

Appellate Division Upholds Trial Court in Affordable Housing Variance Dispute

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Greenbaum, Rowe, Smith & Davis LLP Client Alert

November 2013

In a recent and noteworthy decision regarding affordable housing in New Jersey, the Appellate Division held that the inclusion of a percentage of affordable housing in a predominantly market rate housing project did not constitute an “inherently beneficial use” for the purpose of granting a use variance.

In the case, *Advance at Branchburg II, L.L.C. v. Township of Branchburg Board of Adjustment*, the developer was seeking a use variance for the construction of a multifamily residential development in which approximately 20% of 292 total units would be affordable housing units, to be integrated with market rate units. The Branchburg zoning board denied Advance’s variance application, rejecting the developer’s argument that the inclusion of the 59 affordable housing units qualified the entire project as an inherently beneficial use under the Municipal Land Use Law, thereby meeting the “positive criteria” required under a standard variance review. A trial court subsequently agreed with the zoning board’s rationale for denying the variance and upheld the board’s decision.

The Appellate Division’s November 1, 2013 ruling in *Advance* upheld the trial court’s decision. The Appellate Division had previously held, in *Homes of Hope, Inc. v. Easthampton Twp. Planning Bd.*, that affordable housing constitutes an inherently beneficial use in support of a conditional use variance. The Court, however, distinguished *Homes of Hope* from *Advance* by noting that in the earlier case the proposed project consisted solely of affordable housing in a residential zone (8 multi-family units where only single family was permitted). In *Advance*, the proposed project was predominately market rate housing, with only a small percentage of affordable housing units to be included in a 28 building development located in an industrial zone.

While recognizing that the construction of the market rate units facilitated the construction of affordable housing units financially, the Court declined to hold that the inclusion of a relatively small portion of affordable housing to transform the entire project into an inherently beneficial use for purposes of granting a use variance.

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