Act to property located within the transfer zone. One can imagine a community which is presently rural adopting a transfer of development rights scheme which

would cause land presently in agricultural usage to fall within the transfer zone. Should this occur and should there be little present demand for that land in that rural community as a site for development, perhaps it would be worthwhile to permit that property owner to enjoy the same right to agricultural tax treatment as owners outside the transfer zone for so long as his property is kept in agricultural usage. For purposes of equalizing the tax between the preservation zone and the transfer zone, property owners within the transfer zone who were receiving agricultural tax treatment might also be assigned a hypothetical number of development rights upon which they would be taxed although such rights would be non-severable from the land and utilized only for taxation purposes.

Another question arises with respect to ensuring an adequate number of units within the transfer district to "~~move~~ use up" the number of development rights ~~to~~ created outside the district. The bill, in its present form, appears to permit maximum density requirements within the transfer zone, but would not require developers to build at that density. If developers chose to build at less than the maximum density for a particular site within a transfer zone, development rights that could have been used up on that site will not be used and may, at the time when all of the land in the transfer zone is developed, be in excess. I recognize that the present bill provides for that problem by permitting an amendment of the ordinance expanding the transfer

zone to a new area to permit the use of those rights. Another approach to that same problem which would also ensure the diversity of housing type would be to require development of land within the transfer district at a certain density or a range a density, and not above it or below it. While a requirement for a more intense use without permitting a lesser intense use in the same zone is not a common experience for zoning ordinances, some ordinances, for example in the industrial zone situation, are mandatory as to their intense use, and forbid less intense uses.

Another question arises in my mind surrounding state and federal or perhaps private foundation park land or open space land which falls within a preservation district. Will development rights be assigned to the state for park land located within the district, and to the federal government for similar park land or natural wildlife refuges? Will such rights be assigned to private foundations holding land for such uses as wildlife sanctuaries where there are legal constraints on the usage of property for anything else, should that land fall within the preservation district. If there were valid legal constraints on the use of such property which happens to fall within the preservation zone, it would not seem necessary in order to adequately compensate the owners of that property, to provide them with development rights for units which they would not themselves be entitled to build. Perhaps this is a subject which might be addressed expressly in the legislation.

While I have these few very specific and narrow questions I want to say that the drafting of the bill in general is to be commended, in my opinion, as an extremely thorough and thoughtful piece of work which seeks to deal with some very difficult and controversial subjects in a fair and intelligent fashion. I commend the drafters of the bill and this Committee for being engaged in so worthy an enterprise.

STATEMENT OF ESTHER YANAI - MARCH 19, 1975

As a private citizen, I Esther Yanai of Moorestown, New Jersey, am very much interested in seeing open spaces secured for the quality of life for this and future generations. The use of this mechanism to transfer development rights among separate tracts of land added to presently used provisions for clustering residential development within tracts, would present many new opportunities for planning on the local level.

I am glad to see that land zoned for commercial and industrial use has not been excluded as in an earlier TDR proposal, which I feel would have put undue pressure on residentially zoned land.

Also excellent are the bill's provisions on weighing the commission's membership with those experienced in planning for the community and those who will be in a position of administering the plan if it is adopted. Also I agree with the suggestion made by others that commission membership should also include representatives from any existing local environmental and historic commissions.

My criticisms of the bill are minor and include the following: Article I, 4j, defining "Developability." I'm not sure what is meant by the word "Availability." Does it mean accessibility to roads and other facilities, or are there additional meanings which might be spelled out in detail?

Same section, under c: Should "farmland" be defined so as to also include prime farmlands other than classes I through III, that is special lands suitable for selected crops as recommended by the Soil Conservation Service?

Same section, under s: I believe that "land of steep slope" should be defined with a percentage lower than 25%. In order to determine what slopes

are too steep for development and hence worthy of inclusion in a preservation zone, consider data reported by the Soil Conservation Service. For example, in Burlington County's Soil Survey, Table 9, beginning on page 102, lists the limitations for community development of the different types of soil. The two soils listed with slopes of 15 to 25% (Freehold fine sandy loam and Keyport loam) are rated as having severe limitations for streets and parking lots, landscape plants and lawns, and disposal of septic effluent. Of course, many steep slopes are overlooked in a soil survey of this type, as they're too small to appear in the mapping, and on-site verification of slope is always indicated, but the soil surveys could give us guidelines as to how steep is too steep for wise development, and I'd guess that 15% would be closer to an acceptable limit on slopes than would be the 25% proposed in this bill. Especially commendable are the bill's provisions for permanence of the restrictions placed on the preserved zone.

Article III, section 12e in regard to an ordinance provision for public hearings, I would think that some provision for notifying residents and land owners in the transfer zone is also indicated.

Section 13, a-3, I don't know if others are as much in the dark as I am as to what "integral economic assets" are that are to be considered for preservation.

Section 14f: I question the ability of municipalities to within five years extend their facilities and services to all the transferred development that is expected. Could there not be a series of staged transfer zones,

to spread a gradual development of services to fit a gradual development of successive transfer zones?

Section 21: If the total value of the property in a preserved zone is given to the certificates of development rights, what value is left to be taxed on the land itself? If the land itself is also taxed, isn't that double taxation?

Although I would hope that the legislature may also consider mandatory legislation for preserving sizeable stretches of New Jersey's good farmlands for reasons of food production and environmental protections, I feel that this permissive legislation on municipal development rights could be an excellent supplement to such a major program, and urge its early adoption so that municipalities who wish to try it may do so, before the patterns which development takes in their communities are irretreivably set.

Thank you for the opportunity which the committee has offered to the public to voice their reactions early in their consideration of this bill.

MONMOUTH COUNTY ENVIRONMENTAL COUNCIL
MONMOUTH COUNTY PLANNING BOARD

HEARING STATEMENT

of

Monmouth County Environmental Council

on A-3192

Presented before Municipal Government Committee, Toms River, N.J. March 19, 1975

- - - - - - - - - - - -

We only briefly summarize the position of this Council on the proposed bill since we became aware of the hearing details just two days ago.

Monmouth County agriculture is still a viable economic factor in the County. Grains, nursery stock, fruit, vegetable and horse farms are predominant.

However, past attrition of farmland due to development has depleted our acreage at the rate of 3,000 acres per year. Even during this past year of slowed construction, we are losing 2,000 to 2,500 acres annually.

The pressures of taxes, compiled with high offers for purchase of land for development, is most difficult to resist. Yet farming means more than just production of food and fibre to the people of Monmouth County. It means tax paying open space for all. This is borne out by the overwhelming approval of the Farmland Tax Assessment amendment and the three Green Acres Bond Issues in this County.

We believe A-3192 is a sound proposal to save remaining productive farmland from unbridled development.

Time has about run out. We urge early passage so those municipalities so inclined may begin this most important task.

Thank you.

Robert Huguley,
Environmental Planner

41-X

ONE LAFAYETTE PL., FREEHOLD, N.J. 07728 • 201-431-4000 EXT. 220

HOUSING ASSOCIATION
OF DELAWARE VALLEY
1317 FILBERT ST., SUITE 523, PHILADELPHIA, PENNSYLVANIA 19107 (215) LO 3-4050

TESTIMONY PRESENTED TO N.J. STATE ASSEMBLY

ON BILL # 3192

THE MUNICIPAL DEVELOPMENT ACT

MARCH 25, 1975

MARCH 25, 1975

THANK YOU FOR THIS OPPORTUNITY TO COMMENT ON ASSEMBLY BILL 3192, THE MUNICIPAL DEVELOPMENT RIGHTS ACT.

AS YOU MAY KNOW, THE HOUSING ASSOCIATION OF DELAWARE VALLEY, WOR TO EXPAND HOUSING OPPORTUNITY FOR ALL PERSONS IN THE DELAWARE VALLEY BY, IN PART, WATCHDOGGING AND REVIEWING GOVERNMENT'S HOUSING PROPOSAL AND LEGISLATION.

IN 1971, FOR EXAMPLE, THE ASSOCIATION DISCLOSED HOW THE STATE FUNDED SUBURBAN PHILADELPHIA COMMUNITIES THAT USED ZONING DEVISES TO BLOCK OUT LOW AND MODERATE-INCOME PERSONS. ITS STUDY "THE SUBSIDIZED NOOSE," RESULTED IN THE WITHHOLDING OF RECREATION GRANTS BY THE PENNSYLVANIA DEPARTMENT OF COMMUNITY AFFAIRS TO UPPER ST. CLAIR TOWNSI IN ALLEGHENY COUNTY. ARGUMENTS IN THAT CASE WERE RECENTLY HEARD BY THE PENNSYLVANIA SUPREME COURT.

WE BRING THIS MATTER TO YOUR ATTENTION SO THAT YOU CAN APPRECIATI OUR CONTINUING CONCERN WITH AND UNDERSTANDING OF LAND-USE AND ZONING MATTERS.

THIS CONCERN EXTENDS TO THE MUNICIPAL DEVELOPMENT RIGHTS ACT.

AT A TIME WHEN COMMUNITIES' EXCLUSIVE ZONING LAWS ARE BEGINNING TO BE CHALLENGED AS UNCONSTITUTIONALLY EXCLUSIONARY, WE SEE THE MUNIC: DEVELOPMENT RIGHTS ACT AS A NEW WAY TO BLOCK CONSTRUCTION OF HOUSING FOR LOW-AND MODERATE-INCOME FAMILIES. MORE SPECIFICALLY.

1. THE BILL GIVES MUNICIPALITIES WIDE DISCRETION IN THEIR DESIGNATIONS OF PRESERVATION ZONES. THE LANGUAGE MAKES IT POSSIBLE FOR VIRTUALLY ANY OPEN SPACE, HISTORIC OR AESTHETIC SITE, COMMERCIAL, INDUSTRIAL OR MIDDLE TO UPPER INCOME RESIDENTIAL AREA TO QUALIFY AS A PRESERVATION TRACT.

2. THE BILL VIRTUALLY BLOCKS ANY BUT THE SMALLEST RESIDENTIAL DEVELOPMENT BY REQUIRING THAT CAPITAL FACILITIES AND MUNICIPAL SERVICES ALREADY IN EXISTENCE IN TRANSFER ZONES BE SUFFICIENT TO ACCOMMODATE FUTURE DEVELOPMENT.

3. ACCORDING TO THE BILL THE SIZE OF THE TRANSFER ZONE NEED NOT ACCURATELY REFLECT THE FUTURE NEED OF A MUNICIPALITY.

4. THE USE OF "REASONABLE" TO DEFINE THE RELATIONSHIP BETWEEN THE SIZE OF THE PRESERVATION ZONE AND PRESENT AND FUTURE GROWTH NEEDS IS TOO AMBIGUOUS.

5. THE BILL PERMITS DEVELOPMENT RIGHTS TO BE, IN EFFECT, LAND-BANKED (OR HELD FOR AN UNSPECIFIED PERIOD) BY PRIVATE DEVELOPERS OR THE MUNICIPALITY.

6. THE BILL OFFERS HOLDERS OF DEVELOPMENT RIGHTS CERTIFICATES NO INCENTIVE TO BUILD ANYTHING BUT THE HIGHEST YIELD DEVELOPMENTS.

7. FINALLY, THE BILL ABSOLVES THE STATE OF ANY RESPONSIBILITY IN WHAT COULD BE EXCLUSIONARY ACTS BY ITS MUNICIPALITIES.

IN SUMMARY WE BELIEVE THAT THIS BILL WILL RESULT IN DISCRIMINATORY AND EXCLUSIONARY LAND USE PRACTICES BY TYING UP HUGE PORTIONS OF THE STATE'S LAND IN SO-CALLED PRESERVATION ZONES WHILE DISCOURAGING MULTI-UNIT AND/OR LOW AND MODERATE INCOME HOUSING DEVELOPMENT IN TRANSFER ZONES.

THE MUNICIPAL RIGHTS DEVELOPMENT ACT IS, IN OUR OPINION, MERELY AN UPDATED VERSION OF EXCLUSIONARY ZONING WHICH THE N.J. STATE SUPREME COURT HELD MARCH 24 MUST CEASE. 44 x

TESTIMONY ON THE MUNICIPAL DEVELOPMENT RIGHTS ACT
(Bill No. 3192)

Prepared for the Municipal
Government Committee
of the New Jersey Assembly

by

Dennis E. Gale
Director of Planning and Management Research
Land Use Center
The Urban Institute
Washington, D.C. 20037

March 19, 1975

TESTIMONY OF DENNIS E. GALE
ON THE MUNICIPAL DEVELOPMENT RIGHTS ACT
(Bill No. 3192)

This opportunity to comment on the Municipal Development Rights Act comes at a very opportune time for me. Currently, I am in the process of preparing a publication on transfer of development rights (TDR) with Professor John J. Costonis of the University of Illinois Law School and Mr. Franklin James of the Land Use Center, The Urban Institute. Consequently, I'm in the midst of a comparative analysis of most of the TDR proposals, legislation and enacted programs that have surfaced so far. Hence, I feel comfortable in offering my views on Bill No. 3192 and hope that they will be useful to the Assembly Municipal Government Committee.

As a general observation I'm very pleased with the Act. Certainly, it is an enlightened piece of land use legislation. Perhaps its most distinguishing feature is the fact that it anticipates a number of potentially thorny issues and provides mechanisms to deal with them. It seems to allow a liberal measure of adaptability to local governments while ensuring that, if implemented, it will conform to the purposes of the Act.

My comments are as follows:

1. Section 4: I would expand the coverage of the Act to include environmentally sensitive areas such as marsh and wetland and other ecologically fragile areas. (I notice that you do mention these in Section 13.)

I am pleased that you have addressed the bill to architectural, historical, general appearance and unique quality criteria, as well as farmland. Many observers have been urging this broader interpretation of preservation of the built-environment on federal programs such as the National Registry of Historic Places. Perhaps New Jersey will take the lead in this area.

2. Section 13, (3): The use of TDR to preserve economic assets is intriguing but I'm not sure how broadly the term is to be interpreted. It could apply to extractive industries, where natural resources such as minerals or timber would be protected. Or, it could involve manufacturing installations. Or airports. Or tourist areas such as lake fronts. Even though the thrust of this bill is to leave a great deal of discretion in the hands of local officials and citizens, it would be both prudent and wise, I think, to sharpen the definition of economic asset.

3. Section 14: It is indeed important that any TDR measure require that transfer districts be designated on the basis of the availability of adequate capital facilities and public services, existing zoning constraints, environmental capacities of the ecosystem and the demand for and marketability of development rights. For most of these criteria, the bill's language is appropriate. The explicit definition of present capital facilities (lines 23-28) is especially commendable because otherwise, the phrase could easily be misconstrued, thus undermining the purposes of the Act. It is important to include stronger provisions for the consideration of the environmental capabilities within a potential transfer zone.

Also, I think that the consideration of the demand for development rights is overstated (i.e., "most lucrative site possible and available"). I would replace this with a statement to the effect that there be a reasonable expectation that demand for rights will be sufficient to meet the objectives of the Act.

4. Sections 15 and 16: It might be a good precaution to include a proviso that under no circumstances can a landowner in a preservation district sell his development rights and later purchase others, if subsequently, he should change his mind and want to develop. This point is implied but perhaps, needs to be rendered explicit.

5. Section 18: Distributing the development rights to landholders in preservation zones on the basis of assessed valuation seems to me to be the best alternative. Some TDR schemes recommend distribution using criteria such as market value, acreage, square feet of permitted floor area, permitted dwelling units or bedroom units. Those based on value have the advantage of addressing themselves most directly to the landowner's chief concern--the return he gets for his development potential. Those based on spatial measurements have the advantage of relative ease of calculation. Nonetheless, the distribution of rights to property owners is likely to be a sticky process and every attempt should be made to achieve equitability. Value criteria seem to be most promising here, even though harder to compute.

It is important to include a line in this section which stipulates that the distribution formula be based on a uniform and relatively recent appraisal of all affected properties in the preservation zone. Because many municipalities have only erratic and random revaluation processes, landowner

challenges to rights allocations are likely to result. (Of course, if New Jersey has a mandatory revaluation schedule such as the District of Columbia's, there is no problem. Nonetheless, it would be sensible to include the line I've suggested.)

6. Section 21: This is a more refined and carefully worded provision on tax value determination than any TDR scheme I've studied so far. It should be emulated in future TDR proposals in other states. For clarity's sake I would recommend that the bill indicate that once development rights are cancelled, tax payment liabilities cease and the municipal revenue would be made up by the increased value of the improvements resulting therefrom. Again, though this idea is implied by the bill's wording, it may help to alleviate some confusion and resistance to the bill if made explicit.

Two other provision would be worth evaluating. First, it is extremely important that there be sufficient demand for rights in the municipality. As recommended in Transferable Development Rights (by Schnidman, Foster and Bailey, Bulletin 251, Cooperative Extension Service, University of Maryland), the municipality should be able to retire a portion of uncancelled rights and compensate owners, if demand declines so as to threaten the viability of TDR system.

Secondly, it is very possible that in some communities the zoned densities of right will be very liberal, even without the added density increments implied by the TDR provision. Consequently, demand for rights may not be sufficient, if developers can build at fairly high densities without them. Though it is a sensitive issue, the Committee should consider a provision that would permit a municipality—at its own discretion--to reduce zoned densities of right.

Statement of

Frank Schnidman, Esq.

Urban Land Institute Research Counsel

before the

New Jersey Assembly Municipal Government Committee

March 19, 1975

concerning

Assembly Bill 3192

Municipal Development Rights Act

Mr. Chairman, members of the Committee, I am Frank Schnidman, Research Counsel for ULI-the Urban Land Institute, Washington, D.C. I appear before you to present my personal view in support of Assembly Bill 3192, the Municipal Development Rights Act.

The 1970s have brought wide public recognition to the fact that the resources of this country and the world are finite, and that environmental conservation and land management are a prime responsibility of government. The enormity of problems and the myriad of conflicting interests surrounding any attempt to modify general enabling legislation for land use planning has caused many a state legislator to shy away from responsible action in updating the planning legislation to allow local government to better manage the growth

which is occuring and will occur for the balance of this generation and into the next.

I had the opportunity to view this legislative inaction first-hand when serving as Staff Director of the New York State Joint Legislative Committee on Metropolitan and Regional areas. I also had the opportunity to meet with a number of state legislators deeply involved with land management legislation to discuss the difficult political obstacles to a serious examination of state land use legislation while preparing A Legislator's Guide to Land Management for the Council of State Governments.

This experience has led me to appreciate the time and effort that must be spent by the individual legislator to master the difficult land management issues with which he or she is presented.

It is with this background that I appear before you today to support the concept of allowing municipalities the use of transfer of development rights. For the past fifty years the municipal level of government has played the leading role in land use planning. There are many instances of where the responsibility has been well taken and many where it has not. Repeatedly we have been told that a major reason for the failure of local government to adequately handle its zoning and planning burden has not only been a lack of professional expertise but also a lack of flexible planning tools needed to provide greater options than the gridiron subdivision sprawl of the 1950s and 1960s. Cluster subdivision and planned unit development are tools only recently added to the municipal planning kit. Now Assembly Bill 3192 offers another.

This Bill does not mandate that any action be taken, but allows those municipalities who seek additional planning tools to have the opportunity under State sanction, and State-provided procedural safeguards, to avail themselves of a new planning concept.

I am impressed with the depth of thought and amount of time which must have gone into the preparation of this bill. The utmost effort is provided in the framework of this proposed piece of legislation to help insure passage of a logical, well-based transfer of development rights ordinance. THe procedure outlined in Article II provides the type of methodology needed to prepare a workable program, and Sections 17-21 of Article III furnish the needed directives as to distribution and valuation of such rights.

Yet, here are a few constructive criticisms I would like to make:

1. An amendment should be considered to delay implementation of the Act to allow the proper agency of State government time to prepare "manuals" to assist municipalities in evolving their own ordinances, and to prepare to meet the technical assistance demands which may be made.

2. Though Sections 14a and 14e seem to provide adequate safeguards that a transfer of development rights ordinance will not be used for exclusionary purposes, stronger language to that effect should be placed in Section 13c.

3. The word "most" in Section 14f could possibly foreclose

a great deal of flexibility in choice of transfer zones. I would suggest a milder word be used.

4. Section 25 leaves unclear whether a municipality would have to purchase development rights to build a public building which is greater than the allowed density in the transfer zone. This issue should be clearly resolved in the legislation.

In closing let me mention that ULI-the Urban Land Institute, in its almost forty year tradition of providing pertinent information to both public and private sectors which will lead to orderly and more efficient use and development of land, devoted its January issue of Urban Land magazine to a series of articles on the transfer of development rights concept. For your information, I include a copy of that Urban Land issue as an appendix to my testimony.

Thank you.

My name is John J. Costonis. I am a professor of law at the University of Illinois College of Law and teach principally in the areas of land use planning, property and local government. In the past five years, I have prepared studies on the use of the Transferrable Development Rights (TDR) concept for problems as diverse as landmark preservation (Chicago, Illinois), nature preserve protection (Commonwealth of Puerto Rico) and protection of agricultural land (Hawaii). In addition to examining the legal, planning and economic feasibility of the TDR concept, my work has entailed the preparation of state enabling legislation (Illinois, Puerto Rico) and local ordinances (Chicago, Kansas City) authorizing the use of TDR to solve specific land use problems. In addition, I have followed other TDR initiatives throughout the United States, including, in particular, the TDR proposal authorized in New Jersey Assembly Bill No. 3192.

Bill 3192, in my judgment, is modest, sensible and fair.

It is modest because it is an enabling act only, creating powers that New Jersey municipalities may, but need not implement to meet the crushing land use problems detailed in Article I. It does not force public agencies at the state or local level to do anything; on the contrary, it simply adds a fresh, promising technique to the roster of powers already granted to New Jersey local governments to deal with the difficult land use challenges that threaten to overwhelm them.

The bill is sensible.

It calls for thorough studies on a municipality-by-municipality basis of the economic and planning factors that will determine TDR's feasibility in specific contexts. It requires citizen and legislative participation as a precondition to TDR's implementation in a given community. It does not portray TDR as a panacea that will solve New

Jersey's land use problem in one fell swoop but recognizes instead that TDR programs must be tailored to the particular requirements and needs of each local government that choses to implement TDR. It is the product of innumerable discussions of the TDR concept with New Jersey public officials at all levels of government, with various citizens groups including the real estate community, environmentalists, and those concerned with public finance problems, and with agencies and individuals outside of New Jersey who have been toiling in the TDR vineyard. Indeed, to the extent that it is possible to simulate beforehand the operation, costs and benefits of any legislative initiative, Bill 3192 is as carefully thought out as any that I have had the privilege of reviewing.

The bill is fair.

It is fair to the owners of historic properties, of farmlands and of other ecologically sensitive sites. Under the non-compensatory approaches that would be invoked in the absence of a TDR program, these owners are forced to accept burdens that in many cases ought not to fall on them alone but should be borne by the community. Hence, it resolves what has come to be called the "taking issue" without unduly invading the legitimate economic expectations of these owners, something that cannot be claimed for existing land use approaches.

It is fair to the community. It acknowledges that the scarce general revenues available to New Jersey local governments are simply inadequate for effective environmental preservation programs. It therefore creates a new source of funding through the transfer mechanism, thereby substantially mitigating the dilemma, heretofore insuperable, between environmental protection and inadequate public funds.

And it is fair to the owners of developable land not restricted under environmentally conscious regulation. In large measure, of course, the value of this land is due to general community growth, to public

works, such as highways, to public regulation that stabilizes or increases its value, and--a point often missed--to the very regulations that restrict the use of environmentally sensitive land. Non-restricted lands, after all, enjoy a monopoly precisely because they become the sites on which the development not permitted on the sensitive lands will take place.

Here again, Bill 3192 operates fairly and pragmatically. It protects the owners' investment in non-restricted land by, in essence, guaranteeing its value as of the date the TDR program begins to operate in the specific community. Moreover, it empowers these landowners to increase those values by purchasing additional development rights from the owners of non-restricted lands, development rights that in all likelihood would not have been allocated to the latter in the absence of the environmental protection program.

No one today has the solution to the thorny problem of accomodating the imperative of environmental protection with the equally legitimate concern for fair treatment of burdened landowners. Existing approaches, in fact, largely exacerbate the problem by uncritically favoring one of these interests over the other. TDR is unique in frankly and honestly recognizing the dilemma. By refusing to sweep one or the other interst under the rug, it offers an approach that promises to be durable as well as fair.

Bill 3192 therefore, deserves the support of legislators and others who seek conscientously to accomodate the growth pressures that threaten irrevocably to distort New Jersey's landscape with the entitlement of New Jersey citizens to a quality environment.

The rest of the nation will follow your proceedings very closely indeed.

Thank you.

NEW JERSEY SOCIETY OF ARCHITECTS
A REGION OF THE AMERICAN INSTITUTE OF ARCHITECTS

GARY Y. KAPLAN, AIA - President
ROBERT F. GROVE, AIA - President Elect
RICHARD BOTTELLI, AIA - Vice President
J. ROBERT GILCHRIST, AIA - Vice President
ROMEO AYBAR, AIA - Treasurer
GEORGE KOLARONDA, AIA - Secretary
DONALD J. GATARZ, AIA - Past President
ADOLPH R. SCRIMENTI, FAIA - Regional Director
MRS. HELEN T. SCHNEIDER, HON. AIA - Executive Director

March 14, 1975

Mr. John V. Helb, Aide
Assembly Municipal Govt. Committee
State of New Jersey
Legislative Services Agency
State House
Trenton, New Jersey 08625

Dear Mr. Helb:

I am writing as President Elect and Chairman of the Legislative Committee of the New Jersey Society of Architects regarding Assembly Bill 3192 designated the, "Municipal Development Rights Act".

The Bill was discussed at the Board of Directors' Meeting of the New Jersey Society of Architects last evening. Unfortunately, time did not permit a thorough study of the technical requirements of the Bill, and our Directors declined to support the Bill until they were better informed. There was much support for the concept,"Transfer Development Rights" , and I feel certain that upon further study we will support the Bill in its present form or with some ammendments. Our Legislative Committee is actively studying the Bill in detail.

Our Society has always supported bills which will encourage orderly growth of our state. Such reservations as we may have about the Bill will almost certainly deal with our concern for the protection of individual rights. So much legislation has been written in recent years which unduly restricts construction, or bogs down projects in months of red tape, that we feel this sort of bill requires very careful study before we can lend it our official support.

(continued)

110 HALSTED STREET • EAST ORANGE, NEW JERSEY 07018 • (201) 672-7900-7901-7310

Under these circumstances, we will not attend the currently scheduled hearings, but we would appreciate any additional information you may be able to provide us with regarding ammendments or progress of the Bill.

Very truly yours,

NEW JERSEY SOCIETY OF ARCHITECTS

Robert F. Grove, AIA
President Elect

RFG:dmk

cc: John M. Zvosec, AIA, AIP, Mahony & Zvosec
Helen T. Schneider

AIP AMERICAN INSTITUTE of PLANNERS

Executive Committee } Denton S. Layman, President • Adrian P. Humbert, Vice President • Donald A. Krueckeberg, Secretary
Donald W. Giles, Treasurer • Jane L. Diepeveen • Harvey S. Moskowitz • William Queale, Jr.

2 Tuxedo Place, Cranford, New Jersey 07016 / (201) 272-5282

Municipal Government Committee
℅ Honorable Vincent O. Pellecchia, Chairman
State House
Trenton, New Jersey 08608

March 18, 1975

Re: A-3192

Honorable Assemblymen:

The New Jersey Chapter of the American Institute of Planners supports the Municipal Development Rights Act. The concepts incorporated in this legislation add flexibility to the basic land use goals of a municipality and enables development, environmental issues and economic concerns to be equitably balanced. The concept applies to residential and non-residential uses; urban, suburban, and rural areas; mountainous to coastal areas; and is optional to municipal officials.

The A.I.P. Chapter's Legislative Committee has reviewed the draft bill but has had insufficient time to prepare detailed comments on specific provisions of the bill. We would respectfully request the opportunity to meet with your staff to review our comments and offer suggestions with respect to eliminating some definitions in Section 4; correlating definitions with S-3054 which our Chapter is also supporting; clarifying the composition of a regional commission in Section 6 and the role of the tax assessor and environmental commission; clarifying in Section 6 that where the municipal planner and attorney are serving as consultants, not staff, that their ex officio membership on the commission is optional and, where exercised, they serve with compensation; clarifying that the review and appeal implied in Sections 12a and 12b do not have an applicant who has been denied by the planning board take his first appeal to the same board; rewording Section 13e to permit the subdivision and sale of land in a preservation zone without development; in Section 14e, allowing a private developer to install facilities where the municipal capital improvements program or construction contracts do not provide the facilities needed to serve the proposed project; and specifying in Section 20 that the conversion of development rights to another use are permissive and not required.

It is the opinion of the Chapter's Legislative Committee that these questions and modifications are easily accommodated within the framework of the proposed legislation and we offer our services to your staff in the interest of urging passage of this legislation.

Respectfully submitted,

William Queale, Jr.

William Queale, Jr.
Chairman, A.I.P. Legislative Committee
N.J. Chapter A.I.P.

CONNECTICUT NEW JERSEY NEW YORK

TRI-STATE REGIONAL PLANNING COMMISSION

ONE WORLD TRADE CENTER, 56 SOUTH
NEW YORK, NEW YORK 10048
TELEPHONE (212) 466-7333

March 11, 1975

Mr. John V. Helb, Aide
Assembly Municipal Government Committee
State of New Jersey Legislative Services Agency
Division of Legislative Information and Research
State House
Trenton, New Jersey 08625

Dear Mr. Helb:

Thank you for the invitation to testify before the Assembly Municipal Government Committee on the proposed "Municipal Development Rights Act".

We are very much in agreement with the purpose of this bill -- namely, transfer of development rights to accomplish land use plans. Unfortunately, however, I will not be able to testify before your committee on March 12th due to pressing work here at Tri-State. Perhaps I could use this letter to outline our thoughts.

The Tri-State Commissioners base their long-range planning on a Regional Development Guide (copy enclosed) which calls for urban settlement to be clustered in places of ready transportation access and rural areas to be preserved in near-natural state. This broad idea has been detailed and cross-accepted by most of the county planning boards in our Region. While there is much more that could be said about this plan, the general framework of gathering development in limited areas is enough to illustrate how transferring development rights would provide another means of working toward this goal. We would like to see commercial and residential development take place at locations planned for such use rather than in areas of special value for recreation, conservation or environmental protection. The proposed bill on "TDR" seems to offer just such an opportunity.

To give you an idea of the scale of our plan for clustering development, about 300,000 new housing units that would be expected to be scattered out over the nine counties of northern New Jersey under the trends of the last two decades might be largely "transferred" to selected places for more dense development. This accounts for about one-fifth of the additional residential development that can be accommodated in the nine-county area. Commercial and industrial development might follow similar patterns. Thus, it represents a major element in trying to achieve a more socially productive use of land.

Our only reservation about the transfer of development rights is that it be done in harmony with an over-all plan. Certainly there will be unforeseen problems

in any legislation that creates a new kind of market in development rights. It will be most important to see how these transfers would work in reality. Of real concern too, will be the effects it may have on local planning and zoning.

Sincerely,

J. Douglas Carroll, Jr.
Executive Director

JDC/RSD/cl
encl

Save the Environment of Moorestown, Inc.
700 Camden Avenue
Moorestown, New Jersey
March 19, 1975

Committee on Municipal Government
c/o John V, Helb
Law Revision and Legislative Services
State House
Trenton, New Jersey 08625

Gentlemen:

The membership of Save the Environment of Moorestown, Inc. (STEM) is very concerned that a method be found to facilitate preservation of open space in the state of New Jersey in order that we and future generations may continue to enjoy the quality of life made possible by our unique and natural areas, the many and varied benefits of having our land in agricultural production, and the variety and aesthetic benefits added by preserved scenic and historic areas.

Our organization has investigated the concept of Transfer of Development Rights with interest and would be pleased to see the Municipal Development Rights Act, Assembly Bill No. 3192, enacted so that municipalities will have a tool to use in their efforts to preserve open space within their boundries. However, we do question the effectiveness of this legislation alone in bringing about the preservation of large amounts of open space. We urge that other mechanisms continue to be considered.

Assembly Bill No. 3192 has been given close study by some of our members and specific comments from that committee are attached for your consideration.

Sincerely,

G. Macculloch Miller II
Chairman

Ruth V. Wait
Vice-chairman

enc.

The following are comments on Assembly Bill No. 3192 from members of Save the Environment of Moorestown, Inc.

ARTICLE 1, section 4. Omitted from definitions are: "formula" (3-18) and "conversion schedule" (3-12e).

ARTICLE 2, section 6. Should the Chairman of the Environmental Commission should one exist be a member of the commission ex officio? Is there a minimum number of commission members? Are there requirements for commission members not identified?

ARTICLE 2, section 5. Could it be required that all municipalities make a study of feasibility?

ARTICLE 2, section 8. Do not the studies listed require professional expertise as well as a good deal of time if done well? Should they be done by professionals if the decisions itemized in section 9 are to stand up against the challenges of involved property holders?

ARTICLE 2, section 11. A 2/3 vote of a governing body may be a small number. Should the public have a change to vote

ARTICLE 3.Should the act designate a method for registering and/or recording ownership of development rights and such changes in ownership and the market value at the time of change as may occur between the time they are assigned to the owner of a property within the preservation zone and the time they are used in the transfer?

ARTICLE 3, 12-a. Implementation will be a tremendous job and practically a full time one. Isn't the planning board busy enough?

ARTICLE 3, 13-b. Would it always be desirable for the transfer zone to correspond to the master plan and the zoning ordinance.

ARTICLE 3, 21 For tax purposes is the development right to be "reassessed" only when the entire township property tax reassessment is redone or is this to occur more often if based on "current sales." Value of the development right might increase more rapidly than that of property in general and it would seem difficult to determine.

Zion & Breen Associates, Inc. ▪ Site Planners / Landscape Architects ▪ American Society of Landscape Architects

New York City, N.Y. and Imlaystown, N.J. ▪ Tel.: 212-966-0870 or 609-259-9555 ▪ **Address all mail to: Imlaystown, N.J. 08526**

March 26, 1975

Committee on Municipal Government
New Jersey State Legislature
State House
Trenton, New Jersey 08625

Attention: Mr. John Helb

Subject: Municipal Development Rights Act (A-3192)

Gentlemen:

I am writing to urge your careful and favorable consideration of the proposed bill which would establish "Transfer of Development Rights" as a means of retaining farmland as open space for New Jersey's growing population.

I am a landscape architect who has recently removed his entire office and business operations from New York City as a result of a long love affair with the State of New Jersey, the New Jersey of which few outsiders are aware: the rural farmland that has made Jersey the "Garden State."

I have served briefly as chairman of the Planning Board of Upper Freehold Township, Monmouth County, and successfully kept mindless development from our township until we were able to prepare a Master Plan; but even a Master Plan cannot keep farmland from destruction.

Our practice as landscape architects has taken us to almost every state in the Union and to many countries overseas, including Russia. Everywhere we work, we find the same sad story: farmland falls easy prey to speculative development. Yet in all these places people now realize--too late--their mistake. Only this year, Suffolk County on Long Island has considered it necessary to purchase farmland outright as a solution to the problem. Can we in Jersey sit back and ignore the problem and watch the Garden State become the Garbage State?

Please consider this issue carefully and approve in some form the concept of the Transfer of Development Rights as a means of saving Jersey's farmland.

Sincerely yours,

ZION & BREEN ASSOCIATES, INC.

Robert Zion

RZ ew
cc: B. Budd Chavooshian, Rutgers University
David Moore, New Jersey Conservation Foundation

aspo

1313 East Sixtieth Street Chicago Illinois 60637

American Society of Planning Officials

Telephones: 312/947-2560: General Office
312/947-2565: Membership
312/947-2100: Editorial
312/947-2575: Advisory Services and Research

April 8, 1975

Honorable Vincent O. Pellecchia, Chairman
Assembly Municipal Government Committee
State of New Jersey
State House - Room 218
Trenton, New Jersey 08625

RE.: AB-3192

Dear Mr. Pellecchia:

I have been requested by Committee Aide John V. Helb to comment upon Assembly Bill 3192. I serve as general counsel and staff attorney to the American Society of Planning Officials (ASPO). ASPO is a non-profit membership agency serving citizens and professionals involved in the planning field. Since ASPO is governed by its membership thru a board of directors, I can not speak for the entire organization. However, my views do reflect my professional association with ASPO, and my general expertise in the land use law field.

My comments are basically of three types. First, I make some general observations on the concept of transfer of development rights (TDRS). I then address the general approach taken by AB-3192, and finally critic the bill section by section. I offer these comments in the sincere desire that they assist the Committee in reaching a final and sound decision in their consideration of this bill.

I.

The use of TDRS requires us to think of real property in terms that many will find unfamiliar. The "right" to develop or materially alter a parcel of property must now be thought of as seperate and distinct from the ownership of the physical land itself. This gives rise to two sets of regulatory systems. One designed for the more traditional

concept of property, and another to regulate the newly designated "development right." There are potential dangers of waste in duplications of the two systems, as well as conflicts. But the only way to find out whether a system is workable is to experiment and hopefully learn something from that experience.

The obvious and greatest potential benefit of a TDR system is an easing of the conflict between police power regulation and eminent domain takings. Though its not possible to define the line between these two concepts with any amount of precision, courts constantly find that regulations have transgressed it. This is the usual unconstitutional as applied argument made in testing general regulations as applied to a specific parcel of property. The court's general remedy is to find that regulation invalid, throwing the regulatory scheme out of balance. With a system that recognizes the development right as a distinct entity, the local government may seperate out this right and either purchase it itself, or allow the market to purchase it and ensure its owner proper compensation.

There is some question as to the adequacy of the compensation thus afforded the land-owner. But the stronger the system for ensuring the market-ability, the surer the court will accept this transfer as satisfying due process requirements. In this regard, I suggest the reader take a look at the case of Fred F. French Investing Co. v. City of New York, 352 N.Y.S.2d 762 (N.Y. 1973).

Another judicial movement which may portend the need for TDR systems is the willingness of some courts to require compensation for restrictive land use regulations, rather than simply declaring the regulation invalid. Such a remedy would fit well with a functioning TDR system. At least one court has suggested such a remedy may be appropriate. Brown v. Tahoe Reg'l. Pl'ng. Agency, 385 F. Supp. 1128 (D.C. Nevada 1973). Another court has this issue before it on appeal from an intermediate level decision in the affirmative. HFH, Ltd. v. Superior Court for County of Los Angeles, 116 Cal. Rptr. 436 (1974).

On the other hand, there is a danger that recognizing the right to develop land as a seperate, identifiable entity may weaken use of the police power. If the right to develop is a seperate marketable commodity, the outer extremities of the police power may be severely weakened. Courts reviewing any police power regulations may invalidate it, finding that even that right to develop which has been removed by the regulation may necessitate purchase-compensation. Having recognized this right, communities might find it difficult to establish any as of right floor, above which they would require purchase of additional development rights.

I will stop here in order to get on to the bill at hand. It should be obvious though that there remains a lot of unanswered questions. Perhaps they can not or need not be completely answered until a system of some kind is set-up and experimented with.

II.

As to the overall organization of the bill, I have a few problems. In Article I, there is a lengthy findings clause, but no strong purpose clause. I believe the purpose of the bill should be set out in more detail. The simple declaration of public policy is not sufficient. There needs to be more tie between the findings and the solutions offered by the use of a development rights system.

My biggest objection is to Article II. I seriously question the need for or the soundness of establishing a special advisory body with such a broad scope of powers to design a development rights ordinance. Use of an advisory board in and of itself may not be objectionable. However, I believe there is going to be a lot of duplication of effort and wasted resources if a nearly seperate planning function is set up just to design the development rights ordinance. I go into more detail in the next section of this letter.

The general scope of Articles III and IV present no major problems. I do believe, however, that perhaps too much is covered too quickly in Article IV.

III.

This section of the letter contains a paragraph by paragraph comment on the bill. Those paragraphs and sub-sections not listed were deemed adequate or they simply did not merit specific comment. These observations should be put in context of earlier comments; though some observations may appear relevant only in the context of viewing a single paragraph in isolation.

PARAGRAPH NO.:		COMMENT:
2		This paragraph is awfully long. Might help it if were split up.
3		Need more on purpose here, or in a new section between this and the prior paragraph.
4	a.	Definition (a) somewhat vague; might tighten it up.
	b.	Does (b) include support activities necessary for a viable agricultural operation; i.e. grain elevators, milk processing plants, canneries, etc. Also, should "trees and forest products" be here, or in seperate section for timberlands or forestries; is a pulp mill devoted to producing forest products? Does "substantially undeveloped land" take of these problems?

j. Is "develop-ability" to relate only to natural systems' capacity? The words "desirability and availability" hang on without reference to anything. Is the existence or capacity of "capitol facilities" a factor here? Existing zoning reflected in density?

k. Does simply considering the market in light of how you've defined "develop-ability" really give you "potential?" Seems a little weak.

m. What does this mean? Is economic competition to be regulated under this? It's a poor definition.

n. How about the transfer of a development right in the free market prior to any development proposal? Should this be a seperately defined activity?

o. Is Class III too broad?

u. Seems a little vague. Might a more technical definition be of more help?

y. "Development is discontinued" - Prohibited?

5 & 6 This commission might prove quite useful as a means of bringing people together on this.

7 & 8 These studies should be done, but much may already exist. The municipality's planning staff could do this in many cases. Is a seperate enabling provision calling for this type of information needed? Simply listing minimal considerations and providing supplementary staff where necessary may be sufficient. Are there a number of communities without existing staffs and regulations established under other enabling or home-rule provisions? This might be appropriate for those areas. But, again, the further fragmentation of what appears like general planning powers is to be avoided.

9 Should there be basic requirements for the negative recommendation as well? What date is to be reflected by the assessment? Latest assessment completed or is a new one to be required?

The municipality is asking for trouble, if it does this and doesn't adopt the system. What constraints on development are to be recognized? Are definitions of developability and potential sufficient? Does a flood-plain have development potential? Open farm-land, woodland, swamp, etc.? Does potential reflect increased judicial acceptance of police power restrictions severely limiting development where a valuable ecological role may be served by the land in question? Does designation of area as a preservation zone show in and of itself that the area should not have much development potential because its development would be harmful? This raises the question of whether assigning development rights on basis of assessed value is proper.

May the preservation and transfer zones cover a portion of the community? Or must the entire municipality be one or the other? May they be mutually exclusive? One preservation zone, many transfer zones? Many preservation zones, one transfer zone?

What if there is no zoning ordinance? Should this be a pre-requisite; otherwise, where is the floor of as of right zoning, which makes the transferred development right desirable as a bonus or incentive?

10 Should there be other hearings at an earlier point during design of this development rights ordinance? Need more public participation through-out. Is commission's recommendation to be publicized?

11 Nothing requires the legislative body to act within the sixty days; merely considering the commission's recommendation is enough. What changes in recommended ordinance are allowed without going back to the commission? What if commission recommends adoption and governing body says no, or if commission says no and governing body wishes to agree? Neither option's provided for. Can the commission be directed to come up with an ordinance over its negative recommendation? On the other side, should the governing body be allowed to simply kill the whole affair by rejecting an affirmative recommendation?

What type of proceeding is this if its an amendment? Quasi-judicial, or legislative? Are the statutory provisions referred really adequate; do they need reinforcing? This shorthand reference to proceedures is used here, but not when discussing the special commission. Is there no zoning commission provision in existence, no elements of or any plan at all providing such data, etc. to allow this reference in Article II.

12 d. "Construction, erection, demolition or development" are important terms, but they were not defined in Paragraph 4.

e. How are owners to be identified for mailing of notice? Certified mail? Failure of this provision invalidates ordinance? Is hearing designed to inform people, or are rights actually decided? Change in allocations allowed? Individual challanges to allocations? May the underlying zoning be challenged at this point? The conversion schedule and means of transfer portend great problems, which I anticipate are better addressed in detail in later sections.

Where is municipality to get money for appropriating? Is there something in a development rights ordinance different from other land use control ordinances that requires special expenditures necessitating this appropriation. Does this language specifically authorize expenditure of local funds to purchase development rights and hold them for future resale?

13 a. These areas are a lot like critical area legislation in a number of states. Wetlands? Shorelands? I am still uncomfortable with a.(3) dealing with private economic enterprises. There may simply be too much socio-economic involvement by the public sector in such a designation to pass constitutional muster. Perhaps a better definition would clear this up.

b. May plans be changed to reflect this development rights ordinance?

c. Need more of this type of relationship to existing planning processes in Section 8 itself.

d. Might not non-conforming uses be eliminated? Certainly where investment is slight, it would be wise to do so. With development rights providing supposed compensation to owners of land unable to develop it, this device might also provide some means of eliminating certain uses while insuring just compensation. Anyway, the hope in conventional zoning that non-conforming uses would wither away has not materialized.

e. This is confusing. I believe it means that the value and number of development rights may reflect prior permitted subdivision. It's poorly worded, if that is the intent. Don't think it even belongs in this section, if that's the case.

14 b. And if there is no zoning?

c. How is this incentive to be ensured. If there's a market for sprawling development will that be constructed irregardless of any density bonus. Bonuses are fine in Manhattan or Chicago's loop, but are they really attractive to develop's in Paramus or Mt. Laurel?

d. The underlying as of right zoning might be attacked as a taking. Might the requirement that the developer purchase additional DR's also be challenged as an improper burden upon his right to develop. Can the locality force him to pay for its "social program" of compensating the landowners in a preservation zone? Is it merely another special benefit district? Does the recent Mt. Laurel decision present problems to zoning for very low densities to ensure an incentive for utilization of DR's. Can requiring the purchase of DR's be challenged on exclusionary grounds?

15 No amendments of any kind to be allowed without owner hardship? Are these only requests for changes in restrictions initiated by the landowner? Text [redacted] vs. map changes? Aren't all landowners in the preservation zone likely to be in this situation where they have no reasonable use to which they can put their property? Why have this so general that you then need to put in a provided however to answer the question in my preceding sentence. Are you really concerned with use type variances that are granted too often? You allow the planning board to

grant amendments to the development rights ordinance - subject to review by the governing body. Is this an improper delegation of legislation authority in New Jersey? Can land be developed after its DR's have been sold, if new DR's are purchased? The last sentence in this section seems ambiguous.

16 Since when are the development rights limited to a certain type of use? Are there to be residential DR's, commercial DR's, and industrial DR's? What about single family DR's, duplex DR's, condo DR's, ad infinitum. If there is to be a conversion schedule, may it work automatically or is planning board approval required each time? This seriously undermines the fungibility of the DR's.

17 The sanctity given existing zoning is admirable, but of doubtful validity or wisdom. Many areas are zoned for exceedingly low-density, which probably is not fully defensible, and probably won't accord with any sophisticated studies carried out in design of the development rights ordinance. Furthermore, many landowners have been willing to accept this designation until development became more certain at which time a request for a rezoning or court challenge would be initiated. But now this provision says the land's value is to be reflected by the existing zoning in the calculation of DR's. A realistic zoning ordinance or new study under Section 8 would help. Again, the limitation of DR's to certain use is a problem.

18 Does this allocation formula reflect the best means of distributing development rights? The initial calculation is based on permitted uses for the district or a portion of the preservation zone. This total DR's is then to be divided up among the property owners on the basis of assessed value. Is the highest & best use aspect of assessment to counter the landowner's objections in the original calculation? He is supposedly now as well off as his neighbors respective to the relative number of DR's each actually receive. Is a new assessment to be made. Again, what factors are to limit the assessment? Future speculative potential is being lost. This may not be a protected property right, but its surely of concern to the individual landowner.

Would a simple land area base for assigning development rights work better? Does assessed value represent market value? Are industrial and residential areas assessed in different manners?

19 Should there be some initial administrative review of the DR allocation? Going right into court does not seem advisable for such a technical calculation. Need a development rights allocation review board?

20 The whole problem of conversion schedules is brought on by the formula in 17 and 18. No conversion schedule can be set up until a prevailing market value for development rights is established. This won't happen until there has been some trading and selling of these rights. Without a conversion or exchange rate this market will be slow in developing. This lack of convertibility, or the distinction itself in the first place, will limit the fungibility of DR's. The market will develop even slower, the less DR's are readily convertible to cash. Making conversions reviewable as amendments to the zoning ordinance is even more debilitating. It's the existing zoning and bonus provisions in the transfer (and non-TDR zones if such also exist) that should determine what is developed; not the prior use designation of the preservation zone, which was inappropriate anyway or the area wouldn't have been designated for preservation.

21 Again, the formula for allocation complicates the initial taxation. I do believe they should be taxed as real property, and the market should solve valuation problems as it begins to function. Is the tax to be on the market value of the DR rather than an assessed value which might be only 40% of the market value for improved property.

22 Isn't all property in the preservation zone to be assessed at its non-developable value? Do you need the special agricultural assessment provision? Might there be a disincentive to use the agricultural assessment provision if it were to result in allocation of less development rights? Even if the farm owner had to pay higher taxes for a couple of years in foregoing use of the assessment provision, hoping the share of DR's allocated to him would offset this.

24	This is a good idea.
25	How is public property likely to be zoned? The public didn't pay any property taxes on its land, but it gets a share for what it would have been assessed. What's the highest and best use of municipally owned open space? Improved public property probably won't be in the preservation zone anyway, so its not so much of a problem.
26	Good idea, but how about regulations for its operation?

From these individual comments, you can see I have a lot of problems with this bill. But, again, I encourage you to proceed with its development and adoption. At this point, I will add a few final comments, and summarize some of the points above, and close this letter.

One of the potential dangers of designating high density transfer zones is that these land areas may become very expensive. It's possible the owner of a limited amount of transfer area could hold more of a monoply than a norder of DR's. Adequate designation of transfer zones may help. But the danger is very real that a TDR system may simply exacerbate the problems of housing costs as it creates a second scarce commodity. Now the developer must pay inflated prices for transfer zone property as well as for the development rights themselves.

The formula for allocating development rights for preserved property is based on development potential. However, it seems that the development potential of a particular area is contrary to a pure concept of a development right. Should this right arise out of some inherent quality of the property? It seems the initial allocation might be more neutral. The assignment of where DR's could be exercised would then reflect more of an areas potential. There is nothing sacrosanct about existing zoning or even assessment that necessitates their use in an allocation formula.

Finally, let me again emphasize the danger in recognizing all land's development value and a seperate development right. Such a recognition may have a negative impact upon other use of the police power, and how far it can go. Perhaps in some cases it has gone too far in infringing on private property. But let's not push the pendulum too far the other way in reaction. Also, how to ensure an incentive for exercise of the DR's may present a problem. If an area is zoned too liberally now, it won't be a good target area for the transfer zone. Might it be down-zoned? This raises further taking problems, and potential equal protection questions as preservation areas get all rights under existing zoning tc be sold as DR's.

I hope these comments provide some assistance to the Committee in its deliberations. I'm afraid I do not provide answers for many of the problems to be faced. However, I believe I have raised a number of questions, which you need to at least consider. It may well be that even after considering a question you retain the same provision. This should ensure that your choices are made in light of potential problems, but you made an informed choice. Even a wrong choice of alternatives in light of potential problems is better than blind adherance to an ignorant decision.

Respectfully yours,

Conrad Bagne

Conrad Bagne
Staff Attorney

CB:jmb

Statement of Perry L. Norton, homeowner and resident at
223 Leonia Avenue, Leonia, New Jersey 07605

To the Assembly Municipal Government Committee

Re: Assembly Bill 3192, "Municipal Development Rights Act"

1. I support this bill.

2. I suggest an amendment to Paragraph 7, Article II, as follows:

7. In the resolution adopted pursuant to section 5 of this act, the governing body may also appropriate to the commission such funds as it deems necessary and sufficient for its work. Within the limits of such appropriations, the commission

delete: may appoint and contract with such professional, clerical and stenographic assistants

substitute: shall utilize professional and clerical personnel of the municipality's planning board, if any, for the staff work necessary to conduct the study. In the absence of such staff the commission shall ask the Planning Board to nominate professional planning consultants, or firms, of known competence from which nominees the commission shall engage for services in the manner prescribed by the Local Public Contracts Law, P.L.1971 c.198(C.40A:11-1 et seq.). The members of the commission shall serve without compensation but may, within the limits of the appropriations therefore, be reimbursed for such expenses as are actually incurred in the performance of their duties.

add: Such members of the commission as are in the employ of the municipality in another capacity shall in no way be penalized in those capacities for time devoted to meeting the duties and responsibilities of membership on the commission.

Perry L. Norton

76X