

**INHERENTLY BENEFICIAL OR PARTICULARLY WELL  
SUITED? RECONSIDERING THE TREATMENT OF  
AFFORDABLE HOUSING IN USE VARIANCE APPLICATIONS**

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I. INTRODUCTION

The placement of affordable housing in New Jersey has prompted a contentious and enduring debate. The New Jersey Supreme Court has penned hundreds of pages in an attempt to orchestrate a workable resolution.<sup>1</sup> In the landmark case, *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)*,<sup>2</sup> the New Jersey Supreme Court denounced the common practice of exclusionary zoning and later reaffirmed its denunciation in *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*.<sup>3</sup> The effort on the part of the New Jersey Supreme Court to confront exclusionary zoning practices has been referred to as “among the most ambitious judicial crusades” in the country.<sup>4</sup> At the time of *Mount Laurel I*, municipalities commonly used their zoning ordinances as a tool to exclude low-income residents from their borders<sup>5</sup> in an at-

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<sup>1</sup> See *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975); *S. Burlington Cnty. NAACP v. Mount Laurel*, 456 A.2d 390 (N.J. 1983).

<sup>2</sup> 336 A.2d 713 (N.J. 1975).

<sup>3</sup> 456 A.2d 390 (N.J. 1983).

<sup>4</sup> John Charles Boger, *Lessons Learned from Mount Laurel: Mount Laurel at 21 Years: Reflections on the Powers of Courts and Legislatures to Shape Social Change*, 27 SETON HALL L. REV. 1450, 1452 (1997).

<sup>5</sup> See *S. Burlington Cnty. NAACP*, 336 A.2d at 718–19.

tempt to keep property taxes down.<sup>6</sup> In the face of these practices, the New Jersey Supreme Court declared that every municipality has a constitutional obligation to provide affordable housing.<sup>7</sup> After eight years of municipalities resisting *Mount Laurel I*, the New Jersey Supreme Court reaffirmed municipalities' constitutional obligation to provide affordable housing, expanded the builder's remedy, a device intended to encourage municipalities to comply with *Mount Laurel I*,<sup>8</sup> and invited the New Jersey State Legislature to become involved in the fight to end exclusionary zoning practices.<sup>9</sup> The New Jersey Legislature passed the Fair Housing Act of 1985 (FHA) in an attempt to give life to the constitutional mandate that the Supreme Court announced in *Mount Laurel I* and *Mount Laurel II*.<sup>10</sup> The FHA created a comprehensive system by which municipalities could participate in a program that would assign their fair share of the housing shortfall and in return provide participating municipalities protection from builder's remedy lawsuits.<sup>11</sup>

Prior to implementation of a comprehensive legislative scheme to handle the deficiency of affordable housing, New Jersey's courts deemed affordable housing an inherently beneficial use for the purposes of obtaining a use variance under the Municipal Land Use Law (MLUL).<sup>12</sup> The effect of decreeing affordable housing an inherently beneficial use was to relax certain requirements in the use variance

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<sup>6</sup> *Id.* at 723.

<sup>7</sup> *See id.* at 724.

<sup>8</sup> A builder's remedy is a device intended to encourage municipalities to comply with *Mount Laurel I* that allows a developer who has successfully challenged a municipality's exclusionary zoning ordinances to construct its development where it proposed to do so, unless the municipality can come forward with environmental or other substantial planning concerns. *S. Burlington Cnty. NAACP*, 456 A.2d at 452.

<sup>9</sup> *See id.* at 415.

<sup>10</sup> N.J. STAT. ANN. §§ 52:27D-302-03 (West 2008).

<sup>11</sup> *See* discussion of a builder's remedy *infra* Part II.C. The FHA created the Council on Affordable Housing to oversee municipalities' compliance with their constitutional obligation to provide affordable housing. *See infra* Part II.C. Recently the New Jersey legislature has sought to significantly alter the legal framework in existence regarding the development of affordable housing. *See infra* note 263. For the purposes of arguments made within this Comment, it is inconsequential whether the oversight powers remain with the Council on Affordable Housing or are vested in another governmental agency. *See infra* note 263 for further discussion on recent developments regarding bills to abolish the Council on Affordable Housing.

<sup>12</sup> For purposes of this Comment, "use" variance will refer to any variance issued under § 40:55D-70(d)(1) of the Municipal Land Use Law. *See, e.g.,* Wash. Shopping Ctr., Inc. v. Twp. of Wash. Land Use Bd., No. A-0444-07T2, 2008 N.J. Super. Unpub. LEXIS 427, at \*7 (N.J. Super. Ct. App. Div. Aug. 6, 2008) ("A variance issued pursuant to [N.J. STAT. ANN. § 40:55D-70(d)(1)] is generally known in land use law as a 'use' variance."); *see also infra* Part IV.A-B.

application process, thereby making it easier for an applicant to obtain reprieve from zoning restrictions.<sup>13</sup> Specifically, the supreme court found five years prior to deciding *Mount Laurel I* that “furnish[ing] housing for minority or underprivileged segments of the population outside of ghetto areas is a special reason [for the purposes of granting a use variance].”<sup>14</sup> More than likely, the motivation behind granting affordable housing such coveted status was to help end exclusionary zoning practices.<sup>15</sup>

Assessment of whether New Jersey’s attempt to end exclusionary zoning practices has been successful is mixed. While the efforts expended under the FHA appear to have helped create more affordable housing, the housing that has been built appears to be priced at a rate affordable only to the wealthiest of low-income earners and has not helped relocate urban minorities to New Jersey suburbs.<sup>16</sup> In terms of actual numbers, the Council on Affordable Housing states that it has given certification for 70,000 units, 36,000 of which have been built.<sup>17</sup> Despite compliance by many municipalities with the FHA, a recent appellate division case has added fuel to the affordable housing fire.

In August 2009, the appellate division announced its decision in *Homes of Hope, Inc. v. Eastampton Township Land Use Planning Board (Homes of Hope)*.<sup>18</sup> *Homes of Hope* involved a novel issue that touched upon the interplay between the statutory scheme created for handling affordable housing, the FHA, and the statutory scheme which governs a municipality’s ability to zone and grant variances, the MLUL.<sup>19</sup> The appellate division decided that a zoning board should

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<sup>13</sup> See *Wash. Shopping Ctr., Inc.*, 2008 N.J. Super. Unpub. LEXIS 427, at \*7; see *infra* Part V.B.

<sup>14</sup> *DeSimone v. Greater Englewood Hous. Corp.* No. 1, 267 A.2d 31, 38 (N.J. 1970).

<sup>15</sup> See *DeSimone*, 267 A.2d at 34.

Englewood, like many others, is a city of striking contrasts. It is five square miles in area . . . . The population of about 28,000 is 20% to 25% Black. . . . [I]ts white population is generally affluent . . . . By far the greater part of the black population lives in the Fourth Ward . . . and a very high percentage of the housing there is substandard, much of it not capable of rehabilitation.

See *id.*

<sup>16</sup> Boger, *supra* note 4, at 1454–55 (1997).

<sup>17</sup> *Reports & Quick Facts*, N.J. DEPT. OF CMTY. AFFAIRS, COUNCIL ON AFFORDABLE HOUSING, <http://www.state.nj.us/dca/affiliates/coah/reports/> (last visited Jan. 7, 2010) (on file with author).

<sup>18</sup> 976 A.2d 1128 (N.J. Super. Ct. App. Div. 2009).

<sup>19</sup> See *infra* Part IV.B.

consider an application for a use variance to build affordable housing in light of the preferential standard known as the inherently beneficial use doctrine, even though the municipality has satisfied its constitutional affordable housing obligation per the FHA.<sup>20</sup> The decision inspired an array of criticism ranging from allegations that the case overruled relevant precedent to predictions that the case would lead to an onslaught of litigation.<sup>21</sup> Most, if not all, of the criticism was exaggerated and failed to mention the principled reasons for objecting to the appellate division's decision in *Homes of Hope*.<sup>22</sup>

The inherently beneficial use doctrine is a judicially created doctrine that recognizes some uses as so necessary to the general welfare that municipalities should view a use variance application for those uses favorably.<sup>23</sup> As such, the inherently beneficial use doctrine allows for departure from the requirement that a use variance applicant show that the target piece of property is particularly well-suited for the desired use.<sup>24</sup> But where a municipality has planned for and constructed affordable housing in full satisfaction of its constitutional obligation per the FHA, a demonstrated need no longer exists within that municipality for affordable housing as evidenced by that municipality's certification under the FHA. Therefore, allowing affordable housing to remain as an inherently beneficial use in a municipality that has fully satisfied its FHA obligation is counterintuitive because there is no demonstrable need to warrant relaxing considerations of site suitability for the proposed use. As a result, the appellate divi-

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<sup>20</sup> *Homes of Hope, Inc. v. Eastampton Twp. Land Use Planning Bd.*, 976 A.2d 1128, 1130 (N.J. Super. Ct. App. Div. 2009). On October 8, 2010 the appellate division invalidated significant portions of the revised third round rules promulgated by the Council of Affordable Housing. *See In re N.J.A.C 5:96 and 5:97*, No. A-5382-07T3, 2010 N.J. Super. LEXIS 201 (N.J. Super. Ct. App. Div. Oct 8. 2010). The court found the growth-share methodology allows a municipality to shirk its affordable housing requirements by passing land use ordinances that retard development. *Id.* at \*20. The court advised "COAH to adopt third round rules that incorporate a methodology similar to the methodology set forth in the first and second rules, which were approved by courts in most respects." *Id.* at 29. The court noted that it had doubts as to whether any growth share methodology would be valid under the *Mount Laurel* doctrine because the supreme court, in *Mount Laurel II*, indicated a disapproval of any methodology "that was substantially dependent upon individual municipalities' decisions as to whether to grow." *Id.* at 29. It is unclear from the opinion whether the substantive certification granted to municipalities, such as Eastampton, remains valid or not. The court charged COAH with creating new rules within five months. *Id.* at 78.

<sup>21</sup> *See infra* Part IV.C.

<sup>22</sup> *See infra* Part IV.D.

<sup>23</sup> WILLIAM COX, NEW JERSEY ZONING AND LAND USE ADMINISTRATION 187 (2010).

<sup>24</sup> *See infra* Part III.B.

sion's decision in *Homes of Hope* unnecessarily duplicates and undermines the FHA process and it also ignores the limited role use variances should have in the development of municipalities.

The inherently beneficial use doctrine should be reserved for uses for which a municipality and its surrounding areas have a need.<sup>25</sup> As such, if a municipality has satisfied its FHA obligation, a use variance to build affordable housing should be reviewed under the non-inherently beneficial use standard, which requires the piece of property for which the variance is requested to be particularly well-suited for the use.<sup>26</sup> This is the appropriate course of action because a well-recognized preference exists within the state of New Jersey for land-use planning via zoning.<sup>27</sup> And because of this preference, the grant of a use variance will always be considered the exception, rather than the rule.<sup>28</sup> Therefore, each decision to grant or deny a use variance should be reviewed on its own facts.<sup>29</sup> Furthermore, zoning boards are recognized as particularly well-equipped to determine the efficacy of denying a variance, and therefore, decisions by zoning boards are reviewed in a deferential manner by the judiciary when they are challenged.<sup>30</sup> These reasons necessitate the conclusion that a municipality that has actually achieved its allotment of affordable housing, as determined under the FHA, should be entitled to review an application for a use variance to build affordable housing under the non-inherently beneficial use analysis which requires the use be particularly well-suited for the piece of land in question.<sup>31</sup>

To provide context for the debate in New Jersey over affordable housing, in Part II, this Comment will set out the framework in which the New Jersey Supreme Court established a municipality's constitutional obligation to provide affordable housing and the subsequent codification of that obligation by the New Jersey State Legislature in the FHA. In Part III, this Comment will discuss the process by which a use variance is granted and provide examples of uses that are and are not considered inherently beneficial and the judiciary's reasoning behind declaring certain uses inherently beneficial. Part IV will dis-

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<sup>25</sup> See *infra* Part III.C.

<sup>26</sup> See *infra* Part III.B (discussing what an applicant must show to obtain a use variance).

<sup>27</sup> See COX, *supra* note 23, at 182.

<sup>28</sup> *Id.*

<sup>29</sup> *Burbridge v. Twp. of Mine Hill*, 568 A.2d 527, 532 (N.J. 1990).

<sup>30</sup> See *infra* Part III.A.

<sup>31</sup> See *infra* Part III.B (discussing what an applicant must show to obtain a use variance).

cuss the development of the inherently beneficial use doctrine by the judiciary, the application of the inherently beneficial use standard to affordable housing, the *Homes of Hope* decision, and whether the outcry over the *Homes of Hope* decision is warranted. Finally, Part V will discuss why the *Homes of Hope* decision effectively allows the exception, a use variance, to swallow the rule, the preference for zoning, and why an application for affordable housing in a municipality that has achieved its fair share of affordable housing should be reviewed under the non-inherently beneficial use analysis.

## II. A MUNICIPALITY'S FAIR SHARE OF AFFORDABLE HOUSING: A CONSTITUTIONAL OBLIGATION, ENFORCEMENT, AND CRITICISMS

### A. Mount Laurel I

In 1975 the New Jersey Supreme Court confronted exclusionary zoning practices head on in *Mount Laurel I*.<sup>32</sup> The plaintiffs in *Mount Laurel I* were a group of minorities, Hispanics and blacks, who were seeking affordable housing in Mount Laurel.<sup>33</sup> Mount Laurel, like many other municipalities, engaged in exclusionary land use zoning.<sup>34</sup> For instance, Mount Laurel's zoning ordinance retained 29.2% of land within the municipality for industry.<sup>35</sup> But the court noted, "as happens in the case of so many municipalities, much more land [had] been so zoned than the reasonable potential for industrial movement or expansion warrant[ed]."<sup>36</sup> Because the land was zoned for industry, residential dwellings were prohibited in that zone.<sup>37</sup> The zoning ordinance designated 10,000 acres for residential development and divided this land into four zones.<sup>38</sup> Each zone only permitted single-family detached dwellings, which allowed for substantial development but at a low density.<sup>39</sup> The court found that the "ordinance requirements, while not as restrictive as those in many similar municipalities, nonetheless realistically allow only homes within the financial reach of persons of at least middle income."<sup>40</sup> Mount Laurel effectively zoned out low- and moderate-income citizens by creating

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<sup>32</sup> *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 336 A.2d 713 (N.J. 1975).

<sup>33</sup> *Id.* at 717.

<sup>34</sup> *See id.* at 719.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *S. Burlington Cnty. NAACP*, 336 A.2d at 719.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

large lot-size requirements, age restrictions, and limits or prohibitions on the number of children that could live within a particular zone.<sup>41</sup>

The New Jersey Supreme Court reasoned that the tax structure of New Jersey motivated municipalities to use exclusionary zoning.<sup>42</sup> Specifically, the court found the objective of such zoning practices was to keep property taxes down<sup>43</sup> because the cost of funding municipal county governments, and primary and secondary education is derived from taxes on local real estate.<sup>44</sup> The fewer children in a municipality's schools, the lower the overall cost to run the schools, which would result in lower taxes in the community.<sup>45</sup> Municipalities require large lot sizes to generate greater tax revenue to meet the cost of educating the school-age children in the community<sup>46</sup> and adopt restrictions on the amount of bedrooms or completely ban multi-family dwellings to help reduce the actual number of children in the municipality.<sup>47</sup> By doing so, municipalities disfavor low- and moderate-income families who cannot purchase mega-mansions that help fund the increased education costs.<sup>48</sup> In light of the prevalent use of exclusionary zoning, the New Jersey Supreme Court held that "every [developing] municipality must . . . presumptively make realistically possible an appropriate variety and choice of housing."<sup>49</sup> The court found that a municipality could not foreclose the opportunity of affordable housing within its boundaries and that a municipality must provide for its "fair share of the present and prospective regional need"<sup>50</sup> for such housing.

#### B. Mount Laurel II and a Plea for Legislative Intervention

Eight years later, in the face of continued exclusionary land use practices, the New Jersey Supreme Court decided *Mount Laurel II*.<sup>51</sup> The court found that Mount Laurel persisted in its use of "a blatantly exclusionary [zoning] ordinance."<sup>52</sup> The court affirmed its commit-

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<sup>41</sup> *Id.* at 721–22.

<sup>42</sup> *Id.* at 723.

<sup>43</sup> *Id.*

<sup>44</sup> *S. Burlington Cnty. NAACP*, 336 A.2d at 723.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *See id.*

<sup>49</sup> *S. Burlington Cnty. NAACP*, 336 A.2d. at 724.

<sup>50</sup> *Id.*

<sup>51</sup> *S. Burlington Cnty. NAACP v. Twp. of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

<sup>52</sup> *Id.* at 410.

ment to the constitutional obligation of municipalities to provide an opportunity for affordable housing that it previously announced in *Mount Laurel I*.<sup>53</sup> It sought to clarify, to strengthen, and to make easier public officials' and municipalities' abilities to conform to the constitutional obligation.<sup>54</sup> The court explained that the constitutional power to zone must be exercised for the general welfare and that the general welfare, in terms of housing, was not limited to just the municipality's needs but the general welfare of the surrounding region that creates a housing demand within a particular municipality.<sup>55</sup> The court declared that when a developer successfully challenged exclusionary zoning ordinances and proposed a housing project that contained a certain percentage of affordable housing, a builder's remedy should exist.<sup>56</sup> A builder's remedy essentially allows the developer's project to be built in the proposed spot unless the municipality can come forth with evidence of environmental or other substantial planning concerns.<sup>57</sup> In *Mount Laurel II*, the Supreme Court noted its preference for legislative action on the matter of affordable housing, but it also noted that it would continue to uphold the constitutional obligation established in *Mount Laurel I*.<sup>58</sup>

C. *The Legislature Responds: The Nuts and Bolts of the FHA*

Ten years after the New Jersey Supreme Court decided *Mount Laurel I*, the New Jersey State Legislature adopted the Fair Housing Act.<sup>59</sup> The stated intention of the FHA is to implement a framework that allows for enforcement of a municipality's constitutional obligation to provide affordable housing as stated in *Mount Laurel I* and affirmed in *Mount Laurel II*.<sup>60</sup> Specifically, the legislature explained that "this act is in the public interest in that it comprehends a low and moderate income housing planning and financing mechanism in accordance with regional considerations and sound planning concepts which satisfies the constitutional obligation enunciated by the New Jersey Supreme Court."<sup>61</sup> The FHA established the Council on Affordable Housing (Council or COAH), which has primary jurisdic-

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<sup>53</sup> *Id.* at 415.

<sup>54</sup> *Id.* at 410.

<sup>55</sup> *Id.* at 415.

<sup>56</sup> *Id.* at 452.

<sup>57</sup> *S. Burlington Cnty. NAACP*, 456 A.2d at 452.

<sup>58</sup> *Id.* at 417.

<sup>59</sup> N.J. STAT. ANN. § 52:27D-301 (West 2001).

<sup>60</sup> N.J. STAT. ANN. § 52:27D-303 (West 2009).

<sup>61</sup> *Id.*



tion over the administration of housing obligations.<sup>62</sup> The Council is charged with determining housing regions, estimating the regional need for low- and moderate- income housing, and adopting criteria for determining each municipality's current and prospective share of that need based on a ten year period.<sup>63</sup> Participation in the statutory scheme implemented by the legislature to tackle the affordable housing problem within the state is not mandatory.<sup>64</sup> If a municipality chooses to participate, it does so by adopting a resolution of participation and informing the Council of its intent to submit a housing plan.<sup>65</sup> No punishment is imposed for failure to participate, but a municipality that chooses not to participate does not get the benefit of exhausting administrative remedies provided by the statute prior to litigation.<sup>66</sup> Recently, the Council announced its highest level of participation in the Third Round with 303<sup>67</sup> of the 566<sup>68</sup> municipalities in New Jersey signaling their intent to participate.

Under the FHA, a participating municipality must create a housing element that will meet its current and prospective need for affordable housing.<sup>69</sup> The housing element should include an inventory of existing housing stock that details the number of affordable housing units available, the rental value, a projection of future affordable housing construction, analysis of the municipality's demographic characteristics, and its existing and probable future employment opportunities.<sup>70</sup> The FHA provides a non-exhaustive list as to how a municipality can comply with its affordable-housing requirements.<sup>71</sup> The suggestions include a redetermination of how much land is needed for residential housing, a determination of how to

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<sup>62</sup> *Id.* § 52:27D-304(a).

<sup>63</sup> *Id.* § 52:27D-307.

<sup>64</sup> *See id.* § 52:27D-309(a) (stating that "each municipality *which so elects* shall, by duly adopted resolution of participation, notify the council of its intent to submit to the council its fair share housing plan" (emphasis added)); *see also COAH Fact Sheet*, N.J. DEPT. OF CMTY. AFFAIRS, COUNCIL ON AFFORDABLE HOUSING, <http://www.state.nj.us/dca/affiliates/coah/reports/factsheet.html> (last visited Feb. 7, 2009) (stating "[t]he Act [FHA] also stipulated that . . . COAH is a voluntary process") [hereinafter *COAH Fact Sheet*].

<sup>65</sup> N.J. STAT. ANN. § 52:27D-309(a).

<sup>66</sup> *See* § 52:27D-309(b).

<sup>67</sup> Press Release, Council on Affordable Housing, Council on Affordable Housing Announces Record Participation (Jan. 7, 2009).

<sup>68</sup> *Fast Facts*, STATE OF N.J., <http://www.state.nj.us/nj/about/facts/facts> (last visited March 29, 2009).

<sup>69</sup> N.J. STAT. ANN. § 52:27D-310; *see supra* note 11.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* § 52:27D-311.

keep housing units affordable to low- and moderate-income residents, and plans for infrastructure expansion if required.<sup>72</sup> A municipality then submits its newly created housing element to the Council and petitions the Council for substantive certification.<sup>73</sup> If the public makes no objections to a municipality's housing element within forty-five days after the date of notice to the public, the Council will review the housing element and grant substantive certification providing certain criteria are met.<sup>74</sup>

Upon receiving substantive certification and construction of the affordable-housing units the municipality is obligated to build, a municipality may alter its zoning ordinances without approval of the Council.<sup>75</sup> Thus, a municipality may rezone property zoned for affordable housing if it has received substantive certification and built the required housing to fulfill its obligation.<sup>76</sup> This is significant because the law designed to handle construction of affordable housing, the FHA, allows a municipality to eliminate planned surplus, but affordable housing remains an inherently beneficial use for the purposes of obtaining a use variance. This makes the use variance procedure, which is regarded as an exception to the preference for zoning, more protective than the FHA when it comes to surplus affordable housing. In order to achieve efficient land uses and to harmonize the FHA with the MLUL, the prospect of excess affordable housing should be treated the same under both statutes. Doing this is particularly salient given the intended rarity of variances.<sup>77</sup> Treating affordable housing as a non-inherently beneficial use would allow affordable housing to be treated similarly under both the FHA and

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<sup>72</sup> § 52:27D-311(a)(2),(3),(4).

<sup>73</sup> *Id.* § 52:27D-313.

<sup>74</sup> Substantive certification will be granted provided the Council finds:  
[a] The municipality's fair share plan is consistent with the rules and criteria adopted by the council and not inconsistent with achievement of the low and moderate income housing needs of the region . . . [b] The combination of the elimination of unnecessary housing cost-generating features from the municipal land use ordinances and regulations, and the affirmative measures in the housing element and implementation plan make the achievement of the municipality's fair share of low and moderate income housing realistically possible . . . .

*Id.* § 52:27D-314.

<sup>75</sup> N.J. STAT. ANN. § 52:27D-311(g).

<sup>76</sup> *See id.*; *see also* V & L Assocs. v. Twp. of Montville, No. A-2121-04T5, 2006 N.J. Super. Unpub. LEXIS 1343, at \*41 (N.J. Super. Ct. App. Div. Jun. 2, 2006) (interpreting § 52-27D-311(g) and stating that "[t]he only benefit conferred by the statute [§ 52:27D-311(g)] is to allow a municipality to rezone property that had been designated for affordable housing but later determined to be surplus to its obligations").

<sup>77</sup> *See infra* Part III.A.

the MLUL; yet, a non-inherently beneficial use analysis would still allow for construction of additional affordable housing after taking into account the pertinent criteria.

Notably, the FHA effectively eliminated the builder's remedy for municipalities that receive substantive certification.<sup>78</sup> But municipalities that choose not to participate in the Council's certification process are susceptible to builder's remedy lawsuits and "lose their ability to choose where and how affordable housing will be provided."<sup>79</sup> In *Homes of Hope*, the Eastampton Land Use Planning Board (Board) argued that declaring affordable housing an inherently beneficial use in a municipality that has received substantive certification from the Council would be tantamount to a builder's remedy.<sup>80</sup> The Board reasoned that the effect was similar because it would lose the ability to control the location of affordable housing within its boundaries despite its compliance with the Council's requirements.<sup>81</sup>

Homes of Hope, Inc. disagreed; it pointed to the definition of a builder's remedy as found in the FHA.<sup>82</sup> Specifically, Homes of Hope, Inc. explained the relief it sought was prerogative writ relief<sup>83</sup> and not a builder's remedy that would be a "court imposed remedy for a litigant who is an individual or a profit-making entity in which the court requires a municipality to utilize zoning techniques . . . which provide the economic viability of a residential development."<sup>84</sup>

Clearly, Homes of Hope, Inc. did not literally seek a builder's remedy, but the practical effect of allowing affordable housing to remain as an inherently beneficial use in Eastampton is the same as a builder's remedy. Eastampton did in fact lose its ability to decide where affordable housing would go within its borders despite having planned accordingly for its fair share of the housing shortfall, having received substantive certification of its plan and effecting construction of its fair share creating a surplus of at least twenty-one units.<sup>85</sup>

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<sup>78</sup> N.J. STAT. ANN. § 52:27D-328.

<sup>79</sup> *COAH Fact Sheet*, *supra* note 64.

<sup>80</sup> Brief of Defendant/Appellant Eastampton Township Land Use Planning Board at 14–15, *Homes of Hope, Inc. v. Eastampton Twp. Land Use Planning Bd.*, 976 A.2d 1128 (N.J. Super. Ct. App. Div. Sept. 9, 2008) (No. A-5551-07T2) [hereinafter Brief of Eastampton].

<sup>81</sup> *See id.* at 11.

<sup>82</sup> Brief of Plaintiff/Respondent Homes of Hope, Inc. at 16, *Homes of Hope, Inc. v. Eastampton Twp. Land Use Planning Bd.*, 976 A.2d 1128 (N.J. Super. Ct. App. Div. Oct. 2, 2008) (No. A-5551-07T2) [hereinafter Brief of Homes of Hope, Inc.].

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Brief of Eastampton, *supra* note 80, at 10.

This is an important point because in a FHA compliant municipality, a use variance for affordable housing will effectively be a builder's remedy despite the legislature's attempt to do away with builders' remedies in the FHA. Per the decision in *Homes of Hope*, an application for a use variance to build affordable housing will be analyzed under the inherently beneficial use status, which does not take into account site suitability.<sup>86</sup> Effectively, a municipality loses control over where affordable housing goes, just as it does via a builder's remedy, despite its compliance with the FHA and despite a lack of need for affordable housing as evidenced by its compliance with the FHA. If an application to build affordable housing is reviewed under the non-inherently beneficial use standard, a municipality would retain more control over where affordable housing is built within its borders.

*D. The Successes and Failures of the FHA*

The FHA has been criticized as a deviation from what the New Jersey Supreme Court intended in *Mount Laurel I* and *II*. While the objective behind implementing the FHA was to codify the constitutional obligation announced in *Mount Laurel I* and affirmed in *Mount Laurel II*, some argue that the FHA weakened the obligation with unnecessary procedure.<sup>87</sup> Others conclude that while benefits have been associated with the FHA, those benefits have not been bestowed upon racial minorities.<sup>88</sup> One author found that while some affordable housing may have been produced by the FHA, "those units have primarily gone to white home buyers, furthering the racial segregation and contradicting the spirit of *Mount Laurel*."<sup>89</sup>

A study conducted in 1997 indicated that black and Latino applicants had significantly less success in obtaining affordable housing than their white counterparts.<sup>90</sup> At the time the study was done, the authors concluded that, in obtaining affordable housing, blacks had only half of the success rate of whites and that Latinos had a third of

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<sup>86</sup> See *infra* Part III.B.

<sup>87</sup> See Eamonn K. Bakewell, *Foreclosure of a Dream: The Impact of the Council on Affordable Housing's New Regulations on the Constitutional Duty to Provide Affordable Housing in New Jersey*, 2 RUTGERS J.L. & PUB. POL'Y 310, 317-20 (2005).

<sup>88</sup> Bernard K. Ham, Comment, *Exclusionary Zoning and Radical Segregation: A Reconsideration of the Mount Laurel Doctrine*, 7 SETON HALL CONST. L.J. 577, 609-10 (1997).

<sup>89</sup> *Id.* at 610.

<sup>90</sup> Naomi Bailin Wish & Stephen Eisdorfer, *Mount Laurel Housing Symposium: The Impact of Mount Laurel Initiatives: An Analysis of the Characteristics of Applicants and Occupants*, 27 SETON HALL L. REV. 1268, 1303 (1997).

the success rate of whites.<sup>91</sup> The disparity could be explained based on the pricing system used by the Council.<sup>92</sup> The regulations that were in effect at the time of the study only touched the very top of the low-income bracket.<sup>93</sup> The study found that most successful applicants under the FHA were elderly white women, but that determining the true need of the elderly and whether it was actually met were difficult to do.<sup>94</sup>

While the ultimate success of the FHA might be debatable, it is unclear how allowing affordable housing to remain as an inherently beneficial use in a municipality that has fully complied with its fair share obligation will remedy the deficiencies of the FHA. The legislature's purpose in implementing the FHA was to create a unified, comprehensive approach to tackling the housing shortfall.<sup>95</sup> If the FHA is deficient it should be examined and revamped. Given the recognized limitations on the grant of variances, they cannot be used to create the amount of housing envisioned by the FHA.<sup>96</sup> The most effective way to handle the shortfall is in a comprehensive, state-wide initiative. Allowing affordable housing to retain preferential treatment in use variance applications in municipalities that have fully complied with the FHA undermines the purpose of a variance, leads to inefficient land use and usurps zoning boards' authority to control the use of land.<sup>97</sup>

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 1304.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 1305.

<sup>95</sup> N.J. STAT. ANN. § 52:27D-302(c) (West 2008) (“The interest of all citizens . . . would be best served by a comprehensive planning and implementation response to [the] constitutional obligation [announced in *Mount Laurel I* and *II*].”).

<sup>96</sup> See *Twp. of Dover v. Bd. of Adjustment of Dover*, 386 A.2d 421, 427 (N.J. Super. Ct. App. Div. 1978) (discussing factors to consider in determining whether a Board of Adjustment has exceeded its authority in granting a variance for a project).

<sup>97</sup> In fact at trial, Homes of Hope, Inc. argued that the difficulty of obtaining a variance for a use not deemed inherently beneficial was very difficult.

It's almost like equal protection where if you have – if you fall into the category of a suspect class, you have a chance, and if you don't, you don't have much of a chance, and that's how it is with inherently beneficial. If you get into that inherently beneficial category, you have a fighting chance on a downhill road, and if you are not, my experience is you have almost no chance.

See Brief of Eastampton, *supra* note 80, at app. DA13. This argument, however, does not acknowledge the fact that variances are not intended to be easy to obtain. See *infra* Part III.A.

## III. VARIANCE PRACTICES

A. *Plan for the Future*

The benefits from zoning are numerous. Zoning leads to efficient uses of resources and planning.<sup>98</sup> Municipal governments may wish to reduce the potential for car accidents by creating residential districts that tend to have less traffic than commercial districts.<sup>99</sup> Predictable development is necessary to allocate funds to the development of roads and manageable traffic patterns.<sup>100</sup> Zoning allows a municipality to plan its water systems based on a projected need, and it helps to contain noxious fumes from industrial uses.<sup>101</sup>

In New Jersey, a municipality's right to implement zoning rules that control the use of land within its boundaries is based on the police powers found in the New Jersey State Constitution and has been codified by the New Jersey State Legislature.<sup>102</sup> The importance of planning for development through zoning is evidenced by the stated intentions of the MLUL.<sup>103</sup> One of the stated objectives of the MLUL is to control development in order to promote appropriate densities that will contribute to the well-being of the communities, neighborhoods, and environment.<sup>104</sup> A municipality's zoning ordinances are presumptively reasonable.<sup>105</sup> To reflect the policy of comprehensive zoning, which underlies the MLUL, variances should be granted sparingly and under exceptional circumstances.<sup>106</sup> In fact, William Cox, a foremost authority on New Jersey land use and zoning, writes, "Because there is a strong legislative policy favoring land use planning by

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<sup>98</sup> See *Vill. of Euclid v. Amber Realty Co.* 272 U.S. 365, 392–94 (1926) (stating various benefits associated with zoning); see also N.J. STAT. ANN. § 40:55D-2(a)–(o) (West 1991) (listing various purposes for zoning).

<sup>99</sup> See *Euclid*, 272 U.S. at 392–94.

<sup>100</sup> See *id.*

<sup>101</sup> See *id.*

<sup>102</sup> See generally *Fischer v. Twp. of Bedminster*, 93 A.2d 378, 381–83 (N.J. 1952).

<sup>103</sup> N.J. STAT. ANN. § 40:55D-2(e) (West 2009).

<sup>104</sup> *Id.*

<sup>105</sup> *Ne. Towers v. Zoning Bd. of Adjustment of W. Patterson*, 744 A.2d 190, 195 (N.J. Super. Ct. App. Div. 2000).

<sup>106</sup> *Id.*; *Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment*, 778 A.2d 482, 495 (N.J. Super. Ct. App. Div., 2001); see also *Pierce Estates Corp., v. Bridgewater Twp. Zoning Bd. of Adjustment*, 697 A.2d 195, 199 (N.J. Super. Ct. App. Div. 1997) ("[B]ecause use variances tend to impair sound zoning, they should be granted sparingly and with great caution. . . . Consequently, 'an applicant bears a heavy burden in overcoming a denial.'" (internal citations omitted)).

ordinance rather than by variance, the grant of a [use] variance will always be the exception rather than the rule.”<sup>107</sup>

New Jersey’s preference for planning through zoning is also seen in the standard of judicial review afforded to a grant or denial of a use variance. Because zoning boards have a peculiar knowledge of local conditions, their decisions on whether to grant a variance are viewed deferentially.<sup>108</sup> Notably, “[e]ven when doubt is entertained as to the wisdom of the action, or as to some part of it, there can be no judicial declaration of invalidity in the absence of clear abuse of discretion by the public agencies involved.”<sup>109</sup> When under judicial review, the presumption in favor of planning via zoning manifests itself in the form of greater deference to a zoning board’s decision to deny a variance than to a grant of a variance.<sup>110</sup>

Specifically, judicial review of a zoning board’s decision is limited; “[a] board’s decision is presumptively valid, and is reversible only if arbitrary, capricious and unreasonable. . . . In sum, courts will defer to a decision if it is supported by the record and is not so arbitrary, capricious or unreasonable as to amount to an abuse of discretion.”<sup>111</sup> Furthermore, each case that involves a grant or a denial of a use variance should be reviewed on its own facts,<sup>112</sup> which is significant because many cases that involve an assessment of affordable housing as an inherently beneficial use, including *Homes of Hope*, appear to simply declare the project an inherently beneficial use because it has been one in the past.<sup>113</sup> Courts are inconsistent: some courts reference in their analysis a need for an inherently beneficial use, and others only refer to precedent in declaring a use inherently beneficial.<sup>114</sup> Clearly, despite this inconsistency, “determining wheth-

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<sup>107</sup> COX, *supra* note 23, at 182; *see also Pierce Estates Corp.*, 697 A.2d at 199.

<sup>108</sup> *Ne. Towers*, 744 A.2d at 199; *see also Wash. Shopping Ctr., Inc. v. Twp. of Wash. Land Use Bd.*, No. A-0444-07T2, 2008 N.J. Super. Unpub. LEXIS 427, at \*10 (N.J. Super. Ct. App. Div. Aug. 6, 2008) (stating that “[b]oard decisions are presumed valid and the party attacking them has the burden of proving otherwise” (internal citations omitted)).

<sup>109</sup> *Ne. Towers*, 744 A.2d at 199 (quoting *Kramer v. Bd. of Adjustment of Sea Girt*, 45 N.J. 268, 296 (N.J. 1965)).

<sup>110</sup> *Med. Ctr. at Princeton*, 778 A.2d at 495 (N.J. Super. Ct. App. Div. 2001) (explaining that “[c]ourts give greater deference to variance denials than to grants of variances, since variances tend to impair sound zoning”).

<sup>111</sup> *Smart SMR v. Borough of Fair Lawn Bd. of Adjustment*, 704 A.2d 1271, 1280 (N.J. 1997) (internal citations omitted).

<sup>112</sup> *See Burbridge v. Twp. of Mine Hill*, 568 A.2d 527, 532 (N.J. 1990).

<sup>113</sup> *See infra* Part III.C.

<sup>114</sup> *See infra* Part III.C.

er a use is inherently beneficial is a fact-sensitive inquiry, even where the use involves health care or hospital facilities.”<sup>115</sup>

Because evaluation of a use variance is a fact-intensive inquiry, a use variance application to build affordable housing should include an assessment of a municipality’s need. The nature of a fact-intensive inquiry would seemingly lead to the conclusion that a particular set of facts in one municipality that give rise to an inherently beneficial standard for a use variance would not necessarily do so in another. Yet affordable housing remains an inherently beneficial use despite the fact that the conditions in one municipality might not warrant such preferential status. This is clearly the exception swallowing the rule. Variances are intended to be used sparingly,<sup>116</sup> yet there currently seems to be a per se rule that no matter the factual scenario, affordable housing will remain an inherently beneficial use.

*B. Procedure for Obtaining a Variance: Inherently and Non-Inherently Beneficial Use Standards*

The MLUL governs the ability of a zoning board to grant a variance. Under the MLUL a variance may be granted for special reasons to allow a departure from the planned use of the area to permit “[a] use or principal structure in a district restricted against such use or principal structure.”<sup>117</sup> The MLUL does not provide a definition for what constitutes a special reason to grant a variance. The Supreme Court of New Jersey has determined that a special reason for granting a variance exists if the reason falls within the purposes of zoning as specified by the MLUL in section 40:55D-2.<sup>118</sup> One purpose of zoning set forth in section 40:55D-2 of the MLUL, upon which applicants most commonly rely as a special reason for granting a use variance, is that the proposed use promotes the general welfare.<sup>119</sup>

To obtain a use variance, an applicant must satisfy both positive and negative criteria.<sup>120</sup> The positive criteria are satisfied by showing a special reason as listed in section 40:55D-2 of the MLUL.<sup>121</sup> If the use is non-inherently beneficial and the asserted special reason is the promotion of the general welfare, which in most cases it is, the appli-

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<sup>115</sup> *Med. Ctr. at Princeton*, 778 A.2d at 501.

<sup>116</sup> *Id.* at 495; *see also supra* notes 106–07 and accompanying text.

<sup>117</sup> N.J. STAT. ANN. § 40:55D-70(d)(1) (West 2009).

<sup>118</sup> *Burbridge v. Twp. of Mine Hill*, 568 A.2d 527, 533 (N.J. 1990).

<sup>119</sup> *Id.*

<sup>120</sup> *Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment*, 704 A.2d 1271, 1278 (N.J. 1997).

<sup>121</sup> *See Burbridge*, 568 A.2d at 532–33.



cant must also show the proposed use is particularly well-suited for the target parcel of land because “nearly all lawful uses of property promote . . . the general welfare. Thus, if the general social benefits of any individual use—without reference to its particular location—were to be regarded as an adequate special reason, a special reason almost always would exist for a use variance.”<sup>122</sup> A proposed use that is determined to be an inherently beneficial use, however, will presumptively satisfy the positive criteria without any requirement that the use be particularly well-suited for the target property.<sup>123</sup>

To satisfy the negative criteria for a non-inherently beneficial use, the applicant must show both that the variance can be granted without substantial detriment to the public good and that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance.<sup>124</sup> The applicant must meet what is referred to as an enhanced quality of proof.<sup>125</sup> Specifically, “clear and specific findings” must demonstrate “that the variance sought is not inconsistent with the intent and purpose of the master plan and zoning ordinance.”<sup>126</sup> The proofs and findings must “reconcile the proposed use variance with the zoning ordinance’s omission of the use from those permitted in the zoning district.”<sup>127</sup>

The first prong of the negative criteria focuses on the variance’s effect on the surrounding area and buildings.<sup>128</sup> Under the first prong the relevant question is whether allowing the variance will cause damage to the character of the neighborhood, resulting in substantial detriment to the public good.<sup>129</sup> The second prong asks whether the proposed use will undermine the intent of the zoning plan.<sup>130</sup> Cox explains this prong focuses on “the extent to which a grant of the variance would constitute an arrogation of governing body and planning board authority.”<sup>131</sup> The New Jersey Supreme

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<sup>122</sup> Kohl v. Borough of Fair Lawn, 234 A.2d 385, 391 (N.J. 1967).

<sup>123</sup> Sica v. Bd. of Adjustment of Wall, 603 A.2d 30, 34 (N.J. 1992).

<sup>124</sup> *Smart SMR of N.Y., Inc.*, 704 A.2d at 1278.

<sup>125</sup> Medici v. BPR Co., 526 A.2d 109, 119 (N.J. 1987).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Homes of Hope, Inc. v. Mount Holly Twp. Zoning Bd. of Adjustment*, 566 A.2d 575, 579 (N.J. Super. Ct. App. Div. 1989) (quoting *Medici v. BPR Co.*, 526 A.2d 109, 121 n.12 (N.J. 1987)).

<sup>129</sup> *Id.*

<sup>130</sup> *See id.*

<sup>131</sup> COX, *supra* note 23, at 252 (explaining that this requirement helps make it clear that “municipalities should make zoning decisions by ordinance rather than by variance”).

Court instructed that, with regard to the negative criteria, “[t]he board’s resolution should contain sufficient findings, based on the proofs submitted, to satisfy a reviewing court that the board has analyzed the master plan and zoning ordinance, and determined that the governing body’s prohibition of the proposed use is not incompatible with a grant of the variance.”<sup>132</sup> If a proposed use is deemed to be inherently beneficial, the applicant does not need to meet the higher quality of proof to satisfy the negative criteria, but a balancing test still applies.<sup>133</sup> When a zoning board is confronted with an application for a use variance to construct an inherently beneficial use, the supreme court suggests a zoning board should first identify the public interest at stake, acknowledging that some uses are more beneficial than others.<sup>134</sup> Second, a board should identify the detrimental effect, if any, of granting the variance.<sup>135</sup> Third, a board can alleviate the detrimental effects by imposing reasonable conditions on the grant of the variance.<sup>136</sup> Fourth, the board should weigh the positive and the negative criteria to determine whether the former outweighs the latter.<sup>137</sup> Only once both the positive and negative criteria are met should a zoning board approve a use variance.<sup>138</sup>

C. *The Inherently Beneficial Use Doctrine Explained*

The inherently beneficial use doctrine is a judicially created doctrine.<sup>139</sup> Because no definition exists for what qualifies as a special reason in the MLUL, the courts were left to determine what type of use would qualify as a special reason for a use variance.<sup>140</sup> The courts created the doctrine to handle a narrow spectrum of uses that were deemed so beneficial to the community that municipalities should use a favorable approach when considering applications for such uses.<sup>141</sup> Because of the perceived benefits of these uses, municipalities were encouraged to take into account not only their need but also

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<sup>132</sup> *Medici v. Madison Property Co. No. 4*, 526 A.2d 109, 121 (N.J. 1987).

<sup>133</sup> *Med. Ctr. at Princeton v. Twp. of Princeton Zoning Bd. of Adjustment*, 778 A.2d 482, 496 (N.J. Super. Ct. App. Div. 2001).

<sup>134</sup> *Sica v. Bd. of Adjustment of Wall*, 603 A.2d 30, 37 (N.J. 1992); *Med. Ctr. at Princeton*, 778 A.2d at 496.

<sup>135</sup> *Sica*, 603 A.2d at 37; *Med. Ctr. at Princeton*, 778 A.2d at 496.

<sup>136</sup> *Sica*, 603 A.2d at 37; *Med. Ctr. at Princeton*, 778 A.2d at 496.

<sup>137</sup> *Sica*, 603 A.2d at 37; *Med. Ctr. at Princeton*, 778 A.2d at 496–97.

<sup>138</sup> *See Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment*, 704 A.2d 1271, 1278 (N.J. 1998).

<sup>139</sup> *COX*, *supra* note 23, at 187.

<sup>140</sup> *See Kohl v. Borough of Fair Lawn*, 234 A.2d 385, 389 (N.J. 1967).

<sup>141</sup> *COX*, *supra* note 23, at 187.

the regional need.<sup>142</sup> To determine if something is an inherently beneficial use is a fact-intensive inquiry, even when it comes to such proposed uses as hospitals or schools.<sup>143</sup>

One criticism of the inherently beneficial use doctrine is that it does not consider site suitability as is required for non-inherently beneficial uses. An article appearing in the *New Jersey Planner* advocated a reconsideration of which criterion are relaxed for inherently beneficial uses.<sup>144</sup> The author wrote that “[s]ite suitability’ should be at or near the top of zoning objectives; yet suitability receives no consideration if the use is ‘inherently’ beneficial.”<sup>145</sup> The article goes on to argue that “[s]ite suitability should be shown for all variant uses. Why shouldn’t there be substantive special reasons for *all* variant uses instead of a compulsory and automatic process that ignores the essence of zoning, i.e. the appropriate use of land.”<sup>146</sup>

This argument is particularly salient in *Homes of Hope*. Eastampton complied with its FHA requirements, submitted a housing plan, received substantive certification, and has actually constructed a surplus of units.<sup>147</sup> Despite all of this, a builder was able to request a variance and have it reviewed under a preferential standard without any consideration to the suitability of the land for the purpose.<sup>148</sup> This precedent threatens sound zoning principles. It will allow for uses that have a higher density than the use for which the zone is designed, which potentially will lead to increased demand on systems and increased traffic. It gives the builder the upper hand in determining where to put affordable housing without reference to the policy behind zoning. Therefore, an application for a use variance to build affordable housing in a fully FHA-compliant municipality should be reviewed in light of the suitability of the land for the use as provided by the non-inherently beneficial use analysis. This will allow for adequate planning for the needs of particular zones and promotes efficient use of land.

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<sup>142</sup> *Id.*

<sup>143</sup> *Med. Ctr. at Princeton*, 778 A.2d at 501.

<sup>144</sup> Donald M. Ross, *‘Inherently Beneficial’ Re-Thought*, N.J. PLANNER, Spring 1998 at U-4.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> Brief of Eastampton, *supra* note 80, at 14.

<sup>148</sup> *See supra* Part III.A.

*D. The Inherently Beneficial Use Doctrine in Action*

Applicants for variances have relied on the inherently beneficial use doctrine in an attempt to establish the positive criteria for a multitude of uses. Generally, courts reference some form of need when discussing the applicability of the doctrine to the proposed use. In overturning a grant of a variance for an expansion of a nonconforming use, the New Jersey Supreme Court focused on the fact that no need for the expansion had been shown. In *Kohl v. Borough of Fair Lawn*, a dairy requested a variance to substantially increase its nonconforming use.<sup>149</sup> The special reason advanced for the grant of the variance was that the processing and distribution of milk served the general welfare.<sup>150</sup> Turning to a non-inherently beneficial use analysis, the court noted that while processing milk did serve the general welfare, that reason alone did not provide a basis for the grant of a variance.<sup>151</sup> The court found no showing that an expansion of the use on that particular piece of land was necessary for the promotion of the general welfare.<sup>152</sup> The court further noted that even if the present location was necessary to the welfare of the area, no evidence indicated that the municipality had *any need* for the *additional* milk supply that would be created by the expansion.<sup>153</sup> Despite the fact that the court referenced a *need* while engaging in a non-inherently beneficial analysis; the discussion is noteworthy because it illustrates a hesitancy to subvert the established zones by issuing a variance for a use for which there is no need.

Additionally, the New Jersey Supreme Court has declined to find that a cell phone tower constitutes an inherently beneficial use. When contemplating whether a cell phone tower should be an inherently beneficial use, the court explained that “inherently beneficial uses are generally limited in number within a single municipality.”<sup>154</sup> The court went on to note two applications had already been made for a use variance to build cell phone towers in the area, and the possibility of more led to concern about a potentially large number of communications providers who might wish to install any number of towers on undesignated locations throughout the state.<sup>155</sup> In another

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<sup>149</sup> 234 A.2d 385, 387 (N.J. 1967).

<sup>150</sup> *Id.* at 391.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 391–92.

<sup>154</sup> *Smart SMR of New York, Inc. v. Borough of Fair Lawn Bd. of Adjustment*, 704 A.2d 1271, 1281 (N.J. 1998).

<sup>155</sup> *See id.* at 1282.

case dealing with a variance for a cell phone tower, the appellate division found the applicant could not show that the cell phone tower would in fact improve the particular municipality's communications, and therefore, it was not an inherently beneficial use.<sup>156</sup> This decision led William Cox to surmise that "conceivably more compelling beneficial uses such as a school or hospital could be found not to be inherently beneficial under particular circumstances."<sup>157</sup> Presumably, such circumstances would exist where a municipality and its surrounding areas had no need for the proposed use.

On the other hand, the New Jersey Supreme Court found that a hospital for emotionally disturbed persons constituted a special reason for a use variance.<sup>158</sup> The court paid particular attention to the urgent need for a hospital of this kind.<sup>159</sup> It found that a municipality may consider a need that exists beyond its own borders.<sup>160</sup> The New Jersey Supreme Court acknowledged a similar need in *Sica v. Board of Adjustment of Township of Wall* for a head trauma center.<sup>161</sup> In that case, the applicant received a certificate of need from the New Jersey Department of Health.<sup>162</sup> The court easily deemed the head trauma center an inherently beneficial use and cited the certificate from the Department of Health as evidence of the need for such a center.<sup>163</sup>

In another case, however, the appellate division found that a drug-treatment facility geared towards Jewish males did not constitute an inherently beneficial use.<sup>164</sup> The court noted that extensive evidence existed substantiating a need for this kind of rehabilitation facility in the area, but no evidence existed that the Orthodox Jewish community in the area had a need for such a facility.<sup>165</sup> In distinguishing this case from *Sica*, the court mentioned that in *Sica* the applicant for a use variance had a certificate of need from the Department of Health, and in this case, the applicant did not.<sup>166</sup> This case is

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<sup>156</sup> See *Pierce Estates Corp. v. Bridgewater Twp. Zoning Bd. of Adjustment*, 697 A.2d 195, 200-01 (N.J. Super. Ct. App. Div. 1997).

<sup>157</sup> COX, *supra* note 23, at 189.

<sup>158</sup> See *Kunzler v. Hoffman*, 225 A.2d 321, 326 (N.J. 1966).

<sup>159</sup> See *id.*

<sup>160</sup> *Id.*

<sup>161</sup> See 603 A.2d 30 (N.J. 1992).

<sup>162</sup> *Id.* at 34.

<sup>163</sup> See *id.*

<sup>164</sup> See *Jewish Family Serv., Inc. v. Zoning Bd. of Adjustment of Bergenfield*, No. A-4450-04T5, 2006 N.J. Super. Unpub. LEXIS 795, at \*11 (N.J. Super. Ct. App. Div. Jan. 13, 2006).

<sup>165</sup> *Id.* at \*9.

<sup>166</sup> *Id.* at \*9-10.

notable because it demonstrates that even though a general need may exist for a particular use, the local zoning board is fully capable and better positioned to determine whether a particular need within the community is satisfied by the proposed inherently beneficial use. In this case, the zoning board determined that the proposed inherently beneficial use did not fulfill a demonstrated need within the community and therefore did not constitute an inherently beneficial use.<sup>167</sup>

As the cases discussed above indicate, a general need for a use may be insufficient to qualify a proposed project as an inherently beneficial use. But generally, courts reference some need for the proposed use when discussing an application for a use variance. A discussion as to the necessity of a use is appropriate and imperative in order to foster efficient uses of land and would correctly reflect the preference to contain and plan for particular uses through the adoption of zoning ordinances.

#### IV. AFFORDABLE HOUSING AS AN INHERENTLY BENEFICIAL USE

##### A. *The Early Cases*

The most frequently referenced case for the notion that affordable housing is an inherently beneficial use is *DeSimone v. Greater Englewood Housing Corp. No. 1*.<sup>168</sup> In *DeSimone*, a builder requested a variance to build 146 units of cluster-type, two-story apartments on a ten-acre parcel of land in a portion of the city zoned for single-family dwellings and inhabited predominately by whites.<sup>169</sup> The development was proposed in order to allow for relocation of residents from another portion of the city, which was predominately black and consisted of dilapidated housing.<sup>170</sup> The Board of Adjustment for the City of Englewood granted the variance and noted that the project served the general welfare because the city suffered from a large housing shortage for low-income families.<sup>171</sup> The New Jersey Supreme Court held as follows:

[I]n the light of public policy and the law of the land, that public or, as here, semi-public housing accommodations to provide safe, sanitary and decent housing, to relieve and replace substandard living conditions or to furnish housing for minority or underprivi-

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<sup>167</sup> See *id.* at \*5.

<sup>168</sup> 267 A.2d 31 (N.J. 1970).

<sup>169</sup> *Id.* at 33.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 37.

leged segments of the population outside of ghetto areas is a special reason adequate to meet that requirement of [the MLUL] and to ground a variance.<sup>172</sup>

The facts surrounding the *DeSimone* case and the nature of the challenges to the variance grant caused the court to be wary of the motivation behind the challenges.<sup>173</sup> The court noted that a true desire to vindicate the policy of the statutes invoked was not apparent, but rather, the court found a desire to oppose the project at all costs.<sup>174</sup>

In a subsequent case, the New Jersey Supreme Court wrangled with whether to declare private affordable housing an inherently beneficial use such that no consideration of site suitability would be required.<sup>175</sup> It decided not to answer the question and limited its holding in *DeSimone* to public or semi-public housing projects.<sup>176</sup> But the Law Division found that private multi-family, moderate-income dwellings constituted a special reason for justifying a variance.<sup>177</sup> Interestingly, the court deemed it not an inherently beneficial use but rather “a special reason.”<sup>178</sup> Important, though, is the court’s discussion regarding the need within the municipality for affordable housing as evidenced by expert opinion.<sup>179</sup> After declaring that a special reason existed, the court did not subsequently engage in a site-suitability discussion so the court likely meant, and the case has been

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<sup>172</sup> *Id.* at 38–39.

<sup>173</sup> *See id.* at 35.

<sup>174</sup> *DeSimone*, 267 A.2d at 35.

<sup>175</sup> *Fobe Assoc. v. Mayor of Demarest*, 379 A.2d 31, 39 (N.J. 1977), *abrogated by S. Burlington NAACP v. Twp. of Mount Laurel*, 456 A.2d 390, 431 n.15 (N.J. 1983). Limiting *DeSimone* the court stated,

[T]he inquiry [in this case] turns to whether provision of small middle-income apartment units in Demarest is ‘inherently’ in service of the general welfare so as to warrant a d. variance . . .

[O]ne is hard put to respond to the insistence that if adequate housing of all categories of people is an absolute essential in promotion of the general welfare required in all local land use regulation, as stated in *Mount Laurel* . . . , a variance to provide additional rental housing in a region which plainly needs it is ‘inherently’ for the general welfare . . . [w]e propose to leave definitive resolution of this . . . to a future case . . .

*Fobe Assoc.*, 379 A.2d at 39–40 (internal citations and quotations omitted).

<sup>176</sup> *Id.* at 40–41.

<sup>177</sup> *Brunetti v. Mayor of Madison*, 325 A.2d 851, 853 (N.J. Super. Ct. Law Div. 1974).

<sup>178</sup> *Id.*

<sup>179</sup> *See id.*

construed as establishing, that private, multi-family housing is an inherently beneficial use.<sup>180</sup>

In *Homes of Hope, Inc. v. Mount Holly Township Zoning Board of Adjustment*, the Law Division held the conversion of a single-family dwelling into low-income apartments was an inherently beneficial use.<sup>181</sup> The court found that the fact that Homes of Hope, Inc. is a private developer did not preclude its project from qualifying for the preferential treatment of the inherently beneficial use doctrine.<sup>182</sup> Unlike *Brunetti*, this case lacks any reference to a documented need for affordable housing within the municipality.<sup>183</sup> As recently as 2008, the appellate division found that construction of affordable housing is an inherently beneficial use for the purposes of satisfying the positive criteria of a use variance.<sup>184</sup> That opinion contains no discussion of a need for affordable housing nor does it contain any discussion of whether the particular municipality had satisfied its FHA obligation. The court merely stated that “affordable housing has been held to be an inherently beneficial use.”<sup>185</sup> These cases demonstrate the evolution of the inherently beneficial use doctrine in the affordable housing context and the largely cursory review of whether a proposed project satisfies an established need within the municipality.

*B. Homes of Hope, Inc. v. Eastampton Land Use Planning Board*

Homes of Hope, Inc., a non-profit provider of affordable housing, requested a use variance from the Board to build eight multi-family affordable housing units on a lot zoned solely for single-family dwellings.<sup>186</sup> The density limit in the zone was three units per acre; Homes of Hope, Inc. proposed a density of 9.4 units per acre.<sup>187</sup> Additionally, Homes of Hope, Inc.’s proposed use required a bulk variance from the minimum setback requirements; the zone required a

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<sup>180</sup> See *Homes of Hope, Inc. v. Mount Holly Twp. Zoning Bd. of Adjustment*, 566 A.2d 575, 577 (N.J. Super. Ct. Law. Div. 1989).

<sup>181</sup> *Id.* at 577.

<sup>182</sup> *Id.* at 577–78.

<sup>183</sup> See *id.* at 577 (“The creation of housing accommodations for the underprivileged at a reduced cost makes an important contribution to the general welfare. Homes’ plan, in operation, adds considerably to that contribution.”).

<sup>184</sup> *Wash. Shopping Ctr., Inc. v. Twp. of Wash. Land Use Bd.*, No. A-0444-07T2, 2008 N.J. Super. LEXIS 427, at \*13 (N.J. Super. Ct. App. Div. May 21, 2008).

<sup>185</sup> *Id.* at \*12.

<sup>186</sup> *Homes of Hope, Inc. v. Eastampton Twp. Land Use Planning Bd.*, 976 A.2d 1128, 1130 (N.J. Super. Ct. App. Div. 2009).

<sup>187</sup> Brief of Eastampton, *supra* note 80, at DA53.



forty-foot setback, but because of the configuration of the lot, Homes of Hope, Inc. could only provide a twenty-foot setback.<sup>188</sup> Homes of Hope, Inc. argued that the proposed construction of affordable housing on the lot was an inherently beneficial use.<sup>189</sup>

The Board denied the use variance, bulk variance, and other requests by Homes of Hope, Inc.,<sup>190</sup> reasoning that “surplus affordable housing proposed by [Homes of Hope, Inc.] is not inherently beneficial, since Eastampton Township [had] already satisfied its affordable housing obligation for the 3rd Round COAH cycle”<sup>191</sup> and had a surplus of twenty-one units.<sup>192</sup> The Board further opined that the proposed density would undermine the purpose of the zoning in direct contravention of the MLUL and that the proposed use would not promote “appropriate . . . aesthetics of the lot, neighborhood and the . . . [z]one.”<sup>193</sup> Additionally, the Board found the proposed on-street parking capacity was incompatible with the typical off-street parking of a residential neighborhood.<sup>194</sup>

Homes of Hope, Inc. appealed the Board’s decision and argued that the Board should have to reconsider the application for the use variance in light of the inherently beneficial status of affordable housing.<sup>195</sup> The trial court agreed with Homes of Hope, Inc. that affordable housing is an inherently beneficial use and instructed the Board to review the application for a use variance in light of its decree.<sup>196</sup> The Board appealed the decision, and the appellate division affirmed the trial court’s decision.<sup>197</sup> Specifically, the appellate division found that “affordable housing is an inherently beneficial use.”<sup>198</sup> The court further stated:

A municipality’s compliance with COAH regulations does not change the necessary site-specific analysis necessary for a [use] variance. Compliance protects the municipality from litigation and a builder’s remedy . . . but it does not impact the public policy of this State that low and moderate income affordable housing pro-

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<sup>188</sup> *Id.* at DA32.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at DA37.

<sup>191</sup> *Id.* at DA33–34.

<sup>192</sup> *Homes of Hope, Inc. v. Eastampton Twp. Land Use Planning Bd.*, 976 A.2d 1128, 1131 (N.J. Super. Ct. App. Div. 2009).

<sup>193</sup> Brief of Eastampton, *supra* note 80, at DA33.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at DA10.

<sup>196</sup> *Id.* at DA24.

<sup>197</sup> *See Homes of Hope*, 976 A.2d at 1134.

<sup>198</sup> *See id.* at 1131.

motes the general welfare and constitutes a special reason to support a “d” variance.<sup>199</sup>

The concurring opinion, however, found that it was not “illogical to conclude that once a municipality has actually provided its fair share of affordable housing, further affordable housing projects need not retain their status as inherently beneficial uses for the purpose of ‘d’ variance application.”<sup>200</sup> The concurrence further stated an act of the legislature would be required to declare that affordable housing is not an inherently beneficial use for the purpose of obtaining a use variance.<sup>201</sup>

### C. *Emotions Run High in Wake of Homes of Hope*

In the wake of the appellate division’s decision, a firestorm of criticism erupted. Assemblyman Scott T. Rumana, a Republican representing the Fortieth District of New Jersey,<sup>202</sup> declared that he intended to draft legislation to address the decision.<sup>203</sup> He pondered the utility of “having local land use boards if officials in Trenton or judges in a courtroom can impose their will over the decisions made at a local level with [the] best interests of property taxpayers in mind.”<sup>204</sup> State Senator Sean T. Kean, a Republican representing the Eleventh District of New Jersey,<sup>205</sup> proclaimed the “ruling has the potential to lead to overcrowded schools and even greater property tax increases in [his district] and across the state.”<sup>206</sup> He went on to say “taxpayers have already paid millions of dollars for affordable housing plans that have now been rendered useless.”<sup>207</sup>

Another article stated that the director of the New Jersey Sierra Club found the decision outrageous because it “overturn[ed] other case law that is more on point, including the Mount Laurel II deci-

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<sup>199</sup> *Id.* at 1133–34.

<sup>200</sup> *Id.* at 1136 (Chambers, J., concurring).

<sup>201</sup> *See id.*

<sup>202</sup> *Assemblyman Scott T. Rumana (R)*, N.J. LEGISLATURE, <http://www.njleg.state.nj.us/members/bio.asp?Leg=297> (last visited Feb. 10, 2010).

<sup>203</sup> Press Release, Assemblyman Rumana Says Property Taxpayers Will Never See Relief From Corzine’s and Court’s Housing Mandates (Aug. 25, 2009), *available at* [http://www.njassemblyrepublicans.com/press\\_release.php?id=953](http://www.njassemblyrepublicans.com/press_release.php?id=953).

<sup>204</sup> *Id.*

<sup>205</sup> *Biography*, SENATOR SEAN T. KEAN, N.J.’S 11TH LEGISLATIVE DIST., <http://seankean.senatenj.com/biography.php> (last visited Feb. 10, 2010).

<sup>206</sup> *Senator Sean T. Kean Slams COAH Court Ruling*, SENATOR SEAN T. KEAN, N.J.’S 11TH LEGISLATIVE DIST. (Aug. 31, 2009), <http://www.senatenj.com/index.php/seankean/sen-sean-kean-slams-coah-court-ruling/4067>.

<sup>207</sup> *Id.*

sion” and that the *Homes of Hope* decision “declare[d] open season on local towns and their zoning.”<sup>208</sup> The same article quoted the Independent gubernatorial candidate, Chris Daggett, as saying that “the ruling gives town[s] no incentive to comply with COAH” and would lead to “explosive litigation.”<sup>209</sup> Additionally, the League of Municipalities, a voluntary association authorized by State statute to help municipalities govern more effectively, to which all 566 municipalities belong, called upon the municipalities to adopt a resolution in reaction to *Homes of Hope*.<sup>210</sup> The resolution provided by the League of Municipalities urged the legislature to adopt a rule which would prevent any municipality from having to accept more than its fair share of housing by way of variance.<sup>211</sup>

*D. Criticism Overlooked Principled Reasons for Disagreeing with Homes of Hope*

Most of the public outcry<sup>212</sup> as a result of the *Homes of Hope* decision was exaggerated. But there are principled policy reasons that support Eastampton’s position and that harmonize zoning ordinances, variance procedures, and the FHA. The reasons for opposing the *Homes of Hope* decision that are discussed below and in Part V include the goal of efficient land use and to that end, the preference that development in New Jersey occur through planned zoning rather than through the use of a variance which is intended to be granted only for exceptional circumstances.<sup>213</sup> Further policy arguments are grounded in the notion that zoning boards are particularly well-suited to make decisions regarding the utility of a potential use within the municipality.<sup>214</sup> While individual legislators have advanced potential solutions to the legal issue presented in *Homes of Hope* and the deficiencies of the FHA, any solution that is adopted should ultimately focus on the most efficient use of land and resources, rather

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<sup>208</sup> Tom Hester, Sr., *N.J. Appeals Court’s Affordable Housing Ruling Sparks Outrage*, N.J. NEWSROOM (Aug. 25, 2009), <http://www.newjerseynewsroom.com/state/nj-appeals-courts-affordable-housing-ruling-sparks-outrage>.

<sup>209</sup> *Id.*

<sup>210</sup> *Sample Resolution for Legislative Action on Eastampton COAH Decision*, N.J. STATE LEAGUE OF MUNICIPALITIES (Sept. 14, 2009), [http://www.njslom.org/ml091409\\_coah.html](http://www.njslom.org/ml091409_coah.html).

<sup>211</sup> *Id.*

<sup>212</sup> *See supra* Part IV.C.

<sup>213</sup> *See supra* Part III.A.

<sup>214</sup> *See id.*

than create an opportunity for municipalities to escape responsibility for affordable housing shortfalls.<sup>215</sup>

First, the possibility that municipalities will automatically decide not to participate in the COAH process as a result of this case is unlikely.<sup>216</sup> Municipalities have other important reasons to comply with COAH, including the fact that the community would seek to avoid the possibility of costly litigation challenging a municipality's zoning ordinances as exclusionary.<sup>217</sup> A former director of COAH realized that affordable housing is a hard sell in municipalities but noted that the litigation costs associated with fighting an exclusionary zoning lawsuit outweighed the costs associated with creating a housing plan as the COAH process dictates.<sup>218</sup> Furthermore, participation in the COAH process affords a municipality several administrative remedies that must be exhausted prior to litigation if its zoning laws are challenged as being exclusionary.<sup>219</sup>

Fears that this case "declares open season" on municipalities' zoning laws are also misplaced.<sup>220</sup> The purpose of a variance is to grant specific relief from a zoning restriction on a specific parcel of land.<sup>221</sup> Case law establishes that a variance cannot be so vast as to cover large tracts of land:

The individuality of the variance approach is underscored by the limitation of the board of adjustment's power to a specific piece of property, a limitation expressed [by the MLUL] . . . when a large tract or a substantial area comprising several tracts is involved, the situation is beyond the intended scope of the variance procedure.<sup>222</sup>

If a zoning board granted a variance for such a purpose, it would be beyond the scope of authority granted to the zoning board.<sup>223</sup> Fears that the *Homes of Hope* decision can be used as a tool by which developers can run roughshod over a municipality's zoning ordinances are unfounded. Zoning ordinances will not be decimated because municipalities that are inclined to participate in COAH will likely continue

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<sup>215</sup> See *infra* Part.V.

<sup>216</sup> See Hester, *supra* note 208.

<sup>217</sup> See *COAH Fact Sheet*, *supra* note 64.

<sup>218</sup> Arthur Bernard, *Planning for Affordable Housing*, N.J. PLANNER, Spring 1996, at U-1.

<sup>219</sup> N.J. STAT. ANN. § 52:27D-316 (West 2009).

<sup>220</sup> Hester, *supra* note 208.

<sup>221</sup> See *Dover Twp. v. Bd. of Adjustment of Dover Twp.*, 386 A.2d 421, 426-27 (N.J. Super. Ct. App. Div. 1978).

<sup>222</sup> See *id.* at 427 (internal quotations omitted).

<sup>223</sup> *Id.* at 427.

to do so to avoid litigation costs and to avail themselves of administrative remedies provided by the FHA. While this decision will not permit developers to completely circumvent zoning ordinances, as some claimed,<sup>224</sup> it does, however, expand the role a use variance can play in development. Use variances are regarded as tools to be used only in exceptional circumstances and with great caution,<sup>225</sup> yet the *Homes of Hope* decision will enable a builder to request a use variance and have it reviewed under a preferential standard with little regard to whether the municipality has a particular need for additional affordable housing and also without any regard to whether the land is well-suited for the use. This effectively relaxes the extraordinary role use variances are intended to play in development.

Second, *Homes of Hope* did not chisel away at the *Mount Laurel* doctrine.<sup>226</sup> Both *Mount Laurel* cases addressed the prevalent use of exclusionary zoning, which municipalities used to keep out what some deemed undesirable segments of the population.<sup>227</sup> *Mount Laurel I* and *Mount Laurel II* decreed a constitutional obligation on the part of all municipalities to provide housing for all segments of the population within their zoning ordinances.<sup>228</sup> *Homes of Hope*, by contrast, deals with the appropriate standard to apply to a particular use in an application for a variance.<sup>229</sup> The basic notion that affordable housing provides benefits for a community and that a municipality cannot actively refuse to include it within its borders underlies the legal issues confronted in the *Mount Laurel* cases and *Homes of Hope*. But *Mount Laurel* dealt with what is constitutionally required of a municipality in creating zoning ordinances,<sup>230</sup> and *Homes of Hope* concerned what aspects of a proposed use must be considered in a use variance application.<sup>231</sup>

Contrary to the criticism that *Homes of Hope* overruled the *Mount Laurel* cases, in deciding *Homes of Hope*, the appellate division did not view either the MLUL or the FHA procedure as being intertwined at all.<sup>232</sup> In fact, the *Homes of Hope* decision indicated that the FHA

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<sup>224</sup> See *supra* Part IV.C.

<sup>225</sup> See *supra* notes 106–07 and accompanying text.

<sup>226</sup> Hester, *supra* note 208.

<sup>227</sup> See *supra* Part II.A–B.

<sup>228</sup> See *id.*

<sup>229</sup> See *Homes of Hope, Inc. v. Eastampton Twp. Land Use Planning Bd.*, 976 A.2d 1128, 1130 (N.J. Super. Ct. App. Div. 2009).

<sup>230</sup> See *supra* Part II.A–B.

<sup>231</sup> See *Homes of Hope*, 976 A.2d at 1130.

<sup>232</sup> *Id.* at 1133–34.

process, which gives meaning to the constitutional obligation created in the *Mount Laurel* cases, has no bearing at all on whether an application for a use variance to build affordable housing is an inherently beneficial use. Therefore, the appellate division in deciding *Homes of Hope* clearly did not think that it was making a ruling that would jeopardize either *Mount Laurel I* or *II*.

V. THE MISAPPLICATION OF INHERENTLY BENEFICIAL USE STATUS  
TO AFFORDABLE HOUSING

In a fully compliant FHA municipality,<sup>233</sup> affordable housing should be reviewed under the non-inherently beneficial use analysis when it requires a use variance to be built.<sup>234</sup> Because a municipality, like Eastampton, has complied with its FHA requirements and has fulfilled its regional need of affordable housing, there is no demonstrable need that warrants the preferential treatment afforded by the inherently beneficial use analysis. Therefore, utilizing the non-inherently beneficial use analysis will lead to more efficient uses of land by ensuring that the use is well-suited for the land on which it will be placed. It would also harmonize the FHA and the MLUL because the FHA would remain the primary, cohesive legislation aimed at solving the state-wide housing shortfall. Further, the non-inherently beneficial use analysis would enable zoning boards to fully utilize their particular knowledge and understanding of local conditions in order to best control development within its borders and would honor the notion that a variance should only be used in exceptional circumstances.

A. *Homes of Hope Disregards the True Nature of a Variance*

The *Homes of Hope* decision allows the variance process to be used to effectively circumvent zoning rules. The decision runs coun-

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<sup>233</sup> This Comment only suggests that the inherently beneficial use analysis not be used in municipalities that have actually constructed their fair share of affordable housing as assigned by the Council. In all other municipalities, the inherently beneficial use analysis should be applied to use variance applications to build affordable housing.

<sup>234</sup> This Comment should not be construed as arguing that there is no longer a shortage of affordable housing in New Jersey or that affordable housing is not beneficial to all of New Jersey's municipalities. Rather, the aim of this Comment is solely to advocate that once a municipality has complied with its FHA requirements, an application for a use variance to build affordable housing should not receive preferential treatment because the need for such treatment no longer exists. The principle reason for this argument is that a variance should not be used as a tool to subvert local zoning restrictions and should not be granted without consideration to the land on which it will be put.

ter to the notion that each variance case should be reviewed on its own facts<sup>235</sup> and that development should be primarily conducted through zoning ordinances.<sup>236</sup> The general rule is that the judgment of a planning board should prevail because of the board's unique understanding of local conditions.<sup>237</sup> The *Homes of Hope* per se rule that affordable housing is an inherently beneficial use undermines the zoning system, causes inefficiencies in land use, and violates the concept that the judiciary should not substitute its judgment for that of a board's because of the board's unique understanding of local conditions.

Additionally, a per se rule that affordable housing is an inherently beneficial use conflicts with the assertion that deference should be given to a zoning board's decision to deny a variance<sup>238</sup> and that all variance applications are to be reviewed on their own facts.<sup>239</sup> Reviewing a grant or denial of a variance on its own facts would seem to indicate situations could arise in which a use, deemed inherently beneficial in one municipality, would not be so in another. In fact, William Cox stated that a doctor's office, which might be inherently beneficial in one portion of the country where doctor's offices are rare or nonexistent, is not considered inherently beneficial in New

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<sup>235</sup> See *Burbridge v. Twp. of Mine Hill*, 568 A.2d 527, 532 (N.J. 1990).

<sup>236</sup> See *supra* Part III.A.

<sup>237</sup> See *Burbridge*, 568 A.2d at 532 (stating that “[b]oards of adjustment, because of their peculiar knowledge of location conditions, must be allowed wide latitude in the exercise of delegated discretion” (internal citations omitted)); *Grubbs v. Slothower*, 913 A.2d 137, 140 (N.J. Super. Ct. App. Div. 2007) (stating “[b]ecause of its peculiar knowledge of local conditions, the Board’s factual findings are entitled to substantial deference and are presumed valid” (internal citations omitted)); *Ne. Towers v. Zoning Bd. of Adjustment of W. Paterson*, 744 A.2d 190, 199 (N.J. Super. Ct. App. Div. 2000).

It is not the role of the reviewing court to determine if the decision was wise or unwise . . . . [B]ecause of [zoning boards’] peculiar knowledge of local conditions [zoning boards] must be allowed wide latitude in the exercise of delegated discretion. Courts cannot substitute an independent judgment for that of the boards in areas of factual disputes; neither will they exercise anew the original jurisdiction of such boards or trespass on their administrative work. So long as the power exists to do the act complained of and there is substantial evidence to support it, the judicial branch of the government cannot interfere.

*Ne. Towers*, 744 A.2d at 199. (internal citations omitted).

<sup>238</sup> *Smart SMR of N.Y., Inc. v. Borough of Fair Lawn Bd. of Adjustment*, 704 A.2d 1271, 1280 (N.J. 1997) (“Judicial review of the decision of a Planning Board or Board of Adjustment ordinarily is limited. A board’s decision is presumptively valid, and is reversible only if arbitrary, capricious and unreasonable.” (internal citations omitted)).

<sup>239</sup> See *Burbridge*, 568 A.2d at 532 (“In determining whether to uphold the grant of a variance, the reviewing court must consider each case on its own facts.”).

Jersey.<sup>240</sup> Creating a per se rule that a use is inherently beneficial in municipality Y because it was beneficial in municipality X undermines the notion that use variance applications should be reviewed on a case-by-case basis.<sup>241</sup>

A per se rule ignores the reality that conditions and circumstances vary from municipality to municipality. For instance, in Eastampton, affordable housing is not needed whereas in other municipalities that have not fully complied<sup>242</sup> with their affordable housing requirement per the FHA, a need for affordable housing could be demonstrated and therefore warrant the preferential treatment associated with the inherently beneficial use status. If the deference afforded to a zoning board is to have any meaning, then the standard by which a use variance application to build affordable housing is reviewed should allow that board some latitude in determining what the actual needs of that municipality are. Indeed, the concurring opinion in *Homes of Hope* stated that “it is not illogical to conclude that once a municipality has actually provided its fair share of affordable housing, further affordable housing projects need not retain their status as inherently beneficial uses . . . .”<sup>243</sup> Because it is not illogical, zoning boards should be permitted the ability to make the decision without fearing subsequent litigation. The decision in *Homes of Hope* effectively abandons the deference supposedly afforded to zoning boards by allowing the judiciary and developers to substitute their judgment for that of the zoning board.

The *Homes of Hope* decision unnecessarily duplicates the efforts of the Council in fully FHA-compliant municipalities, fails to account for actual need or lack thereof for a proposed use within a municipality, and can lead to inefficient uses of land. In some variance cases, courts utilize an individualized assessment of whether the municipality or region has a need for the proposed use, but such an assessment is generally not undertaken when it comes to use variance applications to build affordable housing.<sup>244</sup> An individualized assessment in *Homes of Hope* would have reproduced an analysis similar to the one

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<sup>240</sup> COX, *supra* note 21, at 188–89.

<sup>241</sup> See *Burbridge*, 568 A.2d at 532.

<sup>242</sup> For a list of municipalities that have complied with the third round of COAH obligations, see *Council on Affordable Housing*, N.J. DEPT. OF CMTY. AFFAIRS, COUNCIL ON AFFORDABLE HOUSING, <http://www.state.nj.us/dca/affiliates/coah/index.html> (click “list of towns under COAH” to obtain an Excel spreadsheet listing compliant municipalities) (last visited Jan. 13, 2010).

<sup>243</sup> *Homes of Hope, Inc. v. Eastampton Land Use Planning Bd.*, 976 A.2d 1128, 1136 (N.J. Super. Ct. App. Div. 2009) (Chambers, J., concurring).

<sup>244</sup> See *supra* Part III.D. *But see* Part IV.A.



performed by the Council.<sup>245</sup> If the analysis for an application for a variance to build affordable housing were to follow a similar analysis as that used in *Sica*<sup>246</sup> or *Kohl*,<sup>247</sup> an applicant would need to show some evidence of a need for affordable housing in the municipality, which is not possible without infringing on the Council's responsibility. Theoretically, a consideration of housing shortages would be needed within that municipality and the surrounding areas, and then a determination would be made as to whether, given the shortage, a proposed project would qualify as an inherently beneficial use satisfying a portion of that municipality's need. The Council is already responsible for determining the state-wide need for affordable housing and allocating a portion of that need to each municipality.<sup>248</sup> Therefore, any court's assessment of need would duplicate the efforts of the Council. A duplication of efforts would be advantageous in those municipalities that refuse to comply with the FHA but is ultimately unnecessary in fully compliant municipalities.

In fact, Homes of Hope, Inc. and the appellate division used the COAH's own estimation for the number of unmet housing units in New Jersey in referencing a continued need for this preferential standard for affordable housing.<sup>249</sup> Because the Council already gave substantive certification to Eastampton,<sup>250</sup> it found that Eastampton had already met its portion of that need. Additionally, in a fully compliant FHA municipality, a request for a use variance to build affordable housing will resemble a builder's remedy because the zoning board will be precluded from disallowing the variance unless it finds the negative criteria cannot be met. Allowing affordable housing to remain as an inherently beneficial use in Eastampton (or any other municipality that has fully complied with the FHA) duplicates the process that the FHA performs. Arguably, this rule actually undermines the FHA process by negating the planning that municipalities have done to become compliant with the FHA and instead allows for the grant of a variance without any consideration as to the suitability of the land for the purpose. The result is a process that gives no

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<sup>245</sup> See *supra* Part II.C.

<sup>246</sup> 603 A.2d 30 (1992); see *supra* Part III.D.

<sup>247</sup> 234 A.2d 385 (1967); see *supra* Part III.D.

<sup>248</sup> See *supra* Part II.C.

<sup>249</sup> *Homes of Hope, Inc. v. Eastampton Land Use Planning Bd.*, 976 A.2d 1128, 1134 n.1 (N.J. Super. Ct. App. Div. 2009); Brief of Homes of Hope, Inc., *supra* note 82, at 17.

<sup>250</sup> Brief of Eastampton, *supra* note 80, at DA33–34.

flexibility to zoning boards, abandons the purpose of the planning and variance system, and thereby leads to inefficient uses of land.

The *Homes of Hope* decision also undermines the preference for development through zoning ordinances by disregarding the purpose of a variance. The objective of a variance is to allow a particular use that is not permitted on a particular parcel of land in a zone because of the zoning ordinances but is nonetheless suitable for the land in question.<sup>251</sup> Variances are not meant as a way to simply circumvent zoning ordinances.<sup>252</sup> Because zoning through ordinances is preferred, variances are to be used sparingly.<sup>253</sup> Where affordable housing is needed in a municipality, presumably as a result of a municipality's failure to comply with the FHA, it should be deemed an inherently beneficial use. If there is not a demonstrated need for affordable housing within the community, the applicant should have to show site suitability. To hold otherwise clearly causes the exception to swallow the rule by allowing a variance to be granted for less than exceptional circumstances and without consideration of suitability. While the grant of a variance is supposed to be used sparingly, *Homes of Hope* serves to swallow that rule. The broad language used by the court implies that, despite the fact that a variance application requires intensive inquiry, no factual scenario exists that would warrant affordable housing not to be considered as an inherently beneficial use. Such a decision threatens to make the grant of a use variance more commonplace than is intended.

Homes of Hope, Inc. essentially argued in its brief that if affordable housing lost its inherently beneficial use status, it would be impossible to get a variance.<sup>254</sup> The perceived impossibility Homes of Hope, Inc. claimed is not necessarily a bad thing. The difficulty associated with obtaining a use variance merely reflects a preference for development through the use of zoning.<sup>255</sup> The MLUL requires that a zoning board review which of its zoning provisions were subject to requests for variances and submit a report to the governing body

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<sup>251</sup> See *Dover Twp. v. Bd. of Adjustment of Dover Twp.*, 386 A.2d 421, 426–27 (N.J. Super. Ct. App. Div. 1978) (“The variance power of the board of adjustment is . . . intended to accommodate individual situations which, for a statutorily stated reason, require relief from the restrictions and regulations otherwise uniformly applicable to the district as a whole.”).

<sup>252</sup> See *id.*

<sup>253</sup> COX, *supra* note 23, at 182; see *supra* Part III.A.

<sup>254</sup> Brief of Homes of Hope, Inc., *supra* note 82, at 11 (“[T]he road for non-inherently beneficial uses is nearly impossible to travel and affords local municipalities almost absolute discretion.”).

<sup>255</sup> See *supra* Part III.A.

about potential amendments and revisions.<sup>256</sup> Presumably, this review and report requirement is meant to empower the governing body to adjust current zoning ordinances based on the types of variances requested to make zoning more inclusive of those uses that required variances to be built, and minimize future requests for variances.<sup>257</sup> Because a FHA-compliant municipality has already planned for, and in Eastampton's case already built, affordable housing, any recommendations by the zoning board should already be reflected in the zoning.

*B. Solutions Should Focus on Efficient Land Use*

After the appellate division decided *Homes of Hope*, two New Jersey state senators, Philip Haines (R-Burlington) and Christopher “Kip” Bateman (R-Somerset) announced intentions to introduce a bill amending the MLUL to rectify the decision of the appellate division in *Homes of Hope*.<sup>258</sup> Haines said the decision “flies in the face of common sense” and has caused us to “draft legislation to solve an issue that shouldn’t have existed in the first place.”<sup>259</sup> Bateman explained that the citizens of New Jersey were assured during the debate over *Mount Laurel* that they would not be responsible for more than their fair share of affordable housing and that this case undermined those assurances.<sup>260</sup> The proposed solution sought to add to the MLUL one simple line, which stated that “[n]o municipality shall be required by variance, or otherwise, to provide more than a fair share of affordable housing.”<sup>261</sup> As of late 2010, the legislation appears to have been abandoned for a more drastic approach.<sup>262</sup> Given

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<sup>256</sup> N.J. STAT. ANN. § 40:55D-70.1 (West 2009).

<sup>257</sup> See, e.g., *Medici v. BPR Co.*, 526 A.2d 109, 119 (N.J. 1987) (“Similarly, the annual reports by boards of adjustment summarizing variance requests throughout the year and recommending amendments to the zoning ordinance are designed to avoid successive appeals for the same types of variance by encouraging the governing body to amend the ordinance so that such appeals will be unnecessary.”).

<sup>258</sup> Tom Hester, Sr., *Bill Stemming from Affordable Housing Court Ruling to Be Introduced*, N.J. NEWSROOM (Sept. 18, 2009), <http://www.newjerseynewsroom.com/state/bill-stemming-from-affordable-housing-court-ruling-to-be-introduced>.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> See *Bill to Solve Ill-Advised Mount Laurel Court Case to Be Introduced*, SENATOR PHIL HAINES, N.J.’S 8TH LEGISLATIVE DIST. (Sept. 18, 2009), <http://www.senatenj.com/index.php/haines/bill-to-solve-ill-advised-mount-laurel-court-case-to-be-introduced/4202>.

<sup>262</sup> See *infra* note 263 (briefly discussing additional legislation before the Senate that has been referred to the Senate Economic Growth Committee which takes an entirely different approach).

the fluidity of the debate, however, it is helpful to examine such an approach as another possible solution to the legal issue raised by *Homes of Hope*.

First, the potential solution is likely to be politically unpopular. The fact that this proposed solution is a general ban on accepting more than a municipality's fair share raises doubts as to whether the drafters hold the same concern elucidated by this Comment—the efficient use of land and the sparing use of variances. Second, the senators' solution is too broad. No valid reason explains why an applicant for a variance to build affordable housing could not go through the non-inherently beneficial use route. This is the same path all other applicants for variances must take, and concluding that because a municipality has complied with the FHA it should never have to even consider accepting more affordable housing through a use variance is unnecessary and unreasonable. Where a parcel of land can be used for a purpose not permitted by the zoning, it should receive a variance if the legal requirements for obtaining a variance are met.

A more sensible compromise is possible. Where a municipality has complied with its FHA requirement, affordable housing should be deemed a non-inherently beneficial use in that municipality. The judiciary, rather than the legislature, is the appropriate branch to handle such a declaration because the judiciary created the doctrine of inherently beneficial use in the first place. The judiciary is more capable of making a narrow, case-by-case decision that thereby reflects the individuality of the variance process. The judiciary's failure to refine the doctrine could lead to the adoption of the proposed legislation, which is unnecessary and creates bad policy. Removing affordable housing from inherently beneficial use status in a FHA-compliant municipality makes sense because a need for affordable housing within that municipality is no longer demonstrated. Further, allowing affordable housing to remain as an inherently beneficial use in municipalities that have not complied with their FHA requirement provides another tool to incentivize compliance with the FHA.

Such a decision would harmonize the MLUL and the FHA. The FHA would remain the primary legislation equipped to handle the affordable housing shortage in New Jersey.<sup>263</sup> Variance practices re-

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<sup>263</sup> At the time of the writing of this Comment, State Senator Raymond Lesniak introduced legislation that would abolish the Council on Affordable Housing and vest the powers and duties that are not repealed by the legislation with the Department of Community Affairs. S. 1, 214th Leg., Reg. Sess. (N.J. 2010), available at [http://www.njleg.state.nj.us/2010/Bills/S0500/1\\_R1a.PDF](http://www.njleg.state.nj.us/2010/Bills/S0500/1_R1a.PDF); Peggy Ackermann and Claire Heininger, *New Jersey Senate Passes Affordable Housing Overhaul*, NJ.COM (Jun. 11, 2010), <http://www.nj.com/sunbeam/index.ssf?/base/news-6/1276238420285890>

.xml&coll=9. Questions about the bill's ultimate constitutionality exist. See Elizabeth Downey, Opinion Letter, OFFICE OF LEGISLATIVE SERVS., N.J. STATE LEGISLATURE (Apr. 13, 2010), available at FairShareHousing.Org (search "Office of Legislative Services"; then follow "OSL; Lesniak Housing Bill Dead On Arrival" hyperlink at top of the page; then click on "Read OLS analysis here" hyperlink at bottom of the page) (last visited Dec. 30, 2010). The Office of Legislative Services concluded that while the Legislature has the authority to abolish the Council on Affordable Housing, provisions allowing for the satisfaction of affordable housing needs through inclusionary zoning techniques alone "may be susceptible to a constitutional challenge on the basis that relying solely on inclusionary zoning ordinances may violate the constitutional requirement that the exercise of a municipality's land use regulations promotes the general welfare." *Id.* at 1. Affordable-housing advocates argue implementing S-1 would only worsen New Jersey's affordable housing problem. See Kevin D. Walsh, *Affordable Housing: Bill Eliminating COAH Would Only Make Matters Worse*, DAILYRECORD.COM (Jul. 25, 2010), available at [http://fairsharehousing.org/pdf/072510\\_-\\_Affordable\\_Housing\\_Bill\\_eliminating\\_COAH\\_would\\_only\\_make\\_matters\\_worse.pdf](http://fairsharehousing.org/pdf/072510_-_Affordable_Housing_Bill_eliminating_COAH_would_only_make_matters_worse.pdf); see also Kevin D. Walsh, *New Jersey Law Journal Editorial on S-1*, FAIR SHARE HOUSING CENTER BLOG (Jun. 18, 2010), <http://fairsharehousing.org/blog/entry/new-jersey-law-journal-editorial-on-s-1/> (criticizing S-1 for doing away with state-imposed calculations of affordable housing needs in favor of allowing municipalities to certify their own compliance after meeting certain minimal requirements).

The Assembly on December 13, 2010, passed its version of S1, known as A3447. Assemb. 3447, 214th Leg. Reg. Sess. (NJ 2010). Because the focus of this Comment is the role a use variance plays in land use and development, it will not provide any commentary on the ultimate effectiveness of either S1 or A3447 in creating affordable housing. Most germane to this Comment is that both versions of the bill serve to further the argument advanced herein. The bill explicitly states that a variance for affordable housing in a municipality deemed "inclusionary" should not be reviewed under the inherently beneficial use standard. *Id.* at 6. The provision of the bill allowing a zoning board of adjustment, or other land use board, to review a use variance to build affordable housing as a non-inherently beneficial use will give effect to the admonition that variances should be used sparingly. See *supra* Part III.A. Such a provision will eliminate another factual scenario akin to that confronted in *Eastampton* from occurring.

At this point it remains uncertain whether Governor Christie will sign the bill into law. Governor Christie supported S1. See Tom Hester Sr., *Christie Wants N.J. Affordable Housing Bill Approved by the End of June*, NEWJERSEYNEWSROOM (Jun. 17, 2010), <http://www.newjerseynewsroom.com/state/christie-wants-nj-affordable-housing-bill-approved-by-end-of-june>. NJ.com, however, has reported that Governor Christie is not likely to sign the Assembly's version of the bill because it does not go far enough to alleviate the perceived burdens on municipalities in complying with their affordable-housing requirements. See Matt Friedman, *N.J. Assembly Approves Bill Abolishing Council on Affordable Housing*, NJ.COM (Dec. 13, 2010), [http://www.nj.com/news/index.ssf/2010/12/nj\\_assembly\\_approves\\_bill\\_abol.html](http://www.nj.com/news/index.ssf/2010/12/nj_assembly_approves_bill_abol.html) (citing a spokesman for Gov. Christie explaining Christie's opposition to the version of the bill passed by the Assembly); see also David Levinsky, *Christie Likely to Veto Housing Bill*, PHILLYBURBS.COM (Dec. 14, 2010), [http://www.phillyburbs.com/news/news\\_details/article/26/2010/december/14/christie-likely-to-veto-housing-bill.html](http://www.phillyburbs.com/news/news_details/article/26/2010/december/14/christie-likely-to-veto-housing-bill.html). The article quotes Assemblyman Jon Brammick, a Republican representing Union, as stating "Quotas cannot be in this legislation. I am convinced that the governor will not sign quotas, and I'm convinced it's not in the best interest of the state." See Friedman, *supra*.

Adam Gordon, of the Fair Share Housing Center, argues, however, that the Assembly bill makes "municipal obligations much lower than any prior numbers issued

garding affordable housing would return to their intended purpose and provide specific relief from zoning ordinances to use a piece of land because it is well-suited for that use. Variance practice would also cease to be more protective of affordable housing than the legislation designed to handle the statewide shortfall.<sup>264</sup> Homes of Hope, Inc. argued that removing inherently beneficial use status from affordable housing would essentially create a slippery slope by allowing a municipality to refuse variance applications for schools, churches, and hospitals.<sup>265</sup> But if a municipality does not need another school, should a variance application be granted merely because another municipality determined a school would be inherently beneficial in its borders?

Too much of a good thing can be unnecessary and lead to inefficient uses of land. The Supreme Court of New Jersey, when explaining why cell phone towers were not inherently beneficial, noted that “inherently beneficial uses are generally limited in number within a single municipality.”<sup>266</sup> This led William Cox, an expert in New Jersey land use, to conclude that “where the need that the proposed use meets is already satisfied, it may no longer be necessary to consider the use inherently beneficial.”<sup>267</sup> While the construction of afford-

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by COAH.” Adam Gordon, *Need for Housing Greater than Ever, but Under Assembly Bill, Municipal Obligations Go Down*, FAIRSHAREHOUSINGCENTER BLOG (Dec. 13, 2010), <http://fairsharehousing.org/blog/entry/need-for-housing-greater-than-ever-but-under-assembly-housing-bill-municipa/>. The Fair Share Housing Center says the Assembly’s estimates of the amount of housing created under the new bill are overstated. *Id.* It finds that creation is likely to be between 30,000-to-35,000 units over the next decade, which it compares to the 52,747 units required under the rules struck down by the appellate division in 2007. *Id.* According to the Fair Share Housing Center, the number of affordable housing units generated under the Assembly’s bill is too low. Kevin Walsh, *Assembly Housing Bill an Improvement, but Obligations too Low*, FAIRSHAREHOUSINGCENTER BLOG (Dec. 10, 2010) <http://fairsharehousing.org/blog/entry/assembly-housing-bill-an-improvement-but-obligations-too-low/>.

With the future and the effectiveness of the Assembly bill unclear, this Comment continues to urge that any solution to the housing conundrum in N.J. should not be solved by over-extending the role of a use variance in planning and developing. To the extent that this Comment’s arguments were premised on the notion of COAH certification, this Comment and its discussion of *Eastampton* can be read as a cautionary tale for future regulatory schemes that attempt to remedy the affordable housing dilemma in New Jersey. The tale is simple and steeped in the theory underpinning a use variance: that it should be used sparingly. *See supra* Part III.A. It should not be used as a substitute for a state-wide solution to the affordability of housing in N.J.

<sup>264</sup> *See supra* Part II.C.

<sup>265</sup> *See* Brief of Homes of Hope, Inc., *supra* note 82, at 18.

<sup>266</sup> *Smart SMR of New York, Inc. v. Borough of Fair Lawn Bd. of Adjustment*, 704 A.2d 1271, 1281 (N.J. 1998).

<sup>267</sup> COX, *supra* note 23, at 188.

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able housing has laudable origins, building anything simply because a builder can do so is a wholly inefficient use of resources and subverts cohesive planning.

Eastampton and other FHA-compliant municipalities have appropriately planned for and included within their boundaries the regional need for affordable housing; therefore, no need can currently be demonstrated within those municipalities for affordable housing (unless one is prepared to say the entire COAH process is wholly deficient and a need exists as a result of the Council's deficiency, as undoubtedly some might argue). As a result, affordable housing should be deemed a non-inherently beneficial use in those municipalities. Returning affordable housing to non-inherently beneficial use status in FHA-compliant municipalities will lead to better planning, will not duplicate the efforts of the Council, and will harmonize the notion of why a variance is used and the deferential standard applied in variance cases by the judiciary.

In summary, in municipalities that are fully compliant with the FHA, affordable housing should not be an inherently beneficial use for the purposes of obtaining a use variance. To obtain a use variance for affordable housing in a FHA-compliant municipality, an applicant should have to show site suitability when satisfying the positive criteria and be subject to the enhanced quality of proof for the negative criteria. State policy favors development through zoning as opposed to spot development.<sup>268</sup> If a municipality has complied with FHA, it has appropriately and satisfactorily planned for affordable housing in its zoning ordinances and has fulfilled its portion of the region's affordable housing need. Therefore, no need exists within the municipality that can be used to claim that the inherently beneficial use status will help satisfy an affordable housing shortage. Given the legislative preference for development through zoning, use variances should be used sparingly.<sup>269</sup> The reasons to grant a use variance should be substantial and should be grounded in the theory that the parcel of land is suitable for the proposed use. Further, using the non-inherently beneficial use status for an application for a use variance to build affordable housing will preserve the traditional deference to planning boards in evaluating variance applications based on their unique understanding of the local circumstances.<sup>270</sup> In contrast, a rule establishing affordable housing as a universal inherently beneficial use undermines that deference. Therefore, afford-

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<sup>268</sup> See *supra* Part III.A.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

ble housing should be treated as a non-inherently beneficial use in municipalities that have fully satisfied their FHA requirements.

## VI. CONCLUSION

In an attempt to end exclusionary zoning practices in New Jersey, the New Jersey Supreme Court declared every municipality has a constitutional obligation to provide affordable housing within its boundaries.<sup>271</sup> The New Jersey State Legislature responded by passing the FHA, which created the Council on Affordable Housing.<sup>272</sup> The Council is tasked with determining a municipality's fair share of the state-wide need for affordable housing.<sup>273</sup> Five years prior to deciding *Mount Laurel I*, the New Jersey Supreme Court decided that affordable housing constituted a special reason for the grant of a use variance under the MLUL.<sup>274</sup> Since then, affordable housing has been deemed an inherently beneficial use by zoning boards and courts across the State.<sup>275</sup> The designation as an inherently beneficial use allows an applicant for a use variance to satisfy the positive criteria for a use variance without requiring the applicant to show the land on which the use will be placed is particularly well suited for that use.<sup>276</sup>

In August of 2009, the appellate division decided *Homes of Hope*, which found that despite a municipality's full compliance with the FHA and satisfaction of its affordable housing obligation, an application for a use variance to build affordable housing must still be analyzed under the inherently beneficial use analysis.<sup>277</sup> This decision inspired a large amount of exaggerated criticism.<sup>278</sup> There are, however, principled policy reasons for opposing the decision in *Homes of Hope*.

Chief among these reasons is the imperative to show a need for an inherently beneficial use.<sup>279</sup> In *Homes of Hope*, the appellate division and *Homes of Hope, Inc.* referenced the need projected by the

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<sup>271</sup> See *supra* Part II.A–B.

<sup>272</sup> See *supra* Part II.C.

<sup>273</sup> *Id.*

<sup>274</sup> See *DeSimone v. Greater Englewood Hous. Corp. No. 1*, 267 A.2d 31, 38–39 (N.J. 1970).

<sup>275</sup> See *supra* Part IV.A.

<sup>276</sup> See *supra* Part III.B.

<sup>277</sup> See *supra* Part IV.B.

<sup>278</sup> See *supra* Part IV.C.

<sup>279</sup> See COX, *supra* note 23, at 185–88 (discussing inherently beneficial uses and summarizing various cases dealing with inherently beneficial uses).



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Council.<sup>280</sup> Referencing this need, however, ignored the fact that Eastampton had already satisfied its portion of that need and duplicated the efforts of the Council. It therefore left Eastampton without a need to justify the preferential treatment in the use variance application.

Further, a zoning board is recognized as being particularly well-suited to make decisions regarding the needs of its community, and hence, the judiciary generally treats a denial of a variance with great deference.<sup>281</sup> To give life to this admonition, a zoning board in a fully compliant FHA municipality should be entitled to review an application for a use variance under the non-inherently beneficial use analysis rather than under the inherently beneficial use analysis. Allowing zoning boards to review a use variance application to build affordable housing in a fully FHA-compliant municipality under the non-inherently beneficial use analysis will lead to more efficient land use decisions. Under the non-inherently beneficial use analysis, the applicant will have to show the land in question is particularly well-suited to the proposed use.<sup>282</sup> This will also restore a variance, in these compliant municipalities, to its intended purpose, which is specific relief from zoning restrictions in exceptional circumstances. A per se rule that affordable housing constitutes an inherently beneficial use in every municipality, merely because it has in the past, violates the fact-intensive inquiry a use variance requires and ignores the realities of differing conditions in municipalities across the State; therefore, affordable housing, in a fully FHA-compliant municipality, should be considered a non-inherently beneficial use in terms of a use variance application.

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<sup>280</sup> *Homes of Hope, Inc., v. Eastampton Land Use Planning Bd.*, 976 A.2d 1128, 1134 n.1 (N.J. Super. Ct. App. Div. 2009).

<sup>281</sup> *See supra* Part III.A.

<sup>282</sup> *See supra* Part III.B.