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A Clarion Call: Court Reins In Municipal Abuse of Eminent Domain and Zoning

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New Jersey's courts took significant steps in August 2009 to rein in municipal abuses of the state-delegated powers of eminent domain and zoning. In *Township of Readington v. Solberg Aviation Co., et als,* 409 N.J. Super, 282 (App. Div. 2009), the court reversed the trial court's endorsement of what was alleged to be a pretextual condemnation action taken by the municipality. In ordering a remand and underscoring the court's disdain of municipal actions challenged, the court stated there " is a keen interest in revisiting the issues of the Township's bad faith in a plenary hearing...." In the decision, *Homes of Hope, Inc. v. Easthampton Township Land Use Planning Board,* 409 N.J. Super. 330 (App. Div. 2009), the court held that just because a municipality meets its fair-share affordable housing obligation does not mean it has no need for such housing or that such housing is no longer "inherently beneficial" to qualify as a "special reason" to support the grant of a use variance under N.J.S.A. 40:55D-70d of New Jersey's Municipal Land Use Law (MLUL).

Homes of Hope, Inc. (HFH), a nonprofit organization providing affordable housing, owned a brick building containing four dwelling units in Easthampton Township's "Residential Medium Density District," which permitted single-family homes but not multifamily residential dwellings. HFH filed an application with Easthampton's Land Use Board to construct two duplexes next to its building to create eight affordable housing units on the property, which it agreed to deed restrict as affordable housing. Since construction required a use variance under N.J.S.A. 40:55D-70d (1), HFH had to satisfy both the "positive" and "negative" criteria under the MLUL and contended that the "positive" criteria" were presumptively satisfied since providing affordable housing would advance and improve the general welfare. HFH's proposed use was "inherently beneficial" and legally sufficient to satisfy the "special reasons" requirement necessary for the granting of "d" variance relief.

Prior to the HFH application, the New Jersey Council on Affordable Housing (COAH) determined that a 100-unit "low-income family rental development" in the township created a surplus of 21 units creditable against Easthampton's cumulative "fair share" affordable housing obligation for 1999-2014. Thus, the board denied the variance application, concluding that the proposed affordable housing was not inherently beneficial.

In an appeal to the Superior Court, the trial court reversed, citing the Supreme Court's decision in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel (Mount Laurel II)*, 92 N.J. 158 (1983), and noting it is "without question that the [Mount Laurel Court] did not intend for each municipality to meet only the needs of the homeless within strict boundaries of each town" but rather to contribute to the needs of the entire state. The Appellate Division agreed, reiterating that "[a]ffordable housing is an inherently

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beneficial use . . .” that promotes the general welfare.

The court made an important distinction between the purposes served by COAH in granting “substantive certification” of a municipality’s plan for affordable housing compliance and the functions of local planning and zoning boards in granting relief from zoning requirements and restrictions for land uses pursuant to the MLUL. The court stated:

> A COAH certification does not mean that a municipality has reached a limit for affordable housing. Neither the FHA, nor *Mount Laurel I or II* … supports the Board’s argument that once a municipality’s *Mount Laurel* obligation has been fulfilled, a need for low or moderate income housing no longer exists … Providing affordable housing … on a case-by-case basis, continues to foster the general welfare, regardless of a COAH certification, so as to constitute a special reason to satisfy the positive criteria . . .

The ruling in *Homes of Hope* would be confined to “d” variance applications involving 100 percent affordable housing development projects, but if the proposed development involves a mix of market rate units and an affordable housing component or set-aside, the holding lends considerable support toward satisfying the positive criteria on “inherently beneficial use” grounds. For inclusionary developments, a board should analyze how the proposed market units are integrated into the function of the inherently beneficial use by using the three-pronged test enunciated in *Medical Center v. Princeton Twp. Zoning Board*, 343 N.J.Super. 177, 185 (App. Div. 2001).

This segues logically into Judge Chambers’ concurring opinion that followed the majority’s opinion and joined in the result. The majority did not discuss or address the “necessary” standard that is implicitly required in the proofs to be adduced to support the grant of a “d” variance on “inherently beneficial use” grounds. Judge Chambers observed that the *Mount Laurel* litigation that led to the enactment of the New Jersey Fair Housing Act (FHA), N.J.S.A. 52:27D-301 to -329.4 and interpretive case law holding that affordable housing is an inherently beneficial use in the context of a “d” variance application both addressed the need for affordable housing in New Jersey.

Judge Chambers noted *Mount Laurel II* fashioned the “builder’s remedy” and provoked the legislature’s enactment of the FHA, which created COAH that, in turn, promulgated a regulatory scheme to calculate the need for affordable housing and allocate that need among municipalities along with a mechanism to help insulate municipalities from the builder’s remedy. This is a stark contrast to the treatment of affordable housing as an inherently beneficial use in a “d” variance application under the MLUL, which is one of the “devices allowing zoning ordinances to be overridden in order to help meet the need for affordable housing.” However, the grant of a “d” variance for an inherently beneficial use “run[s] contrary to the strong legislative policy in favor of land use planning through the zoning process.”

Judge Chambers noted that neither the FHA nor the MLUL addresses the circumstance where a municipality has actually achieved its fair share of affordable housing and the impact that circumstance has on a “d” variance application, and went so far as to provoke the legislature by stating that it “is a matter for the Legislature to determine should it decide to provide that affordable housing loses its status as an inherently beneficial use in municipalities that have achieved their fair share of affordable housing.”

Affordable housing is indeed an inherently beneficial use, and simply because a town attained substantive certification under COAH regulations to satisfy its fair share obligations under the *Mount Laurel* doctrine does not mean that affordable housing is no longer needed or should lose its inherently beneficial status, such that applications for “d’ variance relief under the MLUL can be summarily defeated. Anything beyond this logic-based conclusion in *Homes of Hope* requires amendment or refinement of the MLUL — but through the legislature, not the courts.

Should the legislature enact appropriate amendment to the MLUL, it might take the shape of a “bright line” rule: once a town attains substantive certification and COAH compliance, it would be exempt from having to permit or sustain “d” variance applications for affordable housing development on “inherently beneficial use” grounds. However, this would likely only embolden supporters of COAH and its deeply developed (albeit faulty) regulatory processes, extol the need for the substantive certification processes and encourage that COAH remain the agency to determine compliance with affordable housing need, as FHA contemplated.

A logical compromise might be a legislative initiative that eliminates COAH but leaves affordable housing need determinations and attendant implementation and regulatory processes to local boards through localized review and approval of affordable housing “d” variance applications, on a case-by-case basis, under existing jurisprudence and the simpler, common-sense approach that sustains affordable housing treatment under “inherently beneficial use” standards. This assumes the actual need for housing at the particular location(s) for which approval is sought can be established in the application process.

COAH and its third-round regulations are under siege in the courts. Political infighting has stagnated developers of market rate and affordable housing and a triangulated government is in near paralysis over how to meet the need for 115,000 affordable housing units state-wide. Municipalities continue to deflect affordable housing approval and construction while fighting rages within all three branches of government. In the recent election season, candidates decried the need for affordable housing, and now our governor-elect has called for a gutting and, foreseeably, the complete elimination of COAH.

The clarion call sounded by the court in *Homes of Hope* suggests that a balanced legislative response to the competing interests at stake would, undoubtedly, find fertile grounds for fruitful cultivation. ■