

New Jersey Law Journal

VOL. CXCVIII - NO.10 - INDEX 847

DECEMBER 7, 2009

ESTABLISHED 1878

IN PRACTICE

REAL ESTATE LAW *

What's All the Hype About?: Local Control Over the Development of Affordable Housing

BY CHRIS MILLER

The Appellate Division's August 24 decision in *Homes of Hope, Inc. v. Eastampton Tp. Land Use Planning Bd.* sparked a political backlash against the New Jersey Council on Affordable Housing. A closer look at the court's decision reveals that this hostility has been misdirected.

Homes of Hope, Inc. v. Eastampton Tp. Land Use Planning Bd., 409 N.J.Super. 330 (App. Div. 2009), has resulted in much debate — as well as confusion — about municipal control over the development of affordable housing, and the protections which a municipality receives from *Mt. Laurel* litigation (a.k.a. "builder's remedy" litigation) as a result of achieving compliance with the regulations of the New Jersey Council on Affordable Housing (COAH). *Homes of Hope* centered on a nonprofit developer's application to a municipal land use board for a use variance (also known as a "d" variance) from the land use regulations in order to build a 100 percent affordable development. Specifically, the developer sought to build eight affordable units (two duplexes) on a .848-acre lot which was zoned for

single-family residential use. Generally, a developer must apply to the municipal land use board for a use variance in order to exceed the permitted density.

Use Variance Analysis Under the Municipal Land Use Law

To obtain a use variance under the Municipal Land Use Law (MLUL), N.J.S.A. 40:55D-70(d), an applicant must satisfy both the "positive" and "negative" criteria. Under the "positive" criteria, an applicant normally must demonstrate "special reasons" why the use variance should be granted (e.g., although the applicant proposes a commercial use in a residential zone, the applicant's property is situated next to a state highway which was constructed after the zone was established, and which separates the applicant's property from the rest of the residential zone). An "inherently beneficial use" presumptively satisfies the "positive criteria," while other uses must demonstrate that they are particularly suited for the zoning. Schools, hospitals, places of worship, community shelters, Seeing Eye facilities, and sewage treatment plants have been held to qualify as an "inherently beneficial use." Affordable housing has also been held to be an "inherently beneficial use."

Under the MLUL, even if an applicant seeking a use variance proposes an "inherently beneficial use" under the "positive criteria," the applicant must still satisfy the "negative criteria." This requires the applicant to demonstrate that any detriment posed by the use is sufficiently outweighed by any benefits to the public good. Generally, a use variance application which poses only minimal adverse impacts will satisfy the "negative" criteria. In deciding whether to issue a variance for an "inherently beneficial use," the land use board's role is to balance the "positive" and "negative" criteria and determine whether the grant of the variance would substantially harm the general welfare.

The Use Variance Application

Prior to *Homes of Hope's* application to the land use board, Eastampton Township had received "substantive certification" from COAH. Substantive certification is a determination by COAH that a municipality has satisfied its constitutional obligation to provide a "realistic opportunity" for affordable housing. Once a municipality receives substantive certification, it is protected from a "builder's remedy" — the court-ordered affordable housing projects which often results in *Mt. Laurel* litigation.

Miller is an associate with Maraziti, Falcon & Healey in Short Hills.

tion — for a period of 10 years.

Based on the fact that Eastampton had received “substantive certification” from COAH, the land use board decided that the proposed 8-unit, 100 percent affordable duplex project was not an “inherently beneficial use,” and ultimately denied the use variance. The board apparently reasoned that once a municipality achieves compliance with the Fair Housing Act, as administered by COAH, affordable housing is no longer entitled to “inherently beneficial use” status in that municipality.

Homes of Hope appealed the board’s decision to the law division of the superior court. The law division disagreed with the board’s decision, stating:

I’m satisfied that the Board has to consider this application in light of...the standard of inherently beneficial [use]. Of course, that means only that the Board must reconsider the application and not that it must automatically grant it... [T]he case has to be reheard, that an opportunity has to be given to the applicant to present its facts in the more favorable light that is attendant to...the inherently beneficial use standard,...the Board retains its right to decide whether a variance is appropriate under the new standard.

The Appellate Division’s Decision

On appeal, the Appellate Division noted that affordable housing has long been considered an “inherently beneficial use” under the MLUL.

The Appellate Division ruled that “a municipality’s compliance with COAH regulations does not change the site-specific analysis necessary for a ‘d’ variance” under the MLUL. In other words, affordable housing does not cease to be an “inherently beneficial use” under the MLUL once the municipality achieves compliance with the Fair Housing Act. Accordingly, the Appellate Division af-

firmed the trial court and remanded the use variance application back to the municipal land use board for consideration.

Affordable Housing as an “Inherently Beneficial Use” Is Not a New Rule: The concept that affordable housing projects are to be considered “inherently beneficial uses” under the MLUL for purposes of use variance analysis is not new. While the Appellate Division did affirm this rule in its opinion in *Homes of Hope*, the Appellate Division’s ruling may be characterized as a negative reaction to the board’s position that “substantive certification” under the Fair Housing Act justifies discontinuing the “inherently beneficial use” standard which otherwise applies to use variance applications for affordable housing projects.

The Court Did Not Order the Affordable Housing Project to be Approved: In *Homes of Hope*, and in contrast with a “builder’s remedy,” the court did not order any affordable housing to be approved. Rather, the court rejected the board’s analysis in denying the variance, and ordered the board to reconsider the application in light of the appropriate standard. It is also important to understand that in this case COAH itself was not requiring any further affordable housing in Eastampton.

A Proposed Affordable Development which Greatly Exceeds the Permitted Density may be Less Likely to Satisfy the “Negative” Criteria for a Use Variance: A proposed affordable development may be more likely to pose “substantial detriment” to the “general welfare” if it grossly exceeds the permitted density.

The Project in this case was a 100 percent-Affordable Development: The development at issue in this case was a 100 percent affordable project. There is no indication in this case, or in the line of cases relied upon by the Appellate Division, that a project which contains market-rate units — let alone predominantly market-rate units — categorically qualifies as an “inherently beneficial use.”

Nevertheless, if a court ultimately ventures to establish a baseline percentage of affordable units which is required in order for a development to qualify as an inherently beneficial use, then the court might look to COAH’s regulations for guidance. For example, COAH’s “inclusionary zoning” rules (N.J.A.C. 5:97-6.4) establish “presumptive maximum” affordable housing set-asides, and “presumptive minimum densities,” for each state planning area (e.g., for planning area 1 municipalities, inclusionary zones should provide for a density of at least 8 units per acre, with 25 percent of the total number of units in the development set-aside for affordable housing). Or, the courts may decide that a “d” variance application to permit a development with a 20 percent affordable housing set-aside qualifies as an “inherently beneficial use,” because it keeps pace with COAH’s growth share formula (1 affordable unit for every 4 new market-rate units).

Speculation aside, where state law mandates affordable housing set-asides for new residential development, a municipality must adhere to such requirements. Assembly Bill 500 (“A500”) — affordable housing reform legislation which became effective in July 2008 — generally imposed mandatory 20 percent affordable housing set-asides in certain regional planning areas of the state (e.g., the Highlands, the Meadowlands). It remains to be seen whether developers in these areas may rely on such statutory provisions to successfully argue that a proposed project qualifies as an “inherently beneficial use.”

The Appellate Division’s recent decision in *Home of Hope* was not the dramatic departure from legal precedent which recent political rhetoric suggest. Nevertheless, the decision does raise new and interesting questions as to how prospective developers of affordable housing might attempt to avail themselves of the “inherently beneficial use” standard in the future, and how such attempts will be received by our land use boards and courts. ■