technical

R E F E R E N C E

document

Development Standards for Limited Growth Areas

November 10, 1987

Prepared by: **Freilich,** Leitner, **Carlisle & Shortlidge**
1000 .US Sprint **Plaza** 4600 **Madison**
Kansas City, MO 64112-1537

The Draft Preliminary
State Development
AND
Redevelopment Plan
January 1988

DEVELOPMENT STANDARDS
FOR LIMITED GROWTH AREAS

Prepared by:
Freilich, Leitner, Carlisle & Shortlidge
4600 Madison, Suite 1000
Kansas City, MO 64112
(816) 561-4414

January 27, 1988

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY

Under the New Jersey State Planning Act, the State Planning Commission is charged with the task of developing a 'coordinated, integrated and a comprehensive plan for the growth, development, renewal, and conservation of the State and its regions*. Professor Robert H. Freilich of Freilich, Leitner, Carlisle & Shortlidge, Kansas City, Missouri was retained by the Office of State Planning as chief legal consultant to conceptualize an overall growth management strategy that utilizes implementation techniques that are both effective to the achievement of the plan's goals and objectives and legally defensible.

The proposed plan incorporates a growth management system that identified seven differentiated functional planning areas ("tiers*) for which specific implementation strategies have been recommended. The primary objectives of the plan are to reduce sprawl, to protect natural resources, to stimulate development in urban areas, and to channel growth into nodes within designated transportation corridors. Four of the tiers are designated as Growth areas while the remaining tiers are designated as Limited Growth areas. The proposed system is designed to accommodate all projected growth coming into the State by directing it into the totality of cities, suburbs and currently undeveloped lands already sewered or located within existing or planned transportation corridors. These growth areas will accommodate full economic activity and provide a full range of residential housing for all income levels.

In order to meet the goals of reducing sprawl and preserving natural resource areas such as open space, agricultural lands and ecologically significant areas, tiers containing these types of land areas have been designated as Limited Growth.

Implementation strategies to achieve the goals and objectives of each tier were developed in April, 1987. Various subcommittees of the State Planning Commission have been diligently working on refining the implementation strategies. In undertaking the task of refinement, the subcommittees have considered public comment in which some opposition to certain provisions of the Draft Plan has been voiced. Although some of the criticism and opposition appears to have been offered by individuals under the mistaken assumption that the plan restricts the full accommodation of projected growth, others expressed

Some of these concerns do reflect the belief that it is impossible to achieve maximum growth except by continuation of the present trend of urban sprawl across the state with little

(footnote continued)

concern about the methodology for development of the density standards recommended for the Limited Growth areas and questioned whether they are legally defensible and reflect national and New Jersey norms.

Accordingly, the Office of State Planning requested Professor Freilich to conduct legal research and an analysis of the effectiveness of density standards proposed in the Implementation Report, dated April 17, 1987. The OSP also seeks to consider alternative methods or standards for managing and directing growth in the Limited Growth Area that will provide localities maximum flexibility in achieving the objectives of the specific Limited Growth tiers and that are focused on outcome rather than on a particular method. This request is consistent with a recommended change in the cross-acceptance policy that introduces the concept of compatibility (which means that a policy or standard in a local, county or regional plan or regulation is acceptable if equally effective in achieving the pertinent state goal, objective or strategy set forth in the Preliminary State Development and Redevelopment Plan), as an alternative to the requirement of consistency (which means that a policy or standard in a local, county or regional plan or regulation should be substantially the same as the policy or standard in the Preliminary State Development and Redevelopment Plan).

This report reviews and discusses the legal basis, theory, and effectiveness of density standards based on residential units per minimum lot size (with some provision for clustering) and a population per square mile standard in the context of the specific objectives and characteristics of the Future Development Areas (Tier 5), an area reserved for future urban growth, and the Agricultural Area (Tier 6), an area for permanent preservation of valuable agricultural land and Tier 7, an area reserved for residential use to protect special natural or cultural resource values.

Specifically, density standards are considered for each tier in terms of objectives to preserve upon space, to preserve prime agriculture lands and to preserve sensitive environmental habitats and areas. Also, consideration is given to various

(footnote continued from previous page)
growth in existing urban areas. Nevertheless, the plan does not place any restrictions on the amount, timing or phasing of growth in Growth Areas and seeks to achieve full accommodation of growth. The projections of consultants show that the minimal difference in growth (primarily residential) between current trend and the proposed plan is occasioned by severe ecological, agricultural and central city loss.

constraints placed on density of development related to the availability of adequate public facilities and sensitivity of the environment to degradation.

A population per square mile standard based on the projected population growth over the life of the Plan is an alternative to the area related density standards in Tiers 5 and 6. The population per square mile standard in Tier 5 could be combined with a performance-based allocation system, or could be allocated by demand until the maximum is reached. In Tier 6, the population per square mile standard can be used in conjunction with a land evaluation/site assessment plan to determine developable land. Development permits could be allocated to the developable land using the same systems as utilized in Tier 5. The preserved agricultural land would be eligible for participation in several farmland retention programs and for the State acquisition of development easements.

In all cases, limiting the extension of public facilities into Limited Growth Areas is a growth management tool that could be used to enhance the effectiveness of land use strategies. For example, extension of facilities could be restricted to occasions where extensions are necessitated because of threatened harm to health, safety and welfare or, in the Agricultural Area, to support agricultural activity. Provision of public facilities to support and maintain current agricultural, non-urban, rural activity in the Limited Growth tiers is certainly acceptable. A restriction on the extension of public service into Limited Growth Areas would discourage the construction of urban systems.

A key concept in any growth management system is that it is a system. Techniques and standards for implementing the Plan are part of that system. The deletion of one may have some impact on the overall effectiveness of the Plan as well as the effectiveness of other techniques that are part of the system. Thus, any evaluation of the effectiveness, as well as the legal validity of a technique must be performed in the context of the system. We believe that the alternative strategies and implementation techniques are supportable against taking, substantive due process and exclusionary challenges in the overall context of the comprehensive State plan and the growth management system. Furthermore, the alternative techniques are effective tools to manage and direct growth to the Growth Areas and away from the Limited Growth Areas reserved for future growth and for preservation of agricultural land and ecologically significant areas.

II. LEGAL FRAMEWORK

Zoning ordinances incorporating density standards have been used by local governments to limit, manage and direct growth in areas characterized by a broad variety of topographical features and for many different purposes. Although local governments with

appropriate authority to enact zoning ordinances can unquestionably regulate density of use, limits as to the extent of the regulation exist* In general, large lot residential use zoning is suspect in urban growth areas where the plan is required under New Jersey law to designate the accommodation of a fair share of regional growth. Where the plan accommodates in growth areas the fair share of the state and regional growth, density standards may be appropriate in limited growth areas to attain other significant environmental agricultural or planning objectives. Ordinances designed to control density that are fixed area-based, variable area-based or require minimum lot sizes, therefore, must be examined carefully to determine if they are subject to legal attack as constituting an unconstitutional taking of property, an unconstitutional arbitrary or unreasonable interference with property rights and/or unconstitutional exclusionary regulation.

A. Unconstitutional Taking of Property

Generally, a police power regulation such as a zoning ordinance incorporating density standards, may regulate activity or use of property to protect or to prevent harm to the public health, safety and welfare. See, e.g., Keystone Bituminous Coal Assoc. v. DeBenedictis, 107 S.Ct. 1232 (1987); and Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). Where the purpose of the government action is to prevent harm, government may limit almost all use of the property through regulation without a finding that a taking has occurred under the Fifth and Fourteenth Amendments. Keystone Bituminous Coal Assoc. v. DeBenedictis, 107 S.Ct. 1232 (1987). However, once a regulation has been deemed to effectuate a taking, monetary compensation may be required to be paid First English Evangelical Church v. County of Los Angeles, 107 S.Ct. 2378 (1987) or the regulation voided. Nollan v. California Coastal Commission 107 S.Ct. 3141 (1987). If the regulation does not involve physical invasion of the property or title acquisition, but is in the nature of amenity protection such as open space preservation, environmental protection, or agriculture preservation, the standard used is a balancing test to determine whether the benefit to the public is outweighed by the burden to the land owner, The balancing test is used to determine whether a reasonable use of the land remains under the regulation. Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978). The diminution in value caused by the regulation must be more than significant; regulations causing only a substantial diminution of value have been found not to constitute an unconstitutional taking. See Haas S Co. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (95% diminution); Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) (75% diminution); and Hadacheck v. Sebastian, 239 U.S. 394 (1915) (70% diminution). But see Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5, cert, denied 429 U.S. 990 (1976) (100% diminution constitutes a taking).

The United States Supreme Court also considers the extent to which the regulation has interfered with reasonable investment-backed expectations. See Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) and Connolly v. Pierson, 106 S.Ct. 1018 (1986). A property owner's distinct and reasonable investment-backed expectations are related in part to the type of land purchased. The analysis of the extent of governmental interference with investment-backed expectations is focused on whether the owner had a right to expect that something of value to him would be paid for, if taken. A purchaser of environmentally constrained land or a developer who purchases agricultural land in an area predominantly used for agricultural purposes may not have a right to expect to be paid for such speculative investment in development. Just v. Marinette, 201 N.W.2d 761 (Wis. 1972). In determining whether the regulation interferes with the landowner's reasonable investment-backed expectations, the Court also considers the extent to which the regulation was unforeseeable or unexpected by the landowner at the time of purchase of the property. Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) and Kirby Forest Industries v. United States, 467 U.S. 1 (1984).

Whether a regulation is permanent or temporary is relevant to determining whether a reasonable use of the land remains. Generally, if the regulation is temporary, then all reasonable use has not been denied because some future use is left. Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938) (after a change in classification, property could not be used for any purpose permitted in a residential zone because of lack of sanitary sewer connections for over nine years; court held that permanent restrictions of any reasonable use goes beyond regulation and becomes an unconstitutional taking of property); Agins v. City of Tiburon, 447 U.S. 255 (1980). In determining the effect of a temporary regulation, the key issue is whether the regulation left a reasonable use over a reasonable period of time. Golden v. Planning Board of Town of Ramapo, 30 N.Y,2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, appeal dismissed, 409 U.S. 1003 (1972).

In New Jersey, the Courts have at times interpreted the State Constitution more broadly and provided greater protection than analogous provisions under the Federal Constitution. Township of Montville v. Block 69, Lot 10, 74 N.J. 1, 376 A.2d 909 (1977). The New Jersey rule is that a taking occurs when 'the ordinance so restricts the use that the land cannot practically be utilized for any reasonable purpose or when the only permitted uses are those to which the property is not adapted or which are economically infeasible*. Morris County Land Improvement Co. v. Parsippany-Troy-Hills Township, 40 N.J. 539, 193 A.2d 232 (1963) However, the approach to the taking may be different where important environmental and ecological considerations have brought about the land use restriction in furtherance of a public policy to protect public interest in

scope and territory. A.M.G. Assoc. v. Township of Springfield, 651 So. 101, 319 A.2d 709 (1975). On a case-by-case basis, the Court will consider the purpose of the regulation, the setting in which the property is found and the total effect of the regulation on the use. Sheerr v. Evesham Township, 184 N.J. Super 11, 445 A.2d 46, 57-58 (1982). In Sheerr, the Court considered diminution in value (not necessarily expressed in terms of money), whether beneficial use remained, whether the regulation advanced a legitimate municipal interest and then balanced the public good against the private harm. Accordingly, where possible, the alternatives include provisions for mitigating the impact of the regulation and reducing economic loss such as continuation of the preferential assessment under the Farmland Assessment Act and the purchase of development easements. See, e.g., Penn Central Transp. Co. v. City of New Yorjc, 438 U.S. 104 (1978). Therefore, any regulation restricting development in the limited growth area will be examined by the Courts to assess the extent to which the landowner has been harmed in comparison to the effectiveness of the regulation in achieving a legitimate governmental objective that advances the public good.

B. Unconstitutional Arbitrary Unreasonable Interference With Property Rights (Substantive Due Process) and Authority Within New Jersey

The most frequent challenge to land use ordinances concern alleged violations of landowners substantive due process rights under the fourteenth amendment of the United States Constitution and/or comparable State constitutional provisions. See New Jersey Const. Art. 1, Para. 1. The landowner is usually alleging that the local government body acted arbitrarily or capriciously in enacting the ordinance (or denying a landowner's request) and therefore, the ordinance unreasonably interferes with property rights. Frequently the constitutional attack is joined with an allegation that the regulation is beyond the authority of local government. In determining the authority of the local government to enact the challenged ordinance, the Court will examine relevant land use enabling legislation or constitutional provisions.

The judicial analysis of this type of constitutional challenge centers on the reasonableness of the action. Factors that a Court considers in determining the reasonableness of a regulation are whether the regulation legitimately serves the health, safety and welfare of the people, whether there is a substantial relationship between the purpose and the means used by the regulation, and whether the restriction imposed on the individual is fairly balanced against the government's interest and action. See Lawton v. Steele, 152 U.S. 133, 137 (1894) and Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928).

The government is favored with the presumption that the regulation is constitutional. Goldblatt v. Town of Hampstead, 369 U.S. 590, 594 (1962). The regulation will be upheld if the basis of the regulation is fairly debatable because the Court will not substitute its judgment for that of the local government body. Village of Euclid v. Ambler Realty, 272 U.S. at 388. Construction Industry Association v. City of Petaluma, 522, F.2d 897 (9th Cir., 1974).

In New Jersey, the due process limitation is derived from Article I, Par. 1 of the New Jersey Constitution:

> All persons are by nature free and independent, and have certain natural and inalienable rights among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.

In order to sustain an ordinance from attack under substantive due process the exercise of police power must be devoid of unreasonableness, capriciousness and arbitrariness. Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955). New Jersey Courts analyze the reasonableness of the exercise of governmental action in a two-step process: 1) A determination is made whether the objective sought to be achieved by the exercise is a legitimate objective of the police power, and 2) if valid, a determination is made whether the means bear a real and substantial relationship to the legitimate objective. Taxpayers Ass'n of Weymouth Township v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016, 1024 (1976), McNeill v. Township of Plumsted, 215 N.J. Super. 532, 522 A.2d 469 (1987). Legitimate objectives of police power must be related to the public health, safety, morals and general welfare. See McNeill, 522 A.2d 471. The concept of general welfare has been held to encompass 'the advancement of a community as a social, economic and political unit.* Southern Burlington City, N.A.A.C.P. v. Mt. Laurel Township, 67 N.J. 151, 336 A.2d 713 (1975), appeal dismissed, 423 U.S. 808 (1975).

New Jersey's Municipal Land Use Law, which authorizes municipalities to enact zoning ordinances, includes the following purposes:

> e. To promote the establishment of appropriate population densities and concentrations that will contribute to the well-being of persons, neighborhoods, communities and regions and preservation of the environment;

f. To encourage the appropriate and efficient expenditure of public funds by the coordination of public development with land use policies;

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

h. To encourage the location and design of transportation routes which will promote the free flow of traffic while discouraging location if such facilities and routes which result in congestion or blight;

j * To promote the conservation of historical sites and districts, open, space, energy resources and valuable natural resources in the State and to prevent urban sprawl and degradation of the environment through improper use of land;

k. To encourage planned unit developments which incorporate the best features of design and relate the type, design and layout of residential, commercial, industrial and recreational development to the particular site;

N.J.S.A. **40.55D-2.**

In addition to the purposes outlined above, the New Jersey Courts have held the following objectives to be legitimate under the police power: planning for the future by imposing restrictions regarding development, Napierkowski v. Gloucester Township, 29 N.J. 481, 150 A,2d 481 (1959); regulations designed to promote orderly, physical development of the municipality according to a land use plan, Harrington Glen, Inc. v. Municipal Bd. of Adjustment of Borough of Leonia, 52 N.J. 22, 243 A.2d 233 (1968); and the protection of the environment, conservation of natural resources, the need for recreational facilities, and the preservation of open space, Riggs v. Township of Long Beach, 212 N.J. Super. 69, 514 A.2d 45 (App. Div. 1986). Since 1938, New Jersey, has recognized both the importance of managing growth and that it is a legitimate exercise of the police power:

... We are surrounded with the problems of planless growth. The baneful consequences of haphazard development are everywhere apparent. There are evils affecting the health, safety and prosperity of our

> citizens that are well-nigh insurmountable because of the prohibitive corrective cost. To challenge the power to give proper direction to community growth and development in the particulars mentioned is to deny the vitality of a principle that has brought men together in organized society for their mutual advantage. A sound economy to advance the collective interest in local affairs is the primary aim of municipal government.

Mansfield & Swett v. Town of West Orange, 120 K.J.L. 415, 198 A. 225 (1938) (cited recently and retaining its vitality, McNeill v. Township of Plumsted, 215 N.J. Super. 532, 522 A.2d 469 (1987)).

To gauge whether the means reasonably relate to a proper objective, the courts examine whether the regulation is reasonably calculated to meet the evil without exceeding the public necessity or substantially affecting uses which do not "partake of the offensive character of those which create the problem sought to be ameliorated.* Kirsch Holding Co. v. Borough of Manasquan, 59 N.J. 241, 281 A.2d 513, 518, (1971); see also State v. Baker, 81 N.J. 99, 405 A.2d 368, 371 (1979) (citing Kirsch). The court must determine whether a proper legislative goal is being accomplished in a manner which is reasonably related to that goal. Home Builders League v. Township of Berlin, 81 N.J. 127, 405 A.2d 381, 388 (1979). The ordinance must be precisely drawn, Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 430 A.2d 881, 888 (1981), to assure that it is not under or over inclusive. Baker, 405 A.2d at 373 or that it ignores 'less restrictive alternatives.* Id. at 372. One of the primary purposes of the planning studies undertaken in development of the State Plan and of this report is to identify and evaluate alternatives to determine those that are most effective in attaining the objective while creating the fewest restrictions on land use.

C. Unconstitutional Exclusionary Regulation

Land use regulations are also subject to attack on the basis that they violate state constitutional requirements of substantive due process and equal protection because they are exclusionary. Exclusionary land use regulations are those that exclude persons of low or moderate income from the zoning municipality. See Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 18 Cal.3d 582, 135 Cal. Rptr. 41, 557 P.2d 473, 483, 487 (1976). Although most state courts have not enunciated or referred to exclusionary concerns as a basis for invalidating land use controls. New Jersey has been in the forefront in the development of the exclusionary regulation concept.

The hallmark decision in New Jersey was Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I) , 67 N.J. 151, 336 A.2d 713, cert, denied 423 U.S. 808 (1975) that required developing communities to provide their "fair share" of regional low- and moderate-cost housing; for a municipality to do otherwise within its land use regulations constitutes a violation of state constitutional requirements of substantive due process and equal protection inherent in Article I, par. 1 of the New Jersey Constitution. Mount Laurel I, 336 A.2d at 724-25. Subsequently, New Jersey courts modified and refined the "fair share" concept. For example, in Oakwood at Madison, Inc. v. Township of Madison, the standard was modified to "least cost" housing. 72 N.J. 481, 371 A.2d 1192 (1977). Further, courts concluded that the directive did not apply to developed communities, Pascack Assn. v. Mayor and Council of Washington Township, 74 N.J. 470, 379 A.2d 6 (1977), or to rural communities not in the path of development, Glenview Development Co., v. Franklin Township, 164 N.J. Super. 563, 397 A.2d 384, 386 (Law Div. 1978), aff'd in part, 456 A*2d 390 (1983) (remanded solely as to question of housing for existing low-income residents).

Southern Burlington County N.A.A.C.P. v. Township of Mount laurel, (Mount Laurel II), 92 N.J. 158, 456 A.2d 390 (1983), reviewed six lower court decisions and refined the standards for applying the exclusionary analysis and provided benchmarks for determining progress toward provision of low-income housing in New Jersey. The Court relied on the 1980 State Development Guide Plan, N.J.S.A. 13:1B-15.52, to make an initial determination of whether an area is appropriate for growth and development and therefore whether a local government is subject to the fair-share doctrine. 456 A.2d at 429-33. The obligation to provide "a realistic opportunity for a fair-share of the region's prospective low and moderate income housing" will not be extended to *those areas where the SDGP discourages growth—namely open spaces, rural areas, prime farmland, conservation areas, limited growth areas, part of the Pinelands and certain coastal zone areas". Id. at 418. The New Jersey Supreme Court stressed that:

> We reassure all concerned that Mount Laurel is not designed to sweep away all land use restrictions or leave our open spaces and natural resources prey to speculators. Municipalities consisting largely of conservation, agricultural, or environmentally sensitive areas will not be required to grow because of Mount Laurel. No forests or small towns need be paved over and covered with high-rise apartments as a result of today's decision.

Mount Laurel II, 456 A.2d at 420.

The legislature has clearly stated in the State Planning Act that the State Development and Redevelopment Plan be "designed for use as a tool for assessing suitable locations for

infrastructure, housing, economic growth and conservation* and be a replacement of the SDGP. K.J.S.A. 52:18A-196. In the development of the Plan by the Office of State Planning, several growth tiers have been identified to more than accommodate all projected growth in the state over the life of the plan. Tiers 5, 6, and 7 have been designated as limited growth areas in order to preserve open space, agricultural land and protect environmentally sensitive areas. As such, under Mount Laurel II, municipalities are not subject to the requirements to provide their "fair share* of low- and middle-income housing in the limited growth areas but must provide adequate housing for their present indigenous lower income population. Mount Laurel II, 456 A.2d at 433, 472, 474.

III. DENSITY STANDARDS

A. Future Development Areas (Tier 5)

1. Background. As a Limited Growth Area, Tier 5 is considered premature for intensive development. Tier 5 is characterized as rural with sparsely developed and populated areas. The lands in the Tier 5 are not currently sewered, not scheduled for sewer extension, or are not considered readily available for public sewer service under the provisions of the area wide State Quality Management Plan approved by the New Jersey Department of Environmental Protection. The area is generally lacking lands highly suitable for agricultural activities, that contain special environmental constraints, or that have resource value (which lands have been located in Tiers 6 and 7). This area is threatened to be engulfed in sprawl development even though the land is not now needed to accommodate projected population and employment growth. In the future, however, it will become part of the Growth Area, through a timed and phased process of orderly transition based upon clearly defined standards and criteria.

The strategies for growth management in Tier 5 should be designed to prevent premature urban development, prevent sprawl and leapfrogging, to ensure concentrated and efficient use of available financial resources for public utilities, to provide open space and recreational areas, and to reserve land for future growth demands and urban development. These goals are legitimate public concerns sufficient to support regulation. See New Jersey State Planning Act, N.J.S.A. §52-18A-196 (sound planning necessary to prevent sprawl and to promote suitable use of land); Municipal Land Use Law, N.J.S.A. 40.55D-2. Mount Laurel II, 456 A.2d at 418 (clear obligation to preserve open space). Under the proposed plan, the implementation strategies are intended to limit and direct growth by restricting the density of permitted development through zoning and subdivision regulations while assuring that development that is allowed will be both efficient

and compatible with potential future development at higher densities when public facilities and services are ultimately extended.

2. Density Standards. A feasible density standard for dispersed residential development in Tier 5 is one dwelling unit per twenty acres (1:20). A one dwelling unit to twenty acre density could potentially deter low density sprawl development which consumes large amounts of land, that ultimately destroys the area for future planned, systematic and appropriately dense urban land use and, that requires costly and inefficient provision of facilities and services.

However, in order to protect property owners' equity and to assure that beneficial use of the property is retained while furthering the growth management objectives for Tier 5, property owners could be allowed to develop at one dwelling unit per five acres density if the property owner clustered the development in 1/2 acre or smaller lot sizes if sewered (including community septic). Non-sewered development would be limited to lot sizes between 1 to 2 acres. In the event cluster development is allowed, subdivision regulations could prevent further development of the open spaces until Tier 5 becomes part of the Growth Area. Permanent open space acquisition programs funded by local and/or state governments could be implemented to meet needs of present and projected residents of Tier 5 before property values increase to levels that would make public acquisition of open space difficult.

Density standards limiting development to one unit per five acres have been found not to constitute a taking without just compensation where the governmental objective is to prevent premature urbanization and to preserve open space. In Agins v. Tiburon, 447 U.S. 255 (1980), the United States Supreme Court found that a Tiburon, California ordinance that placed property in a zone restricted to single family dwellings, accessory buildings and open space uses with density restrictions permitting the building of one to five single-family residences in a five acre tract did not take appellants' property without just compensation. The Court recognized that the State of California had 'determined that the development of local open space plans will discourage the 'premature and unnecessary conversion of open space land to urban uses.'* Agins, 447 U.S. at 261 (quoting Cal. Gov't Code Ann. §65561 (b) (West Supp. 1979). The governmental purpose to protect the public from the ill effects of urbanization was found by the Court to be legitimate. Agins, 447 U.S. at 261 and n. 8 (noting that the city had found that "it is in the public interest to avoid unnecessary conversion of open space land to strictly urban uses, thereby protecting against the resultant adverse impacts, such as air, noise and water pollution, traffic congestion, destruction of scenic beauty, disturbance of the ecology and environment, hazards to geology, fire and flood, and other demonstrated

consequences of urban sprawl*). The Court concluded that the ordinance on its face did not constitute a taking; the benefits resulting from careful and orderly development of residential property with provision of open space accrue to the land owner and must be balanced against any diminution in market value of the property.

In Mount Laurel II, the New Jersey Supreme Court reversed and remanded the trial court's decision in Caputo v« Township of Chester, Ho. L-42857-74 (Law Div. October 4, 1978), that in part invalidated an ordinance limiting development to single family dwellings requiring a minimum five acre lot as being illegal per se. The Court observed that Chester had very little commerce or industry, consisted mostly of farms and residences, had a population density much lower than the state's average, had infrastructure that was far from well-developed, and was characterized by topography, water resources, and agricultural suitability that support a policy of non-development. Mount Laurel II, 456 A.2d at 468-69. Even though the court recognized it was generally acknowledged that Chester would eventually be developed given its location and demand for land, it concluded that development had not really begun.

Significantly, the Court held that *low density limitations like five acre lot minimums are not necessarily in violation of the Mount Laurel fair share obligation so long as municipalities are able to satisfy that obligation in spite of apparently 'exclusionary' devices.* Id. at 470-71. Further, the court found that preservation of open spaces may be sufficient justification for larger lot zoning, including five acre zoning. The court carefully examined the past pattern of development in Chester and the entire zoning ordinance under attack. Id. at 470. See also Robert E. Kurzius, Inc. v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (N.Y. 1980) cert, denied, 450 U.S. 1048 (1981) (Minimum lot requirement of 5 acres was in accordance with master plan and acceptable method to preserve open space as long as not exclusionary and there was no proof of exclusionary intent or effect) ; Senior v. Zoning Commission of Town of New Canaan, 146 Conn. 531, 153 A.2d 415 (1959), appeal dismissed, 363 U.S. 143 (minimum lot requirement of 4 acres not unreasonable in light of surrounding topography, residential semi-rural character and no services), and County Commissioners of Queen Anne's County v. Miles, 246 Md. 355, 228 A.2d 450 (1967) (minimum lot size of 5 acres not discriminatory or arbitrary considering rural area.

The Court also observed, however, that low density limitation will continue to serve as evidence of facial invalidity in exclusionary zoning litigation and be considered presumptively invalid. A municipality may rebut the presumption by showing compliance with the Mount Laurel fair share objectives. 456 A.2d at 471 n. 62*

population growth at smaller percentage than state, careful planning and zoning that helps channel growth into locations nearer centers of public service).

Another significant factor that courts consider when determining the validity of a density standard in rural areas is whether public facilities are available and whether extension of the services are planned. In the Chester portion of Mount Laurel II, the fact that Chester's infrastructure was far from developed was an important consideration. A Minnesota appellate court has concluded that a city's refusal to rezone from a farm residence zone with a minimum lot size of four acres was not unreasonable in light of the fact that no public sewer or water services were available to the plaintiff's property and that the plaintiff's proposal to extend sewer lines a long distance exceeded the terms of the city's plan. Freundshuh v. City of Elaine, 385 N.W.2d 6 (Minn. App. 1986) (city had enacted a program of staged growth). See also Zygmont v. Planning & Zoning Comm'n of Town of Greenwich, 152 Conn. 550, 210 A.2d 172 (1965) (refusal to rezone from a zone requiring a minimum lot of four acres not a taking considering that no extensions of services were planned and all proposed lots would have septic systems threatening damage to water supply)..

Accordingly, given the lack of public facilities in Tier 5, in particular public sewers, the careful studies supporting the state plan and the legitimate goals of preserving open space and preventing premature urbanization of Tier 5, a density standard of one unit per five acres is legally defensible. However, the use of the standard will be closely examined in the context of the population, use, development, and topographical characteristics of the municipality. Most importantly, the Court will evaluate the standard for consistency with other components of the overall land use plan and their rationale for achieving the stated objective of preserving the open space and rural character of the community.

3. Other Alternatives for Tier 5.

a. Planned Development and Mandatory Cluster. A key strategy that is available for use in conjunction with density standards is encouragement of compact development by requiring the developer to cluster to obtain development rights at a higher gross density. A municipality can utilize a variety of flexible zoning techniques such as conditional zoning, planned unit development (P.U.D.), cluster zoning and bonus (incentive) zoning to promote beneficial development and to allow, anticipate and encourage redevelopment at higher densities when urban facilities and services are extended*

In particular, New Jersey authorized and encouraged P.U.D. as early as 1967 by enacting the Municipal Planned Unit Development Act, N.J.S.A. 40:55-54 et. seq. (recodified in

Municipal Land Use Law at 40:55D et. seq.). The act has been broadly construed to require that any cluster zoning ordinance must meet the standards enunciated in the Act. Niccollai v. Planning Board of Township of Wayne, 148 N.J. Super. 150, 372 A.2d 352 (App. Div. 1977); see also Schride Associates v. Township of Wall, 190 N.J. Super. 589, 464 A.2d 1189 (App. Div. 1983) (decided after enactment of the Municipal Land Use Law). P.U.D. has been defined as *an instrument of land use control which augments and supplements existing master plans and zoning ordinances and .- . . enables municipalities to negotiate with developers concerning proposed uses, bulk, density and set back zoning provisions, which may be contrary to existing ordinances if the planned project is determined to be in the public and individual landowner's best interest." Rudderow v. Mount Laurel Township Committee, 121 N.J. Super.. 409, 297 A.2d 583 (App. Div. 1972).

Under current law, in its ordinance requiring approval of subdivisions or site plans by a planning board, a municipality can include provisions for encouraging and promoting flexibility and economy in layout and design through planned unit development, planned unit residential development and residential cluster within specified limitations. N.J.S.A. 40:55D-39(b). Provisions for planned development discuss and encourage maintenance of open space within delineated parameters regarding use, improvement and maintenance. See N.J.S.A. 40:55D-39(c)(1)-(6).

Density standards and mandatory requirements for cluster and planned developments are viable components of the growth management system for Tier 5. However, a variance or waiver provision should be included in a municipality's land use plan and implementing regulations to provide relief to a property owner when the application of the standards renders a parcel or property substantially undevelopable because of its size, shape, and topography and no alternative beneficial use of the land exists. See, 165 Augusta St. v. Collins, 9 N.J. 259, 87 A.2d 889 (1952); Scheff v. Township of Maple Shade, 149 N.J. Super. 448, 374 A.2d 43 (1977).

b. Transition to Growth Area Policies. Another technique that mitigates the impact of density standards in Tier 5 is a provision for shifts of land from Tier 5 to the planned urbanizing areas (growth areas). Consideration of shifts can be scheduled to occur every three years in conjunction with the Commission's revisions and re-adopting of the Plan pursuant to N.J.S.A. 52:18A-199(a).- Criteria and the methodology for such a program were presented In the FLCS Implementation Strategies Report of April 17, 1987 at pp. 36-39. The methodology utilizes an Impact Assessment Report to determine whether the proposed shift will be classified as Incremental or Substantial. Some of the relevant factors evaluated by the Report are the amount of

land involved, contiguity to Planned Urbanizing Area, access, environmental impact, type and density of land uses proposed, and effect on prime agricultural land.

c. Public Facility Extension. Because the extension of major public facilities such as sewer, water and roads facilitates and stimulates growth, an effective method of managing and limiting growth is to prevent the extension of public facilities into Tier 5. In order to limit the extension of public facilities, state funding of public facilities in Tier 5 could be limited to projects that are necessary to prevent harm to public health, safety and welfare and to maintain already existing facilities in Limited Growth Areas. Additionally, impact fee ordinances for new development could be discouraged because under the rational nexus test, municipality will be obligated to provide the services for which impact fees are paid. Cf. 181 Inc. v. Salem County Planning Bd., 133 N.J. Super. 350, 336 A.2d 501, 506 (Law Div. 1975) modified in part, 140 N.J. Super. 247, 356 A.2d 34 (App. Div. 1976) (dedications must be for specific and presently contemplated immediate improvements).

d. Capital Project Regulations. A method to implement the strategy of restricting infrastructure is the adoption of a regulation by the Commission pursuant to its authority under N.J.S.A. 52:18A-199(g) and 52:18A-200 that would require the Commission's approval of all capital projects within areas designated as Limited Growth Areas such as Tier 5. Additionally, state agencies having approval authority over extension of public facilities should not approve the request for extensions into limited growth areas except where necessary to protect the public health and safety.

Under N.J.S.A. 52:93-3 the State Capital Improvement Plan containing proposals for state spending for capital projects "shall be consistent with the goals and provisions of the State Development and Redevelopment Plan adopted by the State Planning Commission.* To the extent the State Plan adopts a strategy to discourage the extension of public facilities into Limited Growth Areas, the state should discourage counties and municipalities from funding or approving the extension of public facilities in Limited Growth Areas, particularly the formation of special districts or utilization of special assessments, except where necessary to protect the public health and safety, and except for facilities which are not in and of themselves likely to generate growth (rural facility standards, open space and parks). Counties and municipalities having capital improvements programs in effect could review and revise such programs to ensure achievement of this strategy.

A full discussion of the authority, other than statutory, for state or local government to refuse to extend public facilities is found infra, at p. 38.

B. Agricultural Areas (Tier 6)

1. Background. Tier 6 is predominantly agricultural in land use. In addition, the agricultural area contains many areas of scattered rural residences and other non-intensive, nonagricultural economic development. Generally, the lands are currently farmed or have a high potential to support agricultural activity, and are located in areas where agriculture is a permitted use or permitted as a nonconforming use under current municipal zoning ordinances. The agricultural areas are subdivided into two tiers: Agricultural Cultural Resource Priority Areas (Tier 6A) containing land most suitable for expansion and intensification of agricultural production and associated economic activities; and Agricultural Natural Resource Priority Areas (Tier 6B) containing lands not only characterized by high agricultural resource values but limited by particularly sensitive environmental features and other natural resource values characteristic of the Ecologically Significant Lands (Tier 7). The lands in Tier 6 are not currently served by public sewer service.

The implementation strategies for growth management in Tier 6 must be designed to carry out the Plan's objective to 'reduce the rate of conversion of prime agricultural land to suburban uses.* The strategies should be designed to retain agriculture as a viable economic activity by maintaining prime agricultural land and soils in agricultural use; preserving existing rural patterns by providing large contiguous land areas to ensure productive agricultural enterprises; minimizing conflicts between agricultural and nonagricultural land uses by preventing introduction of land uses which are ordinarily incompatible with farming; and encouraging concentration of nonagricultural land uses into Freestanding Towns and Villages to minimize conflicts, sprawl and leapfrogging.

2. Need for Agricultural Preservation. Agriculture and related economic activity are significant to the overall economy in New Jersey. Currently, it is estimated that $3 billion are generated from approximately 8700 farms and nearly 2000 related agriculture business firms involving 1 million acres of land. Land exists in finite quantities. Once agricultural land is developed for nonagricultural residential, industrial or commercial uses, it is forever lost for agricultural use. Since 1950, the amount of land in farms has decreased almost by half from 1,770,000 acres to approximately 920,000 acres in 1986.

New Jersey has recognized the value of agriculture as an economic and cultural resource. Under the State Planning Act, the legislature required that the State Development and Redevelopment Plan "shall [p]rotect the natural resources and qualities of the State, including . . . agricultural development areas . . . identify areas for growth, limited growth, agriculture, open space conservation . . . coordinate planning

activities and establish state wide planning objectives in ... agriculture and farmland retention." N.J.S.A. 50:18A-200(a), (d), (f). Further, in enacting the Agricultural Development and Farmland Preservation Act, N.J.S.A. 4:1C-1 et. seq., known as the Right to Farm Act, the New Jersey legislature implicitly recognized the fact that New Jersey farmland has been under pressure to 'prematurely* convert from agricultural to nonagricultural uses. The legislature explicitly declared that *the retention of agricultural activities would serve the best interest of all citizens of this state by insuring the numerous social, economic and environmental benefits which accrue from one of the largest industries in the Garden State.* N.J.S.A. 4:1C-2 (a).

Other legislative enactments also demonstrate New Jersey's concern and intention to preserve farmland and strengthen the agricultural industry. For example, the Agriculture Retention and Development Act of 1983, N.J.S.A. 4:C-11 et. seq., established a Board to provide educational activities regarding conservation and preservation techniques and agricultural management practices and to identify agricultural development areas in which landowners can participate in a voluntary 8 year farm preservation program. The Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 et. seq. limits tax assessment to the value of land in its agricultural use with its purpose to grant farmers tax incentives to maintain land in agricultural use, thereby restraining over development and retaining the open spaces.

The federal government has also recognized the need to preserve farmland. In enacting the Farmland Protection Policy Act, 7 U.S.C.A. §4201 (1982 Supp.), Congress specifically found that 'continued decrease in the Nation's farmland base may threaten the ability of the United States to produce food and fiber in sufficient quantities to meet domestic needs and the demands of our export markets* and that *the extensive use of farmland for nonagricultural purposes undermines the economic base of many rural areas.* §4201(a)(3), (4). Having made these findings. Congress proceeded to mandate that all federal programs be administered *in a manner that, to the extent practicable, will be compatible with State, unit of local government, and private programs and policies to protect farmland* §4201(b).

Numerous sources have documented the increasing rate of conversion of farmland to residential and other uses. See, for example, Pierre Crosson, 'Demands for Food and Fiber,* in Land Use: Tough Choices in Today's World (Soil Conservation Society of America, 1977). Perhaps the most thorough research on this subject has been done by the National Agricultural Lands Study (NALS). As the authors of the NALS report. The Protection of Farmland, note:

> The statistics are dramatic: In the eight year period from 1967 to 1975, some 23.4 million acres of agricultural land were converted to urban, transportation, water resource development, and other non-farm uses — an area larger than the state of Louisiana. (p. 32)

The conversion of farmland to other uses has significant consequences at the national, as well as at the local level. It is important to briefly consider the national ramifications of farmland conversion. Again, to quote from the NALS report:

> Millions of people throughout the would depend on American-grown food for survival. Our agricultural sales earn substantial amounts of foreign exchange and reduce our trade deficit significantly. Much of the land that is being lost is either prime agricultural land, close to major markets, or both. To the extent that it is replaced with poorer land or land which is more remote, required energy and costs for irrigation, fertilizer, and transportation are increased * * Continuing increases in agricultural productivity because of technological improvements cannot be counted on to offset losses in good agricultural land. In fact, the rate of productivity per acre seems to have slowed down significantly in recent years, and past increases in agricultural productivity have been heavily dependent on petroleum, whose cost is increasing rapidly and whose availability is becoming less certain* In short, land remains essential for meeting future needs for food and fiber* (p. 32).

The importance of maintaining existing farm acreage in order to meet national and international food needs has also been highlighted by The Global 2000 Report to the President (Council on Environmental Quality and the U.S. Department of State 1980). The Global 2000 Report, for example, concluded that due to worldwide population growth, demand for grain will increase from 1,202 million metric tons (1973-75) to over 2,141 million metric tons (2000). United States grain production is projected to rise from some 228 million metric tons (1973-75) to 402 million metric tons (2000). pp. 18-19. The Report also found that America's role as the world's principal food exporter is likely to become even more important in the future:

> As the year 2000 approaches and more marginal, weather sensitive lands are brought into production around the world, the United States is likely to become even more of a residual world

> supplier than today; that is, U.S. producers will be responding to widening, weather-related swings in world production and foreign demand, (p. 18).

Given these projections, the Report notes with concern the loss of cropland in urban uses, p. 33.

Tier 6 contains those lands that the state has identified as valuable, productive agricultural lands and which are located in predominantly rural areas. The Draft Plan recommends utilization of strategies in designated growth areas that encourage and direct growth to maximize efficient utilization of public facilities and financial resources while utilizing strategies in the limited growth agricultural tier which will encourage continuation of agriculture as a vital and viable economic activity and cultural resource. The current state programs designed to promote agricultural land retention should be retained. Finally, extension of public facilities into Tier 6 could be limited except to support those activities necessary to support agricultural activities.

A recent New Jersey decision demonstrates the judiciary's awareness and appreciation of the numerous problems created by allowing a large urban type development in a primarily agricultural area. In Orgo Farms and Greenhouses, Inc. v. Colts Neck Township, 204 N.J. Super. 585, 499 A.2d 565 (Law Div. 1985), a developer sought a builder's remedy under Mount Laurel in Colts Neck Township, an area primarily designated as a limited growth area under the SDGP but with one small portion falling within a designated growth area. The developer sought to build 1000 dwelling units, a hotel and a 45,000 square foot commercial space in a limited growth area of the Township. Although the Court found as a matter of law in an earlier ruling, that the developer was not precluded from seeking a builders remedy in a limited growth area, the developer was required to propose a project that was not unsound from a planning or environmental standpoint. Orgo Farms, 499 A.2d at 566. The Court concluded that the proposed project was contrary to sound land use planning and was therefore unsuitable*

In reaching that conclusion, the Court reiterated the importance of controlling development in limited growth areas as expressed in Mount Laurel II. Significantly, the Court characterized Mount Laurel II as *one of the foremost judicial statements of concern for protection of the environment and the preservation of natural resources. It was intended to guard against inappropriate use of open space and to prevent it from falling prey to speculators,* Orgo Farms, 499 A.2d at 567. Additionally, the decision substantially rested on the report and testimony of a court expert. The expert concluded that the proposed development site fell outside a village node that under the county's plan was not to exceed 200 homes; that the

development required a 3.7 mile extension of a waterline which was an inefficient way to meet housing demand; and that the proposed development would impact upon the compatibility of adjacent farm uses by placing housing of a dense nature along a common boundary of approximately 4000 feet with adjacent farmland. The Court's expert characterized the development as an aspect of urban sprawl.

The Court also reviewed a video tape and flight map of an aerial tour of the township and "was struck by the vast area of remaining farmland within the township and the rather limited residential development ... the immediate conclusion that common sense dictated upon viewing the tape was that massive development in the middle of that farmland would impact significantly upon the planned growth of the community.* Orgo Farms, 499 A.2d at 568.

The Orgo Farm decision provides valuable insight into the important factors a court will consider when determining the validity of growth management techniques and the significance of a state plan consisting of accurate classifications of land areas into growth and limited growth areas.

3. Density Standards in Tier 6. Under the Draft Plan, the implementation strategies are intended to disperse development, to maintain large contiguous parcels of land use to minimize conflicts between agricultural and nonagricultural to provide protection of the property owner's equity in his property as well as to maximize the conservation and viability of prime farmland. Accordingly, a combination of density standards, incentives and "impact on agriculture" assessment tools could be utilized to achieve the objectives for Tier 6.

Density standards utilized to preserve agriculture have been upheld in New Jersey. t In Glenview Development Co. v. Franklin Township, 164 N.J. Super. 563, 397 A.2d 384 (Law Div. 1978), the Court upheld the township's zoning ordinances establishing minimum lot size zones of three acres and five acres. The Superior Court carefully scrutinized statistics regarding characteristics of the township's topography, current land uses, employment, growth, zoning history and population. Concluding that the township was rural with seventy two percent of the land use devoted to agriculture and that there was no urgency to accommodate urban growth or development, the Court emphasized the importance of preserving agricultural land, and referred to and relied on the State Development Guide Plan.

The New Jersey Supreme Court reviewed Glenview Development in Mount Laurel II, 456 A.2d at 471-74. The Court observed that the SDGP's treatment of agricultural areas is similar to that of limited growth municipalities, i.e., there is no obligation to provide a fair share of the prospective regional housing need. Again, the geographical location of the county, its population

density, land use patterns, infrastructure and zoning history were important factors in the Supreme Court's analysis of the minimum lot size requirement. The Court agreed within the SDGP's conclusion that 'high density development should be located elsewhere* and that "agricultural areas such as those found in Franklin should be preserved*. Mount Laurel II, 456 A.2d at 472. However, the Court did reverse and remand the case solely to consider whether *the ordinance does not adequately provide for Franklin's present indigenous lower income housing needs.* Mount Laurel II, 456 A.2d at 474. The trial court's rejection of Glenview's claim that the three acre zoning of his property was confiscatory and constituted an illegal taking was affirmed. Mount Laurel II, 456 A.2d at 472 n. 64.

Therefore, the use of a minimum lot size zoning ordinance to preserve agricultural land is a legally defensible technique in New Jersey. Coupled with the reasoning of the Court in Orgo Farms, the likelihood of a density standard being upheld against legal attack is greatly enhanced by the fact that the technique is utilized in an area designated as one of limited growth by the State Plan, assuming that the decision to include specific lands in Tier 6 is based on sound planning and technical studies.

Nationally, minimum lot size, area-based density regulations, and sliding scale zoning ordinances intended to preserve open space and/or agricultural land have generally been upheld. Large lot ordinances specify a minimum lot size, ranging from 10 to 160 acres nationwide. These ordinances are designed to discourage non-farm uses and the demand for non-farm land. See, Juergensmeyer, 'Farmland Preservation: A Vital Agricultural Law Issue for the 1980s,* 21 Washburn L. J. 443 (1982). See also D. Callies and R. Freilich Cases and Materials on Land Use, 899 (West 1986). Fixed-are abased allocation ordinances permit one dwelling unit per area of a specified size. The ratios range from one unit per ten acres to one unit per 160 acres with the most common being one dwelling per forty acres (i.e., quarter/quarter zoning). Kaufman, 'Agricultural Zoning in Pennsylvania: Will Growth Pressures Prevail?*, 91 Dickinson L. Rev.. 289, 296-97 (1986). Clustering of homes and/or restrictions of development to the poorest agricultural land are also found in these ordinances. Finally, sliding scale ordinances also allocate development rights based on a dwelling unit to land ratio, but the density decreases as the amount of land increases. A typical ordinance might allow one unit on five acres; two units on fifteen to thirty acres; three units on thirty to sixty acres, and so on. Id.

Within the legal framework discussed above regarding land use regulation, courts have found the following factors particularly important when evaluating the legality of a minimum lot size ordinance: conformity with a comprehensive plan, continuation of past agricultural use, surrounding topography and land use, proximity to urban centers, availability of

infrastructure, and suitability of land to agricultural use. In California, a state with a strong policy of preservation of agricultural land, a minimum lot requirement of 18 acres in an exclusive agricultural zone was upheld against an inverse condemnation challenge. Gisler v. County of Madera, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974) (zoning was in conformity with general plan; strong legislative policy favored agriculture preservation; property had been and was still used for agriculture; surrounding property used for agriculture). Even without the benefit of any offsetting compensation program to the landowner, extremely large minimum lot sizes have been upheld against taking challenges and charges of unreasonable interference with property rights. See County of Ada v. Henry, 668 P.2d 994 (Idaho 1983) (other properties also affected by down zoning to 80 acre minimum lot size; residual value remained; ordinance serving to discourage premature conversion of open space to urban use is a proper exercise of police power) and Wilson v. County of McHenrv, 92 111. App. 3d 997, 48 111. Dec. 395, 416 N.E.2d 426 (1981) (a 160 acre minimum lot size in an agriculture zone was not unreasonable when land use plan recognized private agricultural land as a resource to be preserved and that agricultural land closer to municipalities was designated for residential use to preserve large tracts; predominant surrounding use was agriculture and land was suited to agriculture).

In Maryland, a state that also is experiencing tremendous development pressures, a trial court upheld a county ordinance that down zoned from areas requiring between one unit per 5 acres and one unit per 2 acres to a new zone with a minimum lot requirement of one dwelling unit per 25 acres. Dufour v. Montgomery County Council, Law No. 56964 (circuit Court for Montgomery County, Jan. 20, 1983). The county had also established a transferable development rights program, although the county had explicitly found in its master plan that the TDK program was supplemental and not integral to the down zoning ordinance. The Court noted that the question of whether just compensation was provided by the TDK system was unnecessary because no taking had occurred. The Court concluded that the landowners had not been deprived of all reasonable use of their property and that the county had a valid purpose in preserving open space and agricultural land. The Court was impressed by the substantial study and the development of a comprehensive plan by the county before the ordinance was adopted.

Finally, in a state that has also developed a strong judicial prohibition of exclusionary zoning, the importance of agricultural preservation and the validity of density standards in accomplishing agricultural preservation have been accepted. In Boundary Drive Associates v. Shrewsbury Township, 507 Pa. 481, 491 A.2d 86 (1985), the landowner alleged that a variable area-based (sliding scale) method of regulating residential development within agricultural districts was unconstitutional on

its face and as applied. The township's comprehensive plan contained policies regarding the preservation of farmland which provided in part:

> [I]t is the township's policy not to consider agricultural land as 'undeveloped farmland awaiting another use.* Farmland must be considered as "developed land" . . . The agricultural zone should not be considered as a holding zone but as a zone having a positive purpose of utilizing the township's natural resources for the benefit of the entire community and the township should protect the agricultural zone from interference by incompatible uses which break down the integrity of the zone and also interfere with normal and customary operations within the zone.

Boundary Drive, 491 A.2d at 88.

The zoning ordinance divided the agricultural districts into three classifications based on soil capability. The first category was made up of areas containing the best farmland in the township. Within this category, no non-agricultural use was permitted except a total of two dwellings on any tract consisting entirely of this high quality farmland. The second category consisted of soils highly suitable for agricultural use but slightly less productive than the soils in the first category. Within the second category, an owner could place on these less productive soils the non-farm dwelling units allocated by a variable area-based density schedule. The third category consisted of soils not suitable for agricultural purposes because topography or size or shape of included farmland precluded efficient use of modern farm equipment. Within this category, small farms, large home sites and a variety of uses by special exception were allowed but unlimited residential development was not permitted in order to avoid conflicts between residential and agricultural uses.

The landowner in Boundary Drive wanted to subdivide his current holding of 39 acres which contained soils of the first and second category. Under the zoning ordinance he was allocated units under the following sliding scale:

Size of Parcel	No. of Dwellings Permitted
0-5 acres	1
5-15 acres	2
15-30 acres	3
30-60 acres	4
60-90 acres	5
90-120 acres	6
120-150 acres	7
over 150 acres	8 plus 1 dwelling for each 30 acres over 150 acres

Because the original 43 acre tract had previously been subdivided and he had sold 3 one-acre lots, he was eligible for one additional dwelling on his remaining parcel under the schedule.

The Court held that preservation of agricultural land is a legitimate governmental objective which can be appropriately implemented by zoning, and distinguished an earlier Pennsylvania case that invalidated an agricultural preservation ordinance that limited the number of dwelling units available to five regardless of the size of the tract. Boundary Drive, 491 A.2d at 91 (discussing Hopewell Township Board of Supervisors v. Golla, 499 Pa. 246, 452 A.2d 1337 (1982)). The Court concluded that a zoning scheme employing a strict linear proportion of one dwelling per acre would thwart the goal of preserving agricultural land. Therefore, on balance the sliding scale allotment system 'accommodated the reasonable expectations of owners of small parcels by placing fewer restrictions on use and, at the same time, promotes the goal of farmland preservation by limiting residential density in larger tracts which can support productive working farms". Boundary Drive, 491 A.2d at 92-93. The Court upheld the ordinance as having a rational basis and was not unduly restrictive. Id.

Shortly after the Pennsylvania Supreme Court decided Boundary Drive, the Commonwealth Court reversed lower Court decision and upheld an agricultural zoning provision precluding division of productive farmland into tracts of less than 50 acres as reasonable and not arbitrary. Codorus Township v. Rodgers, 89 Pa. Cmwlth 79, 492 A.2d 73 (1985) (a sliding scale allocation system for determining density of development was also challenged but the lower court rested its decision solely on the invalidity of the 50 acre minimum ordinance). Of special interest, the Court in Codorus recognized a nationwide legislative trend toward using zoning as a tool for preservation of agricultural land. Codorus Township, 492 A.2d at 76. Reviewing the record, the Court noted that the zoning board found that the township had lost several hundred acres of farmland over approximately a decade but that the size of the average farm had increased, and *that the size of farmland tracts is directly related to the economic viability of farming operations with respect to the use

Under another provision, the schedule allocates the permissible number of dwellings as they existed on a specific date essentially freezing the size of the parcel. The purpose of the provision was to prevent repeated subdivisions into smaller and smaller tracts with each entitled to its own allotment of dwellings in accordance with the heavier density schedule accorded to smaller lots. Boundary Drive, 491 A.2d at 89 and n. 8.

of modern machinery, soil conservation programs and the ability to dispose of agricultural by products.* Codorus Township, 492 A.2d at 76.

The preservation of agricultural land has become a nationally accepted objective of land use regulation. The methods utilized by local governments share some common features in approach, but the actual contents of the ordinances are unique to each locality in order to reflect such local characteristics as the general topography, past zoning history and the nature of agriculture practiced in the locality.

The planning and legal literature discussing the effectiveness of minimum lot sizes and related density standard approaches is minimal. It is clear, however, that agricultural zoning is widely used by local governments. According to NALS, published in 1981, at least 270 local governments had enacted agricultural zoning ordinances to protect farmland in the previous decade. Studies conducted in 10 communities that enacted agricultural zoning ordinances suggest the following conclusions:

> 1. Agriculture is perceived as a long-term permanent land-use after agricultural zoning has been enacted;
> 2. Generally, localities reduced densities and allowed rezonings only to lands not well-suited to agriculture;
> 3. Communities have amended their initial ordinances to strengthen restrictions on non-farm uses in the zones; and
> 4. Speculation for residential, commercial and industrial purposes shifted from agricultural areas to designated development areas with a decrease in subdivisions of agricultural land.

Coughlin and Keene, 'The Protection of Farmland: An Analysis of Various State and Local Approaches,* 1981 Land Use Law & Zoning Digest 5, 8.

The minimum lot size that is most effective in preserving agricultural land depends on physical characteristics of the region, local farm size, demographic pressures of urbanization, and the nature of farming in the area. The goal is to find a lot size large enough to provide a profit to the farmer and to deter subdivision without constituting an unconstitutional taking or unreasonable restriction of land use. A recent article reached the following conclusions concerning the determination of a minimum lot size*

> In determining the minimum lot size to be used in an EFU [Exclusive Farm Use] zone, elected county officials face a difficult and controversial trade-off — both the

> social benefits and the private costs of land use control increase as the minimum is increased. It is hypothesized that the benefits of small minimum lot sizes (five, ten, and perhaps twenty acre restrictions) are negative -- more land is converted to non farm uses than when no minimum is in effect. However, as the minimum is further increased, benefits become positive and increase with increasing minimums for two reasons. First, the amount of agricultural land converted to nonagricultural use will decline as the minimum lot size is increased; the higher price of successively larger parcels in an EFU zone will result in the loss of less land to hobby farms or *ranchettes*. Second, uncertainty concerning future land use in an EFU zone will be reduced with increasing minimum lot size.
>
> At very large minimum lot sizes, social benefits probably increase at a progressively decreasing rate. This occurs because beyond some point, further increases in the minimum result in successively smaller incremental reductions in farmland conversion.
>
> Most of the densely populated counties of the Willamette Valley are using 20-40 acre minimum lot sizes. In contrast, the more rural counties of eastern Oregon have adopted much larger minimums; the largest is a 320 acre minimum lot size in Deschutes County.

Gustafson, Daniels & Shirack, *The Oregon Land Use Act: Implications for Farmland and Open space Protection,* 18 JAPA 365. In exclusive farm zones in the area of Oregon most like New Jersey (i.e., the urbanized western part), a 20 to 40 acre minimum has worked under a state sponsored land use planning program.

Although New Jersey's farms do not require the large acres necessary in other areas of the country due to the nature of its crops, it has nevertheless been stated that a 40 acre farm is generally the smallest size farm that can be a productive economic unit. The larger the minimum lot size the more likely the farmer will be able to profit from his land and retain his beneficial use until a(point of diminishing returns is reached. However, zoning by itself is not enough. Clearly, planning and zoning must be linked to select any appropriate and effective minimum lot size or density standard and to achieve the objective of preservation of agricultural land. See Duncan, 'Toward a Theory of Broadbased Planning for the Preservation of Agricultural Land,* 24 Nat. Res. J. 61 (1984). Additionally, other growth management strategies should be implemented that will balance and strengthen the effectiveness and validity of a density standard to preserve agricultural lands.

4. Other Alternatives for Tier 6. Growth management strategies for Tier 6 could incorporate techniques for compensating or encouraging a land owner to retain the land in agricultural use. Currently New Jersey authorizes public acquisition of development easements defined as "an interest in land, less than fee simple absolute title thereto, which enables the owner to develop the land for any nonagricultural purpose*. N.J.S.A. 4:lC-13(f). Innovative funding and program approaches could expand the development easement acquisition program. The Implementation Strategies Report, April 17, 1987 suggested a number of potential funding mechanisms to expand the development easement acquisition program including the following: a bond issue similar to that authorized by the 1981 Farmland Preservation Bond Act; a dedicated real estate transfer tax, a dedicated farmland conveyance gains tax; and a modified transfer of development rights (TDR) program. Additionally, a loan guarantee program for agricultural lands could be established.

a. TDR programs have been established in many areas across the nation, including New Jersey, for the protection and preservation of agricultural and/or environmentally sensitive land. A central concept in a TDR program is that the right to develop property may be severed from other rights of land ownership. Under that concept the development rights of a parcel in a preservation district can be severed and transferred to a parcel in a development district. Development rights in the preservation district are assigned in a systematic manner. Owners in the preservation district are unable to develop beyond a stated threshold; however, they are able to sell their development rights to owners in the development districts, who may use these newly acquired rights to develop at greater densities than normally allowed by the applicable zoning provisions. The TDRs represent a noncash compensation to the property owner in the preservation district. A TDR system relies on private initiative and financing. In order to be successful, the program must ensure that a market exists for the development rights. See generally Coughlin and Keene, supra at 9.

TDRs have been used to protect properties which exhibit special characteristics which a community wishes to protect. These include environmentally sensitive lands such as beaches (City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla. D.C.A. 1983)), open space (Matlack v. Burlington County Chosen Freeholders Board, 191 N.J. Super. 236, 466 A.2d 83 (1982), affirmed 194 N.J. Super. 359, 476 A.2d 1262 (1984)), agricultural lands (Appeal of Buckingham Developers, Inc., 433 A.2d 931 (Pa. Cmwlth 1981), West Montgomery County Citizens Ass'n v. Maryland National Capital Park and Planning Comm'n, 552, A.2d 1328 (Md. 1987) (upholding concept of TDR and authority to regulate the density and distribution of population for agricultural purposes if implemented through zoning power)); and landmarks (Penn Central Transportation Co. v. New York City, 438 U.S. 104

(1978)). Several townships and counties in Pennsylvania, Massachusetts, New Jersey, New York and Maryland have established TDR programs for agricultural preservation.

According to Sarah Redfield, the practical viability of a TDR approach is still unproven in rural areas where transfers might have to operate over large areas and perhaps across political boundaries and where the value of the rights is less predictable than in a compact urban setting. S. Redfield, Vanishing Farmland; A Legal Solution for the States, 99 (Lexington Books 1984). Furthermore, creating and maintaining a ready private market for the development rights remains a large obstacle to the success of most TDR systems.

b. A purchase of development rights (PDR) program is an alternative to the TDR program wherein the state purchases the development rights for resale to owners in development areas when a demand for development rights exists or to simply hold the rights for long periods of time. This concept has been used in the Pinelands with the Pinelands Development Credits program. When the state sells the development rights to developers in identified development districts or nodes in the Planned Urbanizing Tier as part of a development program, revenues from the sale could be used to finance the future purchase of development rights. PDR programs have also been implemented in Massachusetts; Sussex County, New York; King County, Washington; Connecticut; Howard County, Maryland; New Hampshire; and Southhampton, New York. Callies & Freilich, supra, at 900. The concept was found to be constitutional in the State of Washington in Louthan v. King County, 617 P.2d 977 (Wash. 1980). The Washington Court upheld a plan which provides for owners of eligible property to apply to sell development rights in their land to the county at a price not more than the difference between the value of the land if confined to agriculture purposes and the current value of the land and, in return, the owners would agree to restrict the use of the land to agricultural use in perpetuity. In order to finance the purchase of the development rights, the King County Council proposed to sell $50 million general obligation bonds. Voter approval of the proposed bond issue was obtained. Louthan, 617 P.2d at 978-79. In New Jersey, development easements could be sold for periods of 10, 20, or 30 years or in perpetuity depending on the particular objectives of the municipality as well as the amount of funds available for purchase of development easements.

Although the PDR technique requires the use of public funds to acquire development rights, commentators have suggested that economic benefits accruing from the PDR programs may balance the costs to the governmental units. A PDR program "confronts most directly the economic situation of farmers and their expectation of their freedom to sell their land if and when their financial situation warrants.* S. Redfield, supra at 99. The theme of freedom to sell for development value is incorporated in New

Jersey Department of Agriculture and the New Jersey Department of Environmental Protection report, 'Grassroots: An Agricultural Retention and Development Program for New Jersey* (1980). Accommodation of the farmers' freedom to sell and the directness of the PDR approach *cause the potential of this technique to continue to be intriguing, particularly if it were to be tied to other regulatory and funding efforts*. S. Redfield, supra at 100.

In addition to considering the alternatives of density standards, purchase of development rights programs, and transfer of development rights programs, the State should retain and consider strengthening its statutory programs now in existence that encourage the retention of farmland and agricultural activities: Right to Farm Act (protecting farm uses from nuisance actions); the Eight-Year Farmland Retention Programs (improve, for example, by increasing the percentage for State grants for soil and water conservation projects where the landowner has conveyed development easements or development rights for the property); and the Farmland Assessment Act (increase the roll-back tax payment required for conversion from agricultural or horticultural use).

Finally, as in Tier 5, the extension of public facilities, special assessments and special districts for infrastructure financing could be discouraged for other than those facilities necessary to support agricultural activity or to protect the public health and to meet safety specifications. The Department of Environmental Protection could discourage the extension of public facilities by not approving the funding or extension of sanitary sewer systems into agricultural areas unless such extensions are essential to protect the public health. Furthermore, if exclusive agricultural districts were established incorporating limited densities, extensions of public facilities or subjecting farmers to special assessments for improvements would be absolutely prohibited. See, e.g.. New York's agricultural districting program, McKinney's Agric. & Mkts. Law §§ 300-377, and similar provisions in other states, Minn. Stat. Ann. § 40A.01 et. seq.; Va. Code §§ 15,1-1506 to 15.1-1513 (all provisions contain limitations on capital improvement expenditures promoting new nonfarm development and exemption from special assessments except If the farmer uses the service).

C. Ecologically Significant Areas (Tier 7)

Tier 7 is composed of pristine waters and their watersheds, critical plant and endangered or threatened wildlife habitats and park lands identified as having special natural or cultural resource values. Pristine waters are defined by those waters of particular clarity, color, scenic setting or other characteristics of scenic value, exceptional ecological or recreational significance, exceptional water supply significance or exceptional fishery resource value, including designated trout

production waters and their watersheds. The lands in Tier 7 are predominantly low density residential, recreational and undeveloped open space. These land areas are sensitive and can be easily disturbed by development.

Any development in ecologically significant areas must be evaluated for its impact on the dynamics and balances of the ecosystems. The strategies, policies and standards for Tier 7 are intended to permanently protect the integrity and function of these resources from any deleterious impacts of development. The characteristics of the natural environment will serve as a limit on the character and intensity of development. The integrity of native habitats and ecosystems will be protected through careful control of the siting, intensity and character of development.

Low density dispersed development will facilitate the maintenance of existing rural land patterns that provide large contiguous land areas for the protection of sensitive natural resources. Tier 7 should continue to include open space for both conservation and recreation which will help meet regional open space and recreation needs of nearby growth areas, as well as present and projected residents of limited growth areas.

Although another consultant has the primary responsibility for the development of performance based standards to protect the integrity and viability of ecologically significant lands, it is appropriate to discuss standards designed to attain objectives of New Jersey's growth management system for Tier 7. Under the Draft Plan, areas in Tier 7 are permanently reserved with no plan to convert the areas from their semi-rural development to urbanized areas as in Tier 5 (the Future Urbanizing Area). Therefore, in addition to the Nitrate Dilution Model as the primary method to direct and allocate development in Tier 5, a density standard generally applicable to Tier 7 could be established.

Under the Nitrate Dilution Model, development may be allowed on lot sizes ranging from a maximum greater than 20 acres to a minimum of less than 5 acres depending on soil characteristics. In order to assure that Tier 7 remains non-urban and semi-rural, a maximum density standard could also be utilized. Princeton utilizes 4 acre and 5 acre minimum lot sizes to preserve conservation areas identified by their topographic, soil and vegetative characteristics. Under its zoning ordinances, a developer is allowed to cluster residential development in the conservation zones on a minimum of eight contiguous acres. Additionally, incentives for increased densities are available for plans that include the construction of other than single family residences and that provide for 75% or more of preserved open space in the common open space of the site.

In Tier 7, increased densities could be allowed, for example, if a developer agreed to cluster on very large parcel, such as a 100 acre parcel, and to preserve 75% of the parcel for open space. The requirement of a larger parcel with significant open space is suggested to ensure that sufficiently sized areas exist to support wildlife habitats which may be threatened when development is dispersed. The maximum density for clustering on the large parcel would be determined by application of the Nitrate Dilution Model.

Finally, in certain highly sensitive areas, development could be more significantly limited. Areas where the more restrictive density standard could apply are in forested areas, endangered wildlife habitats, and within areas that share boundaries with bays, stream beds and lakes. For example, in Maryland's Chesapeake Bay Critical Area program, a minimum lot size of 20 acres is required within 1000 feet from the tidal mean high water line of Chesapeake Bay or from the upland boundary of a tidal marsh. The only exceptions to the standard are in areas where the property has already been sewered and public water is available, or in areas that are already developed and the proposal is for infill development only. See Chesapeake Bay Critical Area Law of 1984, Md. Ann. Code 14.15.02.02 (A) et. seq. See, also. Federal Water Pollution Control Act, § 404, 33 U.S.C. § 1344; Deltona Corp. v. United States, 228 Ct. Cl. 476 (1981) (Court must consider entire property when determining whether a taking by overregulation has occurred); United States v. Cumberland Farms of Connecticut, 646 F. Supp. 1166 (D. Mass 1986).

Density standards are intended to further the protection of the environmental resources found in Tier 7 and also to assure the continued semi-rural nature of the area. Further development of standards for Tier 7 must be undertaken in concert with other consultants who have primary responsibility for developing standards that will protect the sensitive ecological lands and systems characteristic of Tier 7.

IV. STANDARDS BASED **ON** POPULATION PER SQUARE MILE

A. General Methodology

An alternative standard for limiting growth in Tiers 5 and 6 is one based on projected growth in Tiers 5 and 6 over the life of the plan converted into a population growth per square mile standard. The population per square mile in each tier is determined by the following procedure:

1. Determine the total acreage in Tier 5 and Tier 6 as of the date of the Plan;

Alternatively, the standard could be based on historic growth in Tiers 5 and 6 over the past ten years.

2. Convert number of acres in each tier into square miles;
3. Determine projected population growth under the Plan through the year 2010 in Tiers 5 and 6;
4. Divide projected population growth in each tier by square miles in each tier to determine growth that can be accommodated per square mile over the life of the Plan in Tiers 5 & 6; and
5. Each municipality would multiply the growth per square mile in each tier times the total square miles in each tier within the municipality to determine the allowable population growth in each tier over the life of plan.

B. Population Per Square Mile Standard in Tier 5

The gross total population growth for the life of the Plan in Tier 5 could be utilized by local government in a number of different ways. The allowable population growth can be converted to an allowable number of dwelling units, either single family or multi-family, or both, by determining the average number of residents per type of dwelling unit, weighted by desired mix of housing.

Population/building permit quotas have been upheld when certain factors exist. The best known and most widely copied system is that of the City of Petaluma, California, which established an annual quota of 500 building permits to be awarded per year. The quota was established after the City had undertaken comprehensive studies of the capacity of the city's capital infrastructure necessary to assimilate population growth and included consideration of past rates of growth. 'Saving* features were also present in the Plan: possible revision of the quota by as much as 10 percent up or down; exemption from the quota of parcels consisting of 4 or fewer units; and a housing element to include low- and moderate-income housing. The plan also established an urban extension boundary or 'greenbelt* area around the City to serve as a limit beyond which residential growth and extension of City services were prohibited during the life of the plan.

The Ninth Circuit Court of Appeals upheld the Petaluma Plan and method of population control as "rationally related to the social and environmental welfare of the community and [did] not discriminate against commerce and was therefore not arbitrary or unreasonable.* Construction Industry Assoc. v. City of Petaluma, 522 F.2d 897, 909 (9th Cir. 1975). See also Pardee Construction Co. v. Camarillo, 690 P.2d 701 (Cal. 1984) (upholding growth control ordinance with annual quota of building permits); Sturges v. Town of Chilmark, 402 N.E.2d 1346 (Mass. 1980) (rate of development by-law applicable over a ten year period upheld in rural setting and no showing of regional demand for primary housing); Steel Hill Development Co., Inc. v. Town of Sanbomton, 469 F.2d 956 (1st Cir. 1972) (ordinance zoning town into 3 acre and 6 acre lot to preserve rural nature and prevent ecological

danger upheld while Town undertook further planning; court found no existing demand for suburban expansion and that Plaintiff still had his land and buildings that were not worthless) Cf. Beck V. Town of Raymond, 394 A.2d 847 (N.H. 1978) (zoning ordinance limiting number of building permits issued to individual according to number of acres owned upheld to allow town two year period to develop a master plan). But see City of Boca Raton v. Boca Villas Corp., 371 So.2d 154 (Fla. App. 1979) (Absolute cap on population in entire city in urban area was established prior to studies and no convincing evidence of utility shortages; population cap was invalidated); and Rancourt y. Town of Barnstead, 523 A.2d 55 (N.H. 1986) (Although three percent annual growth limitation for entire town was in Master Plan, evidence failed to establish that limit was based on scientific, statistical data, and town had not enacted a capital improvement program nor ordinance to regulate or control the timing of development nor any standards for aquifer protection). Cf. Golden v. Planning Board of Town of Ramapo, 285 N.E. 2d 291 (N.Y. 1972) (The timing and sequencing controls in Ramapo were based on a four-volume study of existing land uses, public facilities, transportation, industry and commerce, housing trends and projected population trends as well as sewage district and drainage studies).

In New Jersey, extensive studies have already been undertaken in the development of the statewide comprehensive plan. Areas designated by the Plan as growth areas are capable of accommodating all projected growth over the life of the Plan. Population per square mile quotas would be utilized only in limited growth areas to aid in the preservation of open areas and agricultural lands as well as to facilitate the channeling of growth into the growth areas. The capacity to provide public facilities and services is uniquely within the domain of the public sector; that power must be utilized in a reasonable, non-discriminatory manner and in good faith and in a way that advances the public health, safety and general welfare. Therefore, approximate and studied public facility plans and financing strategies are typically an integral part of an overall growth management and adequate public facilities system. See Wincamp Partnership v. Anne Arundel County, 458 F. Supp. 1009 (D.Md.1978); Charles v. Diamond, 360 N.E.2d 1295 (N.Y. 1977); Pritchett v. Nathan Rodgers Construction and Realty Corp., 379 So.2d 545 (Ala.1980); Belle Harbor Realty Corp. v. Kerr, 323 H.E.2d 697 (N.Y. 1974).

1. Performance Based Allocation Techniques in Tier 5. Allocation of the population per square mile standard could be accomplished by an annual performance based method comparable to the one used in Petaluma and Camarillo. Each municipality would first determine the amount of allowable growth per year by dividing total growth in Tier 5 by number of years under the plan. That number would then be the standard for allocating development permits during each year. The municipality could

conduct, an annual allotment process under which it would determine which proposals would be awarded the limited number of development permits. Each municipality could establish and develop criteria to ensure that particular local values and objectives are met. However, certain basic criteria relating to the availability of public utilities and services, the proposed development's contribution to public welfare and open spaces, and the development's impact on character and objectives of Tier 5 should be included in the municipality program. Examples of these criteria are: capacity of water system to provide for needs of the proposed development without system extensions beyond those normally installed by the developer; capacity of sanitary sewers to dispose of the wastes of the proposed development without extension beyond those normally installed by the developer; capacity of major road linkage to provide for needs of the proposed development without substantially altering existing traffic patterns or overloading existing road system; extent to which development accomplishes an orderly and contiguous extension of existing development as opposed to 'leapfrog* development; and the extent to which the development avoids or mitigates negative impacts on adjoining agricultural uses or sensitive ecological lands by utilization of open spaces or buffer zones. Each proposal could be rated on a scale with points assigned for each criterion. The municipality could then award development permits to the proposals receiving the best scores so long as consistent with the Plan. Initiatives enacting a permit limitation and allocation method have been upheld in California. Building Industry Association of Southern California v. City of Camarillo, 41 Cal. 3d 810, 226 Cal. Rptr. 81 (1986), Lee v. City of Monterey Park, 173 Cal. App. 3d 793, 219 Cal. Rptr. 309 (Cal. App. 1985).

2. Demand-Driven Allocation Technique in Tier 5. As an alternative to an annual competition, the municipality could allow development to occur as demand dictates with the total projected population growth in Tier 5 for that township establishing the maximum allowable development under the plan. Of course, this 'free market* allocation system would be subject to the normal land-use regulations and controls requiring subdivision plat approvals, building permits, maximum lot sizes, P.U.D. or cluster zoning to ensure that development does not frustrate the goals and objectives of Tier 5. If this approach were selected, extension of public facilities should be severely restricted.

C. Population per Square Mile Standard in Tier 6

As in Tier 5, the gross population per square mile for tier 6 could be converted to total projected population growth by multiplying it times the number of square miles in Tier 6 within the municipality. The gross allowable population growth could then be further converted into dwelling units based on the

average number of residents per type of dwelling unit and weighted to reflect the mix of housing desired or appropriate in Tier 6.

1. LESA System. In order to determine where development should occur in Tier 6, all agricultural land in the municipality could be evaluated under the Agricultural Land Evaluation and Site Assessment (LESA) system developed by the United States Department of Agriculture Soil Conservation Service (SCS).

The LESA system, if implemented as suggested in the detailed handbook available from the SCS, is a very sophisticated tool which takes the form of a point system based on relative values assigned to various factors. There are two basic parts to the LESA system: the land evaluation and the site assessment.

Of the two, the land evaluation part is the easiest to apply because the SCS has developed computer programs to do the evaluation, which relies heavily on the quality of soils. The land is first categorized as cropland, forest land, or rangeland, and the soils are then classified according to rating systems assessing land capability, 'important[1]" farmland (a system that rates land as prime farmland, unique farmland, land of statewide importance or land of local importance), and either soil productivity or soil potential. The soils are ranked into groups, depending upon what is considered poor or good in the locale for the stated agricultural use. A relative value is determined for each group: the best group is assigned a value of 100 and all other groups are assigned lower values. The land evaluation is based on data from the National Cooperative Soil Survey.

The site assessment part of the LESA system identifies important environmental, social and economic factors other than soils that contribute to the quality of the land for agricultural use; it is designed to protect those lands which are located within an economically viable agricultural area and have the greatest potential for continuing production. Some of the commonly used factors include: surrounding land uses (and percentage of land used for agricultural purposes within a specified radius); agricultural viability, including the size of the farm, agricultural infrastructure, land ownership, on-site investment, and the possible impact of conversion on other farmland; land use regulations and tax incentives; surrounding zoning; availability of urban services, including the distance to an urban area, water and sewer systems, jobs, schools and shopping; transportation accessibility; impact on historic or cultural resources, environmentally-sensitive lands or open space; and compatibility with comprehensive plans. Each factor selected is stratified into a range of possible values in accordance with the needs and objectives of the system.

Application of LESA combines a value for land evaluation with a value for site assessment to determine the total value of the land for agriculture. The higher the total value of land, the higher the agricultural viability.

After all agricultural land has been evaluated under LESA, the municipality would then be able to identify the agricultural land that is least suitable for agricultural use because of its soil content and site characteristics. State guidelines could be developed to guide the municipality in determining what LESA score or range of scores should determine those agricultural lands that can be developed during the life of the plan. The less suitable agricultural lands that will be available for limited future development should be mapped by the municipality.

Growth management systems with a primary goal of agricultural preservation in Black Hawk County, Iowa and Topeka-Shawnee County, Kansas have utilized LESA or a LESA modified program. The Black Hawk county system combined LESA with a zoning ordinance that incorporated both exclusive and nonexclusive agricultural districts. The best land for continuing agricultural use was placed in the most restrictive zone, which included a density standard allowing one single family residence provided that the owner is actively engaged in the farming operation and is a member of the farm owner's immediate family. The ordinance provided that only one lot for this purpose shall be separated from a farm and at least 35 acres must remain after transfer from the farm. In the Topeka-Shawnee County Development Framework, LESA was utilized in a growth management system that divided the jurisdiction into functional service areas. Lands with the highest scores under LESA for agricultural economic viability were placed in the rural service area where agricultural preservation was the primary objective.

2. Rural Interchange Centers. A second alternative method for designating areas within Tier 6 where development can occur is by identifying Rural Interchange Centers (RIC), a short-hand LESA. Development within Tier 6 would be limited to the RIC whose boundaries would be clearly defined by an appropriate distance from the actual interchange center. Growth would not be permitted beyond the boundaries.

3. Allocation Techniques. Allocation of allowable growth within the "development" areas as identified by either the LESA or RIC method could be accomplished by either of the two allocation methods discussed under Tier 5:

Alternative 1; Demand-driven development allowed until the maximum population growth over the plan is reached. Subdivision regulation, P.U.D., maximum lot requirements, agricultural impact statements and environmental overlays would be components of the approval process to assure the preservation of agricultural land and to minimize conflicts.

Alternative 2; Annual competition to approve a yearly allotment of permits (determined by dividing projected growth over the plan by the number of years of the plan); criteria should be designed to account for special concerns that exist in the agricultural area (e.g., minimize conflicts between nonagricultural and agricultural uses, reduce negative impacts on land in agricultural preservation).

4. Other Policies and Techniques in Tier 6. After determining the land that is subject to development the remaining agricultural land consisting of the most suitable for economic agricultural activity could be preserved for exclusive agricultural use over the life of the plan. Single family residences for farm owners/operators and buildings/structures necessary for agricultural operations could be allowed within the zone by special permit. Farmland protection policies now in existence should be retained with the improvements discussed in the density standards section for Tier 6.

However, a vital and viable state program for the purchase of development rights could be maintained to preserve the farmer's equity in his land and to protect the farmer's freedom to sell. Although the purchase of permanent easements is preferable from a preservation standpoint, purchases of temporary easements for 10, 20 or 30 year periods could also be considered in order to reduce the costs of funding the program. Funding of a purchase program was discussed previously. Finally, in concert with the population per square mile standard and allocation method, the policies and methods for discouraging and limiting extension of public facilities into Tier 6 could be maintained.

V. STANDARDS BASED ON FINANCING AND/OR PERMITTING OF INFRASTRUCTURE

Standards based on restrictions of state funding for infrastructure and standards based on infrastructure permitting implicitly suggest that public infrastructure will be extended into the Limited Growth tiers. Generally, linking development permission to a capital improvement plan over a set period of time has been utilized for the timing and sequencing of growth in areas where growth is planned. For example, the Ramapo, New York special permit plan was linked to availability of five essential services, and was upheld in Golden v. Planning Board of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (N.Y. 1972), appeal dismissed, 409 U.S. 1003 (1972). Similarly, a Livermore, California initiative prohibiting the issuance of further residential permits until local educational, sewage disposal, and water supply facilities met specified standards was upheld in Associated Home Builders of the Greater Eastbay, Inc. v. Livermore, 18 Cal. 3d 582, 136 cal. Rptr. 41, 557 P.2d 473 (Cal. 1976).

The introduction of capital facilities into limited growth areas designated as holding zones or for permanent preservation as agricultural and environmentally sensitive land increases pressures to develop the areas at urban densities. Given that the primary objective underlying the agricultural tier is to encourage farming and related agricultural operations, it follows that urban-level utility and road services are not required. In fact, the construction of sewer, water, and road facilities designed for suburban subdivision-type development are likely to add to farming costs (through potentially higher taxes and/or benefit district assessments), and will also encourage the growth which might eventually jeopardize New Jersey's agricultural base.

This process has been summarized in the National Agricultural Lands study report. The Protection of Farmland;

> As residential or other non-farm development begins or is anticipated in an area, public agencies are under pressure to finance capital investments, such as water and sewer lines and improved roads and street lighting. The public agency may require owners of farmland to help pay for those investments by levying special assessments on their land on an ad valorem, acreage, or front-foot basis. This levy is based on the rationale that the sewer line or water main will increase the property's value for development. Even though the owner prefers to keep the land in farming for the foreseeable future, he must still pay the assessment, (p. 81).

Restricting urban-level services in the agricultural and other limited growth areas will not only reduce the farmer's tax burden, but will also reduce the tax burden imposed on every taxpayer in the limited growth areas.

Under common law, municipalities have the discretion to determine whether to extend utility services within its own boundaries so long as the discretion is not exercised in an arbitrary manner. See, e.g., Moore v. City Council of Harrodsburg, 105 S.W. 926 (Ky. 1907) (mandamus will not lie to compel a city council to extend utilities); and Lawrence v. Richards, 88 A. 92 (Me. 1913) (mandamus not appropriate to compel water district trustee to extend service to plaintiff's property). Cf. Johnson v. Reason, 392 S.W.2d 54, 56 (Ky. 1965) (once a municipality does extend services within its borders, it cannot refuse reasonable extensions at least where necessary "to supply impartially all applicants who are in substantially like position to those being served*).

Municipalities cannot usually be required to extend utility services outside of its borders. If such extension has occurred, courts may require a municipality to service impartially all those within reasonable reach of its supply system. Thus, when a city entered into a contract with residents of certain suburbs to

sell water and the contract was intended to service all residents, the city could not refuse to allow new residents use of water facilities. Mayor & City Council of Cumberland v. Powles, 255 Md. 574, 258 A.2d 410 (1969); see also Delmarva Enterprises, Inc. v. Mayor & Council of Dover, 282 A.2d 601 (Del, 1971) (holding denial of service to be discriminatory when liens were in existence and city had permitted hook-ups in the past).

Exceptions to the common law rules have developed. While a municipal decision on original extension has been characterized as "governmental, * the actual supplying of utilities has been characterized by courts as "proprietary." Many courts have held that municipalities acting in this proprietary capacity are operating a public utility and are subject to regulation. At least one court has held that a city's duty under public utility law prevails over growth policy where land use controls and utility extensions were vested in two separate agencies and the city lacked authority to regulate land use outside its boundaries. Robinson v. City of Boulder, 547 P.2d 228 (Colo. 1976). One way a municipality may avoid the harshness of this rule is to extend services only under contract. City of Milwaukee v. Public Service Commission, 5 N.W.2d 800 (Wis. 1942) (utility need not service outside city limits because service provided in the past to limited area had been done so under contract).

A municipality may refuse to extend services to new users based on a utility related reason. The court in Povles specifically noted that a water shortage or financial crises would justify refusal. See also Reid Development Corp. v. Parsippany-Troy Hills Township, 31 N.J. Super, 459, 107 A.2d 20 (App. Div. 1954) (utility extension as growth control allowed so long as reasonable utility related reasons alleged). Legitimate utility related reasons include: limited financial resources, Rose v. Plymouth Town, 173 !>.2d 285 (Utah 1946); insufficient facilities or shortage of capacity, Swanson v. Marin Municipal Water District, 128 Cal Rptr. 485 (Ct. App. 1976); and environmental concerns, Cappture Realty Corp. v. Board of Adjustment, 126 N.J. Super 200, 313 A.2d 624 (Law. Div. 1973) affirmed 133 N.J. Super. 216, 336 A.2d 30 (App. Div. 1975) (in the context of a moratorium on new services to prevent damage to the environment).

Finally, a municipal growth management plan can include processes and rules governing utility extension. If a master plan does control the location and timing of utilities, a municipality can avoid extension where to extend would be inconsistent with the plan. For example, Santa Rosa, California refused to extend sewerage connections to a development in an agricultural area beyond the city's boundaries but within its utility boundaries which represented "leapfrog* development inconsistent with the city and county general plan. The city's refusal was based on a cooperative planning arrangement between

the county and the city to further the regional objective of preventing sprawl. The court used the concept of regional general welfare to uphold the city's decision. Dateline Builders, Inc. v. Santa Rosa, 194 Cal. Rptr. 258 (1983).

In New Jersey, statutory authority requires that the State Capital Improvement Program be consistent with the State Development and Redevelopment Plan. N.J.S.A. 52:9S-3. The extension and construction of public facilities is intended by the state legislature to enhance and facilitate the accomplishment of the State Plan's objective to protect environmentally sensitive areas, to reduce sprawl, to stimulate development in urban areas, and to channel growth into nodes within designated transportation corridors. The purposes for restricting the extension of capital public facilities into the Limited Growth Areas were discussed previously.

VI. CONCLUSION

This report has focused on evaluating the legality and effectiveness of development standards and implementation strategies for Limited Growth Areas identified in the Draft New Jersey Development and Redevelopment Plan. After considerable legal research and analysis specific development standards were presented as alternatives for implementation strategies in the Future Development Area (Tier 5), the Agricultural Area (Tier 6) and the Ecologically Significant Area (Tier 7). In Tier 5 and Tier 6 more than one development standard was proposed in order to provide increased flexibility to the municipality in its effort to meet the compatibility and/or consistency requirements of the Plan. In Tier 7, any development densities should be implemented in conjunction with the performance based Nitrate Dilution Model. When considering development standards for Limited Growth Areas, it is of critical importance to evaluate them in the context of the overall comprehensive plan and growth management system. The strategies for the Limited Growth Areas are intended in part to encourage and direct growth toward those areas designated as Growth Areas by the Plan. The Plan when considered in its entirety is designed to accommodate the State's entire projected growth by encouraging redevelopment of the urban areas, channeling growth into nodes and corridors, preventing sprawl and premature urban development, and preserving New Jersey's natural resources.

BIBLIOGRAPHY

Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980).

A.M.G. Assoc. v. Township of Springfield, 65 N.J. 101, 319 A.2d 705 (1975).

Appeal of Buckingham Developers, Inc., 433 A.2d 931 (Pa. Cmwlth 1981).

Application of Wetherill, 45 Pa. Cmwlth. 303, 406 A.2d 827 (Pa. Cmwlth Ct. 1979).

Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 18 Cal.3d 582, 135 Cal. Rptr. 41, 557 P.2d 473 (1976).

Arverne Bay Construction Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

Borough of Kinnnelon v. South Gate Associates, 173 N.J. 216, 411 A.2d 724 cert, denied, 85 N.J. 94, 425 A.2d 260 (1980).

Boundary Drive Associates v. Shrewsbury Township, 507 Pa. 481, 491 A.2d 86 (1985).

Building Industry Association of Southern California v. City of Camarillo, 41 Cal. 3d 810, 226 Cal. Rptr. 81 (1986).

Cappture Realty Corp. v. Board of Adjustment, 126 N.J. Super 200, 313 A.2d 624 (Law. Div. 1973) affirmed 133 N.J. Super. 216, 336 A.2d 30 (App. Div. 1975).

Caputo v. Township of Chester, No. L-42857-74 (Law Div. October 4, 1978).

Charles v. Diamond, 360 N.E.2d 1295 (N.Y. 1977).

Chucta v. Planning & Zoning of Town of Seymour, 225 A.2d 822 (Conn. 1967).

City of Boca Raton v. Boca Villas Corp., 371 So.2d 154 (Fla. App. 1979).

City of Hollywood v. Hollywood, Inc., 432 So.2d 1332 (Fla. D.C.A. 1983).

City of Milwaukee v. Public Service Commission, 5 N.W.2d 800 (Wis. 1942).

Codorus Township v. Rodgers, 89 Pa. Crawlth 79, 492 A.2d 73 (1985).

Connolly v. Pierson, 106 S.Ct. 1018 (1986).

Construction Industry Assoc. v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975).

County Commissioners of Queen Anne's County v. Miles, 246 Md. 355, 228 A.2d 450 (1967).

County of Ada v. Henry, 668 P.2d 994 (Idaho 1983).

Dateline Builders, Inc. v. Santa Rosa, 194 Cal. Rptr. 258 (1983).

DeCaro v. Washington Township, Berks County, 344 A.2d 725 (Pa. Cmwlth Ct. 1975).

Delmarva Enterprises, Inc. v. Mayor & Council of Dover, 282 A.2d 601 (Del. 1971).

Deltona Corp. v. United States, 228 Ct. Cl. 476 (1981)

Dufour v. Montgomery County Council Law No, 56964 (Circuit Court for Montgomery County, Jan. 20, 1983).

First English v. Evangelical Church v. County of Los Angeles, 107 S. Ct. 2378 (1987).

Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952) (affirming 21 N.J. Super. 81, 90 A.2d 757 (Law Div. 1952).

Flora Realty & Investment Co. v. City of LaDue, 362 Mo. 1025, 246 S,W.2d 771 (Mo. 1952) (enbanc), appeal dism., 344 U.S. 802 (1952).

Flury v. Land Use Board of Appeals, 623 P.2d 671 (Or. App. 1981).

Fred F. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N,Y.S.2d 5, cert, denied 429 U.S. 990 (1976).

Freundshuh v. City of Blaine, 385 N.W.2d 6 (Minn. App. 1986).

Gisler v. County of Madera, 38 Cal. App. 3d 303, 112 Cal. Rptr. 919 (1974).

Glenview Development Co., v. Franklin Township, 164 N.J. Super. 563, 397 A.2d 384 (Law Div. 1978), aff'd in part, 456 A.2d 390 (1983).

Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962).

Golden v. Planning Board of Town of Ramapo, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, appeal dismissed, 409 U.S. 1003 (1972).

Haas & Co. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979).

Hadacheck v- Sebastian, 239 U.S. 394 (1915).

Harrington Glen, Inc. v. Municipal Bd. of Adjustment of Borough of Leonia, 52 N.J. 22, 243 A.2d 233 (1968).

Hillsborough County v. Putney, 495 So.2d 224 (Fla. App. 1986).

Hitchman v. Oakland Township, 329 Mich. 331 45 N.W.2d 306 (Mich. 1951).

Home Builders League v. Township of Berlin, 81 N.J. 127, 405 A.2d 381 (1979).

Honeck v. County of Cook,-12 I11.2d 257, 146 N.E.2d 35 (1957).

Hopewell Township Board of Supervisors v. Golla, 499 Pa. 246, 452 A.2d 1337 (1982).

Johnson v. Reason, 392 S.W.2d 54 (Ky. 1965). Just

v. Marinette, 201 N.W. 2d 761 (Wis. 1972).

Katobimar Realty Co- v. Webster, 20 N.J. 114, 118 A.2d 824 (1955).

Kelly v. Zoning Hearing Board of Moreland, 87 Pa. Cjnwlth. 534, 487 A.2d 1043 (Pa. 1985).

Keystone Bituminous Coal Assoc. v. DeSenedictis, 107 S.Ct. 1232 (1987).

Kinzli v. City of Santa Cruz, 620 F.Supp. 609 (N.D.Cal. 1985).

Kirby Forest Industries v. United States, 467 U.S. 1 (1984).

Kirsch Holding Co. v. Borough of Manasquan, 59 N*J. 241, 281 A.2d 513 (1971).

Lawrence v. Richards, 88 A. 92 (Me. 1913).

Lavton v. Steele, 152 U.S. 133 (1894).

Lee v. City of Monterey, 173 Cal. App. 3d 793, 219 Cal. Rptr. 309 (1985)*

Levy v. Board of Adjustment of Arapahoe County, 149 Colo. 493, 369 P.2d 991 (1962) (enbanc).

Louthan v. King County, 617 P.2d 977 (Wash. 1980).

Lusardi v. Curtis Point Property Owners Ass'n, 86 N.J. 217, 430 A.2d 881 (1981).

Mansfield & Swett v. Town of West Orange, 120 N.J.L. 415, 198 A. 225 (1938).

Martin v. Township of Millcreek, 50 Pa. Cmwlth. 249, 413 A.2d 764 (1980).

Matlack v. Burlington County Chosen Freeholders Board, 191 N.J. Super. 236, 466 A.2d 83 (1982), affirmed 194 N.J. Super. 359, 476 A.2d 1262 (1984).

Mayor & City Council of Cumberland v. Powles, 255 Md. 574, 258 A.2d 410 (1969).

McNeill v. Township of Plumsted, 215 N.J. Super. 532, 522 A.2d 469 (1987).

Meeker v. Bd of Commrs of Clatsop County, 601 P.2d 804 (Or. 1979).

Mindel v. Township Council of Franklin, 167 N.J. Super. 461, 400 A.2d 1244 (Law Div. 1979)

Moore v. City Council of Harrodsburg, 105 S.W. 926 (Ky. 1907),

Morris County Land Improvement Co. v. Parsippany-Troy-Hills Township, 40 N.J. 539, 193 A.2d 232 (1963).

Morse v. County of San Luis Obispo, 247 Cal. App. 2d 600, 55 Cal. Rptr. 710 (1967).

Mount Laurel I, 336 A.2d at 724-25.

Mount Laurel II, 456 A.2d at 433, 472, 474.

NapierkowsKi v. Gloucester Township, 29 N.J. 481, 150 A.2d 481 (1959),

National Capital Corp. v. Village of Inver Grove Heights, 222 N.W.2d 550 (Minn. 1974).

ffectow v. City of Cambridge, 277 U.S. 183 (1928).

Niccollai v- Planning Board of Township of Wayne, 148 N.J. Super. 150, 372 A.2d 352 (App. Div. 1977).

Nollan v. California Coastal Comm'n, 107 S,Ct. 3141 (1987).

North Shore Unitarian Universalist Soc/y v. Incorporated Village of Upper Broofcville, 493 N.Y.S.2d 564 (App. Div. 1985).

Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 371 A.2d 1192 (1977).

Olson v. Ada County, 665 P.2d 717 (Idaho 1983),

165 Augusta St. v. Collins, 9 N.J. 259, 87 A.2d 889 (1952).

181 Inc. v. Salem County Planning Bd., 133 N.J. Super. 350, 336 A.2d 501 (Law Div. 1975) modified in part, 140 N.J. Super. 247, 356 A.2d 34 (App. Div. 1976).

1000 Friends of Oregon v. Marion County, 688 P.2d 412 (Or. App. 1983).

Orgo Farms and Greenhouses, Inc. v- Colts Neck Township, 204 N.J. Super. 585, 499 A.2d 565 (Law Div. 1985).

Orleans Builders & Development v. Byrne, 186 N.J. Super. 453 A.2d 200 (1982).

Pardee Construction Co. v. Camarillo, 690 P.2d 701 (Cal. 1984).

Pascack Assn. v. Mayor and Council of Washington Township, 74 N.J. 470, 379 A.2d 6 (1977).

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

Pritchett v. Nathan Rodgers Construction and Realty Corp,, 379 So.2d 545 (Ala. 1980).

Rancourt v. Town of Barnstead, 523 A.2d 55 (N.H. 1986).

Reed v. Rootsdown Township Board of Zoning Appeals, 9 Ohio St. 3d 54, 458 N.E.2d 840 (1984),

Reid Development Corp. v. Parsippany~Troy Hills Township, 31 N.J. Super. 459, 107 A.2d 20 (App. Div. 1954).

Riggs v. Township of Long Beach, 212 N.J. Super. 69, 514 A.2d 45 (App. Div. 1986).

Robert E. Kurzius, Inc« v. Incorporated Village of Upper Brookville, 51 N.Y.2d 338, 414 N.E.2d 680, 434 N.Y.S.2d 180 (N.Y. 198°) cert, denied, 450 U.S. 1048 (1981).

Robinson v. City of Boulder, 547 P.2d 228 (Colo. 1976).

Rose v. Plymouth Town, 173 P.2d 285 (Utah 1946).

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).

Rudderov v. Mount Laurel Township Committee, 121 N.J. Super. 409, 297 A.2d 583 (App. Div. 1972).

Scheff v. Township of Maple Shade, 149 N.J. Super. 448, 374 A.2d 43 (1977).

Schride Associates v. Township of Wall, 190 N.J. Super. 589, 464 A.2d 1189 (App. Div. 1983).

Senior v. Zoning Commission of Town of New Canaan, 146 Conn. 531, 153 A.2d 415 (1959), appeal dismissed, 363 U.S. 143,

Sheerr v. Evesham Township, 184 N.J. Super 11, 445 A.2d 46 (1982).

Smeja v. County of Boone, 34 111. App. 3d 628, 339 N.E.2d 452 (1975).

Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel I), 67 N.J. 151, 336 A.2d 713, cert, denied 423 U.S. 808 (1975).

Southern Burlington County N-A.A.C.P. v. Township of Mount Laurel, (Mount Laurel II), 92 N.J. 158, 456 A.2d 390 (1983).

In re Spear Street Assoc., 145 Vt. 496, 494 A.2d 138 (Vt. 1985).

State v. Baker, 81 N.J. 99, 405 A.2d 368 (1979).

Steel Hill Develop., Inc. v. Town of Sanborton, 469 F.2d 956 (1st Cir. 1972).

Still v. Bd of County Comm's of Marion County, 600 P.2d 433 (Or. App. 1979).

Sturges v. Town of Chilmark, 402 N.E.2d 1346 (Mass. 1980).

Svanson v. Marin Municipal Water District, 128 Cal Rptr. 485 (Ct. App. 1976).

Taxpayer's Ass'n of Weyroouth Township v. Weymouth Township, 71 N.J. 249, 364 A.2d 1016 (1976).

Thurston v. Cache County, 626 P.2d 440 (Utah 1981).

Township of Montville V. Block 69, Lot 10, 74 N.J. 1, 376 A.2d 909 (1977).

United States v, Cumberland Farms of Connecticut, 646 F. Supp. 1166 (D. Mass, 1980)

Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

West Montgomery County Citizens Ass'n v. Maryland Capital Park and Planning Comm'n, 552 A-2d 1328 (Md. 1987).

Wilson v- County of McHenry, 92 111. App. 3d 997, 48 111. Dec. 395, 416 N.E.2d 426 (1981).

Wincamp Partnership v. Anne Arundel County, 458 F. Supp. 1009 (D. Md. 1978).

Zyqmont v. Planning & Zoning Comm'n of Town of Greenwich, 152 Conn. 550, 210 A.2d 172 (1965).

Articles and Books

Callies, D. and Freilich, R., Cases and Materials on Land Use, (West 1986).

Church, "Farmland Conversion: The View From 1986*, 1986 U. 111. L> Rev. 521

Coughlin and Keene, "The Protection of Farmland: An Analysis of Various State and Local Approaches*, 1981 Land Use Lav & Zoning Digest

Crosson, "Demands for Food and Fiber,* in Land Use; Tough Choices in Today's World (Soil Conservation Society of America 1977)

Duncan, "Toward a Theory of Broadbased Planning for the Preservation of Agricultural Land," 24 Nat. Res. J. 61 (1984)

Freilich & Davis, "Saving the Land: The Utilization of Modern Techniques of Growth Management to Preserve Rural and Agricultural America", 13 Urb. Law. 27 (1981)

Geier, "Agricultural Districts and Zoning: A State-Local Approach to a National Problem", 8 Ecolog. L. Q. 655 (1980)

"The Global 2000 Report to the President" (Council on Environmental Quality and the U.S. Department of State 1980)

Gray, "The city of Petaluma: Residential development Control" in 2 Management and Control of Growth 149 (Scott, Brower & Miner, ed. 1975)

Gustafson, Daniels & Shirack, "The Oregon Land Use Act: Implications for Farmland and Open Space Protection," 18 JAPA 365

Johnson, "The Future of Farmland and Preservation: Will New Jersey Remain the Garden State?", 12 Rutgers L. J. 713 (1981)

Juergensmeyer, "Implementing Agricultural Preservation Programs: A Time to Consider Some Radical Approaches?", 20 Gonzaga L. Rev. 701 (1985)

Juergensmeyer, "Farmland Preservation: A Vital Agricultural Law Issue for the 1980s," 21 Washburn L- J. 443 (1982)

Kaufman, "Agricultural Zoning in Pennsylvania: Will Growth Pressure Prevail," 91 Dickinson Rev. 289 (1986).

Keene, "Agricultural Land Preservation: Legal and Constitutional Issues", 15 Gonz. L. Rev. 621 (1980)

National Agricultural Lands Study, The Protection of Farmland: A Reference Guidebook for State and Local Governments (1981)

New Jersey Department of Agriculture, "Report on New Jersey Agriculture to the State Planning Commission* (1987)

New Jersey Department of Agriculture and the New Jersey Department of Environmental Protection report, "Grassroots: An Agricultural Retention and Development Program for New Jersey" (1980)

Redfield, Vanishing Farmland; A Legal Solution for the States (Lexington BooKs 1984)

Rose, "Farmland Preservation Policy and Programs," Nat. Res. J. 591 (1984)

Statutes

Agricultural Development and Farmland Preservation Act, N.J.S.A. 4:1C-1 et* seq. (Right to Farm Act)

Agriculture Retention and Development Act of 1983, N.J.S.A. 4:Cll et. seg.

Chesapeake Bay Critical Area Law of 1984, Md. Ann* Code 14.15.02.02(A) et. seq.

Farmland Assessment Act of 1964, N.J.S.A. 54:4-23.1 et. seq.

Farmland Protection Policy Act, 7 U.S.C.A. §4201 (1982 Supp.)

Federal Water Pollution Control Act, § 404, 33 U.S.C. § 1344. Minn. Stat. Ann. § 40A.01 et. seq.

Municipal Land Use Lav, N.J.S.A. 40.55D-2

Municipal Planned Unit Development Act, N.J.S.A. 40:55-54 et. seq. (recodified at 40:55I> et. seq.).

New Jersey Constitution, Article I, Par. 1 New

Jersey State Planning Act, N.J.S.A. 52-18A-196 New

York, McKinney's Agric. & Mkts. Law §§ 300-377 Va.

Code §§ 15.1-1506 to 15.1-1513