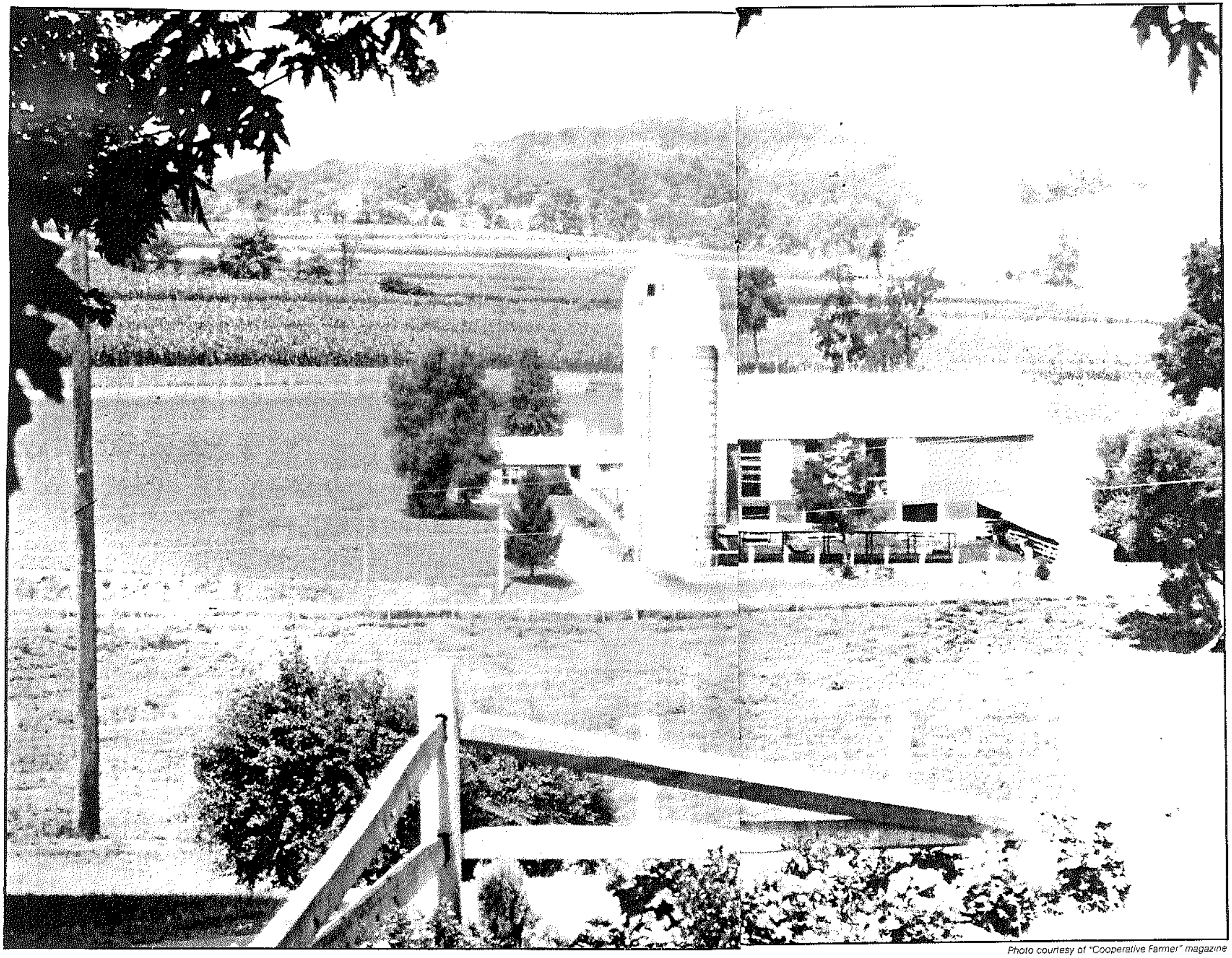


Photo courtesy of "Cooperative Farmer" magazine

TDR's:

Do They Work and at What Cost?

by David B. Fisher, NJBA Director of Environmental Affairs & Planning

Montgomery County, Maryland's TDR Program is examined, including an assessment of its transferability to New Jersey for the protection of farmland.

Earlier this Fall, a group of people left New Jersey farmland bound for Maryland farmland beginning a two-day excursion. The trip (September 5 and 6, 1984), organized by the State Agriculture Development Committee (SADC), brought several SADC members, N.J. Department of Agriculture officials (including Secretary Arthur Brown), myself and other interested individuals to Montgomery County, Maryland. Here, the County's Transfer of Development Rights (TDR) Program was examined in a series of meetings with local planners, economists, developers, farmers and through an actual tour of the County.

This article will introduce you to the Montgomery County TDR Program, and how (in three years) it has developed Into a functioning program where many transfers are taking place. Also discussed is the transferability of the Montgomery County TDR Program to New Jersey's governmental structure for the purpose of protecting farmland. This is critical due to pending legislation to empower New Jersey towns to develop TDR ordinances.

See TDR page 12

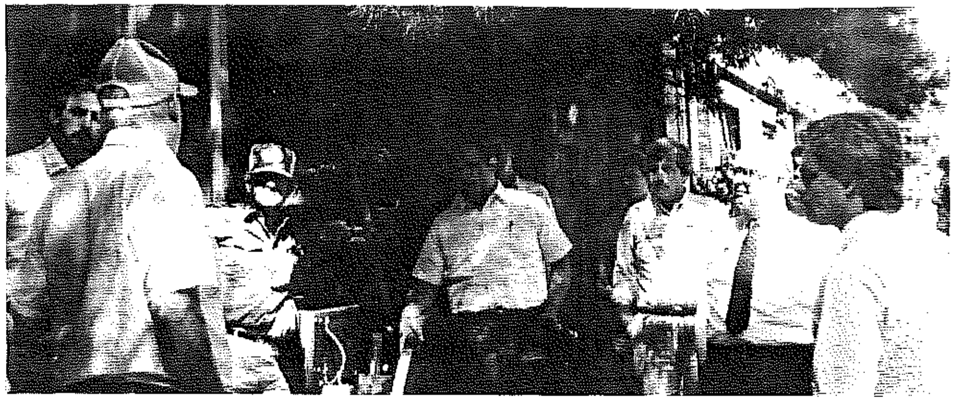
DIMENSIONS, Nov/Dec. 1984
Vol.II, No.7

TDR *cont. from page 9*

Montgomery County consists of 500 square miles of rapidly growing rural/suburban landscape, immediately adjoining the Washington, DC area. Its 600,000 residents may live in a million dollar estate along the Potomac River or in a quiet little village like Olney or Damascus. They may reside in an apartment building in busy Silver Spring or Bethesda, or live and work on a 200 acre farm.

Montgomery County is a "Charter" county in Maryland which means that it has zoning powers over its towns and rural areas. Approximately 40 percent of its land is actively farmed, including portions that are transected by two major interstate highways. Due to the pressures for development, along these major transportation corridors and throughout portions of the County's prime farming areas, Montgomery felt compelled to take action.

An increase in residential construction on 5-acre zoned farmland prompted the County Council to adopt an emergency interim law in 1979 that restricted development in a large part of the County, designated as "prime agricultural land", to one dwelling unit per 25 acres. The Council instructed the Planning Board (staffed by the Maryland-National Capital Park & Planning Commission) to prepare a comprehensive plan to preserve farmland within one year. As such, the Board designated a large contiguous agriculture reserve and rezoned it to the Rural Density Transfer Zone (RDT). This RDT zone became the "sending" area for TDR's, while developing areas of the County were later designated as "receiving" areas; hence, the birth of Montgomery's TDR program.



Members of the group, including NJDA Secretary Arthur Brown and NJBA's Dave Fisher, (right), listen to a Montgomery County farmer talk about the TDR program.

WHAT IS TDR?

Let us digress for just a moment to define exactly what is meant by TDR or transfer of development rights. The basic TDR process is initiated when a unit of government designates an area as a protected area or "sending area" (i.e. agricultural lands, wetlands, areas of special historical significance, etc.) and prohibits development therein. At the same time provisions are made for the "development rights" (that are assigned to each "sending area" landowner) to be transferred to another area (receiving area) where development is to be encouraged. Landowners in the sending area, who will continue to own their land, may sell their TDR's to landowners or builders who wish to develop their land in the "receiving area." The incentive for buying TDR's comes by way of increased densities at which the builder can develop his "receiving area" property, and other benefits such as reduced site improvement expenses or expediting the permit process. These incentives, along with other factors, are intended to establish a "market" for the TDR's which will dictate the price at which they are transacted.

PROCESSING 2000 TDR'S

The truly unique quality about Montgomery's TDR Program is that it is "working"; in other words, transfers are taking place. Whether the program is actually preserving or enhancing "farming," is questionable at this point. However, more than 10,000 acres of farmland or open space is in the process of being protected. This acreage figure translates to 2000 TDR's, based on the program's "5-acre-to-one-right" TDR ratio. The actual number of transfers finalized to date is 200, while the remaining 1800 TDR's await (subdivision) approval and ultimate easement recording.

So, you ask why has this TDR Program enjoyed an active beginning, while others around the Country have not? It is attributed, I feel, to a number of factors that end up creating a healthy environment for the marketing of TDR's. First, Montgomery is a "Charter" county with strong planning and zoning responsibilities for the entire region. It had the power to "downzone" about 40 percent of the County to one unit per 25 acres, which was subsequently challenged and upheld by the Maryland Courts. With this county-strong governing structure, there are few special local taxing districts within the County, and no transfer tax is placed on the TDR transactions.

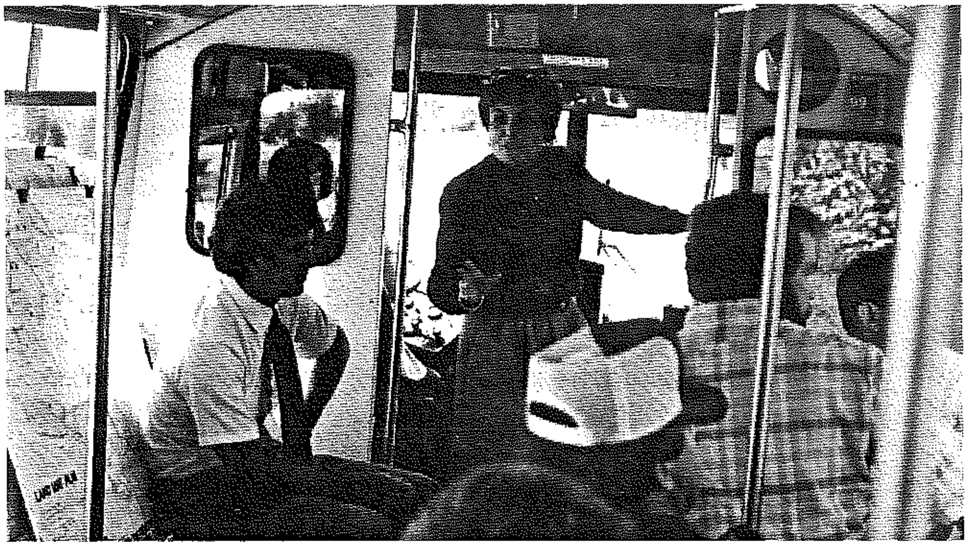
Second, an extremely robust real estate market exists in the County, particularly along the interstate highway transportation corridors. Out-migration from the Washington, DC area and the attractive, rather affluent nature of the County makes it a prime target for industry and new homebuyers. This demand for housing (along with other incentives) translates to a strong market for the purchase of TDR's which is essential to the success of the program.

INCENTIVES GALORE

Third, the Montgomery County TDR Program provides two key incentives that appear to be attracting builders to the concept. These include automatic approval of a sewer extension permit to extend sewerage service to the project site, and a density bonus of <u>four to eight times the base zoning</u> for that area (provided that the project is compatible with adjacent land uses, and that the existing infrastructure is not overloaded). In a predominantly rural County such as Montgomery, a vital ingredient for medium to high density development

See TDR page 14

TDR *cont. from page 12*



County planning commission staff, Denis Canavan (sitting left) and Melissa Banach, take the New Jersey visitors on a guided bus tour of the County's farmlands and developing areas.

is sewer service. The ability of the County to provide this incentive is critical.

The large density bonus offered to TDR participants, is without a doubt one of the primary reasons why the program has found willing purchasers. By comparison, the N.J. "Pinelands Development Credit" (PDC) program provides only a 50 percent increase in density over base zoning. For example, six units per acre would be increased to nine units per acre. Futhermore, all of the Montgomery TDR's are transacted on the open market, and the area realtors will soon be listing TDR's in the Multiple Listing Service. The program's flexibility is further illustrated by the fact that a buyer can place an "option" on TDR's that he plans to buy (until project plans are finalized), while at the same time have only an option on the property to which the rights are being transferred.

The fourth contributing factor that, if nothing else, has helped to ease opposition to the TDR program, was the "grandfathering" of those lots that were approved subdivisions when the program was enacted. Thus, approved (paper) subdivisions in the sending area, have the right to proceed in accordance with the old zoning requirements.

Another feature of the program is the method used to restrict the sending area land. When the TDR is applied to the sending area property, it is done so by easement (conveyed to the County) and not by restrictive convenant. If Montgomery County, for example, decided that the TDR program is no longer a valid land use/planning technique for the area, the restriction on the land could be withdrawn via the easement mechanism.

TDR COSTS & LOCAL RESISTANCE

The price per TDR in Montgomery County ranges from about \$4200 to \$7000, with an average price of approximately \$5000. Since one TDR represents five acres (5:1 ratio), the per acre value of each TDR is about \$1000. With TDR's sold from the farmland, however, the value of the land drops to a typical range of \$1200 to \$2000 per acre (with some land reaching as high as \$2500 per acre). Even with this upper-end value of \$2500, by adding the average \$1000 value per TDR, a \$3500 per acre value is obtained for farmland. This is \$1500 less than the average \$5000 per acre value of county farmland, which means that some value is being lost.

A vital question for farmers is whether or not their land (minus TDR's) retains sufficient loan power, since development value is lost after the TDR's are sold. Some believe that the Federal Land Bank, for example, does not look favorably upon the farmer's ability to repay his loan based only on his farm operation/income. To help counteract this loss in development value, Montgomery's program chose to allow each 25 acres to retain one development right (less the number of existing residential units on-site). For instance, if a 200 acre farm with one home sold its TDR's it would still retain the right to build seven units on the property (one unit per 25 acres equals eight units, minus one existing home, equals seven units or development rights retained).

There appears to be one obvious disadvantage for developers that purchase TDR's; that is the delay in processing project plans. Montgomery planners admit that the program is quite complicated to administer, and local resistance to the increase in housing density can be substantial. According to the Home Builders Association of Suburban Marylan, local civic groups are well organized and in many instances exert extreme pressure on the County and developer to modify project plans. The "paper" requirements for TDR approval can also be significant in that contract documents (to purchase the TDR's) must be submitted to the County as part of the application.

Some developers are having difficulty finding active sellers, since many farmers are reluctant to sell their TDR's at today's prices, hoping for an increase in demand, and likewise TDR prices. Upon final approval of the plans, the developer must prepare a record plat and easement document, which are ultimately recorded by the County completing the TDR transaction.

With the additional paperwork and time delays, it is obvious that someone will have to pay more, namely, the homebuyer. As is typically the case, the more the project costs, the greater the increase in per unit cost. Recent studies have documented that the cost of regulation (developer's "soft" costs) represents up to 30 percent of the selling price of a home!

TDR'S ILLEGAL

New Jersey has a history of dealing with the TDR concept, however, it has yet to be sanctioned by State law. The most recent reminder that TDR is essentially "illegal" in New Jersey is illustrated by the Centex Homes vs. East Windsor Township case where both the Trial Court and Appellate Di-

cont. on next page

vision (Superior Court) decided against the Township's TDR Ordinance. The case is now on appeal to the New Jersey Supreme Court.

Recent legislation has surfaced to make legal the adoption of a TDR ordinance by any municipality. The measure, sponsored by Senator Francis McManimon (S-666) and Assemblyman Joseph Bocchini (A-591), simply amends the Municipal Land Use Law to allow for the adoption of such ordinances, without providing any procedures or standards.

PROBLEMS FOR NEW JERSEY

Even if you could transplant the Montgomery TDR program to New Jersey, which level of government would best be able to administer the program? The logical choice might be the county, however, our county agencies are clearly the weakest link in New Jersey's governmental structure. Counties have little, or no say over where sewerage facilities can be extended, since our Department of Environmental Protection must approve such permits. Furthermore, counties have virtually no planning/zoning powers in New Jersey due to the strong home-rule status of local municipalities.

The present legislative initiative in New Jersey (A-591/S-666), amends the Municipal Land Use Law to permit the adoption of a TDR ordinance by any municipality. This legislation provides no guidelines, structure or minimum requirements with which municipalities must comply when developing their TDR program. Comments from Montgomery County people reinforce the need for "strong enabling legislation," which sets forth specific purposes and procedures.

STRONG AGENCY NEEDED

There is no question that the success of a TDR program lies in the hands of the agency that administers it, including its ability to devote time and resources to the program. This presupposes that all of the other vital components (such as a strong real estate market, realistic density bonuses, other incentive controls, retained development rights, etc.) of the TDR program are in place. Due to the multitude of uncertainties and areas that towns cannot control, A-591/S-666 is <u>not</u> the right approach.

Montgomery County farmers also receive an important benefit under their State Farmland Assessment laws in that both the land and farm "structures" are eligible, rather than just the land (as in New Jersey). A recent legislative effort in New Jersey has been initiated, however, which proposes a Constitutional amendment that will allow towns to exempt from taxation agricultural "facilities."

Montgomery County provides one other critical component in the process, namely, a fierce commitment to see their TDR program work. The County Commission, with more than 1500 employees, has continued their strong public relations ties to the community long after the "start-up" of the program. While landowners remain doubtful about the ultimate outcome of the program, the Montgomery planning staff cannot be faulted for their local public participation ef-

cont. on next page

TDR cont. from page 15

forts to solicit support and inform individuals of the programs structure and intent.

CAUTION MUST BE TAKEN

If TDR is to be considered in New Jersey, it must be done carefully. Our court system, with its strong land use laws and attitude toward property rights, is quite different as compared to that of Maryland. Property owners and builders feel strongly about the carrying capacity of the land, and often pose the question..."If I am allowed to build at certain increased densities with TDR, why shouldn't I be permitted that same density (by right) without the TDR transaction?"

Even the Montgomery County TDR program contains a basic inequity, in that most of the receiving areas were down-zoned in anticipation of the mandatory density increases when applying TDR's. Such down-zoning (prior to TDR usage) negates the essential benefit of the density increase resulting from TDR purchase, and is in actuality a "bad faith" zoning ploy to take away that which already exists.

We now have evidence of a TDR program in New Jersey (the Pinelands Development Credit program), which has failed to function as intended. This, I feel, is mainly due to the local resistance to allow the increased densities of PDC's, thereby affecting the health of the housing market in the Pinelands growth areas (many of which have not yet been "certified" as growth areas). Furthermore, the PDC program offers a minimal density bonus as compared to the Montgomery TDR program.

We must ever be cognizant of the local political forces in municipal government, and the potential for abuse of the TDR technique. Especially now with the burden of municipal obligations under the Mt. Laurel II Decision, towns may be eager to investigate new land use planning alternatives, including TDR's as a means of shifting "developing area" land into agriculture to shelter it from development. Extreme caution is therefore urged to all who seek to sanction such a technique, since the success of a TDR program depends on a unique blend of so very many components. ■

Headquarters Building Site Plan Approved

On September 20, 1984, the Monroe Township Planning board gave preliminary and final Site Plan approval to Home Owners Warranty Corporation of New Jersey for the construction of a three-story office building to serve as the headquarters for the New Jersey Builders Association and its affiliates.

The 3.3 acre tract is located along Forsgate Drive adjacent to the New Jersey Turnpike in Monroe Township. The proposed building will be a 35,300 square-feet structure (gross floor space), of which 30,100 feet would be leaseable. The building would have a facade of brick, stucco, and glass.

The Planning Board approval paves the way for closing of title to the tract which is currently owned by Guardian Development Corporation. The Middlesex County Planning Board approved the Site Plan application in April of 1984 and the Monroe Township Municipal Utilities Authority has already given preliminary approval.

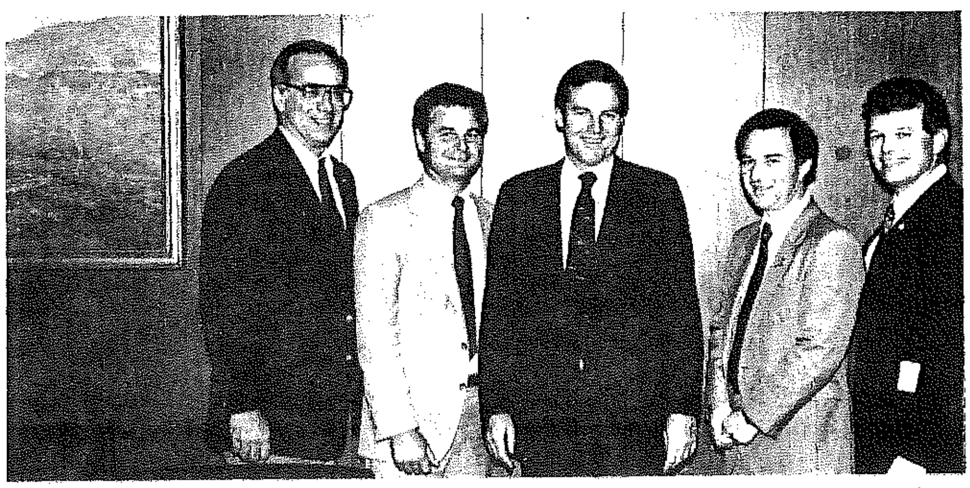
These developments herald a dream come true – a home of its own – for the New Jersey Builders Association. ■

Hutt Lectures On Mt. Laurell II at Harvard Univ.

NJBA General Counsel, Stewart M. Hutt, Esq., was a panelist in a discussion entitled "The Impact of Court-Ordered Low Income Housing – Implementing Mt. Laurel II," on November 29 at a real estate and urban development from sponsored by Harvard University, Cambridge, Mass.

Mr. Hutt, a Harvard graduate, was asked to focus on the perceived effects of implementing the court-ordered remedies, including effects on infrastructure, municipal financing, and local control of land planning. In addition, he explored the background of the fair-share concept and its effectiveness in addressing low-income needs, as well as the impact of a court-ordered remedy on the respective roles of courts, municipalities, builders, and low-income housing advocates.

The more than 100 people in attendance included graduate students and faculty from the Harvard Law School, the Kennedy School of Government, the Graduate School of Design, and the MIT Center for Real Estate Development. ■



NJBA recently met with Governor Thomas Kean in Trenton to discuss major issues confronting the housing industry. The topics covered during the meeting were the infrastructure bank, Mt. Laurel II, and freshwater wetlands. Pictured are (left to right) Charles Pisano, chairman of NJBA's Mt. Laurel II Task Force; David B. Jackson, president of NJBA; Governor Kean; H. Daniel Pincus, NJBA First Vice President and chairman of the Legislative Committee; and Leonard Sendelsky, president of HOW and BPAC chairman.