

May 22, 1997

**SENATE BILL NO. 824  
(Second Reprint)**

To the Senate:

Pursuant to Article V, Section I, Paragraph 14 of the New Jersey Constitution, I am returning Senate Bill No. 824 (Second Reprint) with my recommendations for reconsideration.

A. Summary of Bill

This bill makes several amendments to the Municipal Land Use Law, N.J.S.A. 40:55D-1, et seq. ("MLUL"). The MLUL identifies the standards a zoning board must use when considering variance applications. There are two types of variances, bulk ("C") and use ("D"). Bulk variances are required when the proposed use is related to a previously approved non-conforming use; use variances are required when the proposed use is inconsistent with the zoning plan.

Under the MLUL, a zoning board must issue bulk variances when the benefits of the deviation substantially outweigh any detriment. Use variances, on the other hand, may be issued only if the proposed use will not pose a substantial detriment to the public good and will not substantially impair the purpose of the zoning plan.

Applicants whose variance applications are denied file their appeals in Superior Court. On appeal, courts review the zoning board's compliance with the MLUL. Courts have reversed the zoning boards' denials based upon a standard that is not part of the MLUL, the inherently beneficial use standard.

Over the past several years, courts have determined that certain uses are inherently beneficial. Some uses determined by the courts to be inherently beneficial are: hospitals, public housing, shelters and, most recently, cellular towers. In the courts' view, the determination that a use is inherently beneficial requires that the variance be issued, regardless of the local body's analysis using the MLUL. In effect, the courts have presented this new rule of law as

an overriding factor which municipalities must consider when reviewing variance applications. This bill changes case law by restricting the standard's role in the variance application process.

The bill changes how the inherently beneficial use standard may be used in determining whether variances should be issued. First, the bill amends the bulk variance law. Under the bill, the fact that a proposed use is inherently beneficial shall not be relevant to a decision on a bulk variance. This amendment to the MLUL reaffirms the substantial detriment test.

The bill also amends the use variance law. The amendment to the use variance law clarifies that it is not enough for a use variance applicant to prove that the proposed use constitutes an inherently beneficial use; under this bill, an applicant must still prove that the use will not substantially impair the zoning plan. By restoring this balance, municipalities will again be able to evaluate a proposed use on a particular site to ensure that it does not have a negative impact on the overall zoning plan of the community.

#### B. Recommended Action

I commend the sponsors of this bill for introducing this bill. As a matter of public policy, New Jersey recognizes the importance of striking a balance between the need to provide locations for facilities of a public or quasi-public nature and the ability of local governments to review the specific location and site plans for these facilities. The bill's broad prohibition against the use of the inherently beneficial standard for bulk variances, however, is worded too broadly.

The bill might have a detrimental effect on facilities regulated by the Department of Health and Senior Services ("the Department"). The Department issues Certificates of Need for health care facilities, which frequently apply for bulk variances. Some

examples of health care facilities are drug treatment facilities, assisted living facilities, and AIDS hospices. Health care facilities rely on the inherently beneficial use standard as protection from local prejudices that may oppose the creation of these health care facilities. Health care facilities provide necessary services to some of our most vulnerable citizens. New Jersey has a responsibility to ensure that any application to provide services in the public interest is given fair and balanced consideration.

To ensure that this balance is maintained, I recommend that applicants for bulk variances be allowed to prove that the proposed use is inherently beneficial and that this status be considered relevant to a determination to grant or deny a bulk variance. I further recommend, however, that municipalities, and ultimately, courts may determine the weight to be afforded to them. In this way, the determination that a use is inherently beneficial is neither irrelevant to nor dispositive of the decision whether to grant or deny a bulk variance.

This recommendation strikes the same type of balance contemplated by the bill's amendments to the MLUL with respect to use variances. It prevents applicants for bulk variances from relying on the fact that their use is inherently beneficial and clarifies that they must still comply with the standards of the MLUL. It reaffirms the integrity of the variance application process and respects everyone's interests.

Therefore, I herewith return Senate Bill No. 824 (Second Reprint) and recommend that it be amended as follows:

Page 2, Section 1, Line 4:

After "be" delete "relevant  
to" and insert "dispositive  
of"

Respectfully,

/s/ Christine Todd Whitman

Governor

[seal]

Attest:

/s/ Michael P. Torpey

Chief Counsel to the Governor