

## LEGISLATIVE HISTORY CHECKLIST

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..JSA: 40:55D-70

LAWS OF: 1997 CHAPTER: 145

BILL NO: S824

SPONSOR(S): Schluter and others

DATE INTRODUCED: February 22, 1996

COMMITTEE: ASSEMBLY: Local Government  
SENATE: Community Affairs

AMENDED DURING PASSAGE: Yes Amendments during passage  
Third reprint enacted denoted by superscript numbers

DATE OF PASSAGE: ASSEMBLY: February 27, 1997 Re-enacted 6-26-97  
SENATE: January 27, 1997 Re-enacted 6-5-97

DATE OF APPROVAL: June 30, 1997

FOLLOWING STATEMENTS ARE ATTACHED IF AVAILABLE:

SPONSOR STATEMENT: Yes

COMMITTEE STATEMENT: ASSEMBLY: Yes  
SENATE: Yes

FISCAL NOTE: No

VETO MESSAGE: Yes

MESSAGE ON SIGNING: No

FOLLOWING WERE PRINTED:

REPORTS: No

HEARINGS: No

*Also included:  
floor statement 11/7/96  
floor statement 12/19/96*

KBP:pp

P.L. 1997, CHAPTER 145, *approved June 30, 1997*  
Senate, No. 824 (*Third Reprint*)

1 **AN ACT** concerning certain variances under the "Municipal Land Use  
2 Law," and amending P.L.1975, c.291.

3

4 **BE IT ENACTED** *by the Senate and General Assembly of the State*  
5 *of New Jersey:*

6

7 1. Section 57 of P.L.1975, c.291 (C.40:55D-70) is amended to  
8 read as follows:

9 57. Powers. The board of adjustment shall have the power to:

10 a. Hear and decide appeals where it is alleged by the appellant that  
11 there is error in any order, requirement, decision or refusal made by an  
12 administrative officer based on or made in the enforcement of the  
13 zoning ordinance;

14 b. Hear and decide requests for interpretation of the zoning map or  
15 ordinance or for decisions upon other special questions upon which  
16 such board is authorized to pass by any zoning or official map  
17 ordinance, in accordance with this act;

18 c. (1) Where: (a) by reason of exceptional narrowness, shallowness  
19 or shape of a specific piece of property, or (b) by reason of  
20 exceptional topographic conditions or physical features uniquely  
21 affecting a specific piece of property, or (c) by reason of an  
22 extraordinary and exceptional situation uniquely affecting a specific  
23 piece of property or the structures lawfully existing thereon, the strict  
24 application of any regulation pursuant to article 8 of this act would  
25 result in peculiar and exceptional practical difficulties to, or  
26 exceptional and undue hardship upon, the developer of such property,

**EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.**

**Matter underlined thus is new matter.**

**Matter enclosed in superscript numerals has been adopted as follows:**

<sup>1</sup> **Senate floor amendments adopted November 7, 1996.**

<sup>2</sup> **Senate floor amendments adopted December 19, 1996.**

<sup>3</sup> **Senate amendments adopted in accordance with Governor's recommendations May 22, 1997.**

1 grant, upon an application or an appeal relating to such property, a  
2 variance from such strict application of such regulation so as to relieve  
3 such difficulties or hardship; (2) where in an application or appeal  
4 relating to a specific piece of property the purposes of this act would  
5 be advanced by a deviation from the zoning ordinance requirements  
6 and the benefits of the deviation would substantially outweigh any  
7 detriment, grant a variance to allow departure from regulations  
8 pursuant to article 8 of this act; provided, however, that the fact<sup>1</sup> that<sup>1</sup>  
9 a proposed use is an inherently beneficial use shall not be<sup>3</sup> [relevant  
10 to] <sup>3</sup>dispositive of<sup>3</sup> a decision on a variance under this subsection and  
11 provided that no variance from those departures enumerated in  
12 subsection d. of this section shall be granted under this subsection; and  
13 provided further that the proposed development does not require  
14 approval by the planning board of a subdivision, site plan or  
15 conditional use, in conjunction with which the planning board has  
16 power to review a request for a variance pursuant to subsection a. of  
17 section 47 of this act; and

18 d. In particular cases for special reasons, grant a variance to allow  
19 departure from regulations pursuant to article 8 of this act to permit:  
20 (1) a use or principal structure in a district restricted against such use  
21 or principal structure, (2) an expansion of a nonconforming use, (3)  
22 deviation from a specification or standard pursuant to section 54 of  
23 P.L.1975, c.291 (C.40:55D-67) pertaining solely to a conditional use,  
24 (4) an increase in the permitted floor area ratio as defined in section  
25 3.1. of P.L.1975, c.291 (C.40:55D-4), (5) an increase in the permitted  
26 density as defined in section 3.1 of P.L.1975, c.291 (C.40:55D-4),  
27 except as applied to the required lot area for a lot or lots for detached  
28 one or two dwelling unit buildings, which lot or lots either an isolated  
29 undersized lot or lots resulting from a minor subdivision or (6) a  
30 height of a principal structure which exceeds by 10 feet or 10% the  
31 maximum height permitted in the district for a principal structure. A  
32 variance under this subsection shall be granted only by affirmative vote  
33 of at least five members, in the case of a municipal board, or  
34 two-thirds of the full authorized membership, in the case of a regional  
35 board, pursuant to article 10 of this act.

36 If an application development requests one or more variances but  
37 not a variance for a purpose enumerated in subsection d. of this  
38 section, the decision on the requested variance or variances shall be  
39 rendered under subsection c. of this section.

40 No variance or other relief may be granted under the terms of this  
41 section, including a variance or other relief involving an inherently  
42 beneficial use, without<sup>2</sup> [an independent] a<sup>2</sup> showing that such  
43 variance or other relief can be granted without substantial detriment  
44 to the public good and will not substantially impair the intent and the  
45 purpose of the zone plan and zoning ordinance. In respect to any  
46 airport safety zones delineated under the "Air Safety and Zoning Act

1 of 1983," P.L.1983, c.260 (C.6:1-80 et seq.), no variance or other  
2 relief may be granted under the terms of this section, permitting the  
3 creation or establishment of a nonconforming use which would be  
4 prohibited under standards promulgated pursuant to that act, except  
5 upon issuance of a permit by the Commissioner of Transportation. An  
6 application under this section may be referred to any appropriate  
7 person or agency for its report; provided that such reference shall not  
8 extend the period of time within which the zoning board of adjustment  
9 shall act.

10 <sup>1</sup>[Except as provided hereunder, with respect to an application for  
11 a variance or other relief under this section, "inherently beneficial use"  
12 means a use which uniquely and peculiarly serves the public welfare at  
13 a particular site. With respect to an application for a variance or other  
14 relief under this section involving a health care facility, as defined  
15 under section 2 of P.L.1971, c.136 (C.26:2H-2), "inherently beneficial  
16 use" means a use that by its essential nature or character serves the  
17 public good and promotes the general welfare.]<sup>1</sup>

18 (cf: P.L.1991, c.445, s.10)

19

20 2. This act shall take effect immediately.

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25 Modifies "Municipal Land Use Law."

SENATE, No. 824

STATE OF NEW JERSEY

INTRODUCED FEBRUARY 22, 1996

By Senator SCHLUTER

1 AN ACT concerning certain variances under the "Municipal Land Use  
2 Law," and amending P.L.1975, c.291.

3

4 **BE IT ENACTED** *by the Senate and General Assembly of the State*  
5 *of New Jersey:*

6

7 1. Section 57 of P.L.1975, c.291 (C.40:55D-70) is amended to  
8 read as follows:

9 57. Powers. The board of adjustment shall have the power to:

10 a. Hear and decide appeals where it is alleged by the appellant that  
11 there is error in any order, requirement, decision or refusal made by an  
12 administrative officer based on or made in the enforcement of the  
13 zoning ordinance;

14 b. Hear and decide requests for interpretation of the zoning map or  
15 ordinance or for decisions upon other special questions upon which  
16 such board is authorized to pass by any zoning or official map  
17 ordinance, in accordance with this act;

18 c. (1) Where: (a) by reason of exceptional narrowness,  
19 shallowness or shape of a specific piece of property, or (b) by reason  
20 of exceptional topographic conditions or physical features uniquely  
21 affecting a specific piece of property, or (c) by reason of an  
22 extraordinary and exceptional situation uniquely affecting a specific  
23 piece of property or the structures lawfully existing thereon, the strict  
24 application of any regulation pursuant to article 8 of this act would  
25 result in peculiar and exceptional practical difficulties to, or  
26 exceptional and undue hardship upon, the developer of such property,  
27 grant, upon an application or an appeal relating to such property, a  
28 variance from such strict application of such regulation so as to relieve  
29 such difficulties or hardship; (2) where in an application or appeal  
30 relating to a specific piece of property the purposes of this act would  
31 be advanced by a deviation from the zoning ordinance requirements  
32 and the benefits of the deviation would substantially outweigh any  
33 detriment, grant a variance to allow departure from regulations  
34 pursuant to article 8 of this act; provided, however, that the fact a

**EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.**

**Matter underlined thus is new matter.**

1 proposed use is an inherently beneficial use shall not be relevant to a  
2 decision on a variance under this subsection and provided that no  
3 variance from those departures enumerated in subsection d. of this  
4 section shall be granted under this subsection; and provided further  
5 that the proposed development does not require approval by the  
6 planning board of a subdivision, site plan or conditional use, in  
7 conjunction with which the planning board has power to review a  
8 request for a variance pursuant to subsection a. of section 47 of this  
9 act; and

10 d. In particular cases for special reasons, grant a variance to allow  
11 departure from regulations pursuant to article 8 of this act to permit:  
12 (1) a use or principal structure in a district restricted against such use  
13 or principal structure, (2) an expansion of a nonconforming use, (3)  
14 deviation from a specification or standard pursuant to section 54 of  
15 P.L.1975, c.291 (C.40:55D-67) pertaining solely to a conditional use,  
16 (4) an increase in the permitted floor area ratio as defined in section  
17 3.1. of P.L.1975, c.291 (C.40:55D-4), (5) an increase in the permitted  
18 density as defined in section 3.1 of P.L.1975, c.291 (C.40:55D-4),  
19 except as applied to the required lot area for a lot or lots for detached  
20 one or two dwelling unit buildings, which lot or lots either an isolated  
21 undersized lot or lots resulting from a minor subdivision or (6) a  
22 height of a principal structure which exceeds by 10 feet or 10% the  
23 maximum height permitted in the district for a principal structure. A  
24 variance under this subsection shall be granted only by affirmative vote  
25 of at least five members, in the case of a municipal board, or  
26 two-thirds of the full authorized membership, in the case of a regional  
27 board, pursuant to article 10 of this act.

28 If an application development requests one or more variances but  
29 not a variance for a purpose enumerated in subsection d. of this  
30 section, the decision on the requested variance or variances shall be  
31 rendered under subsection c. of this section.

32 No variance or other relief may be granted under the terms of this  
33 section, including a variance or other relief involving an inherently  
34 beneficial use, without an independent showing that such variance or  
35 other relief can be granted without substantial detriment to the public  
36 good and will not substantially impair the intent and the purpose of the  
37 zone plan and zoning ordinance. In respect to any airport safety zones  
38 delineated under the "Air Safety and Zoning Act of 1983," P.L.1983,  
39 c.260 (C.6:1-80 et seq.), no variance or other relief may be granted  
40 under the terms of this section, permitting the creation or  
41 establishment of a nonconforming use which would be prohibited  
42 under standards promulgated pursuant to that act, except upon  
43 issuance of a permit by the Commissioner of Transportation. An  
44 application under this section may be referred to any appropriate  
45 person or agency for its report; provided that such reference shall not  
46 extend the period of time within which the zoning board of adjustment

1 shall act.

2 Except as provided hereunder, with respect to an application for a  
3 variance or other relief under this section, "inherently beneficial use"  
4 means a use which uniquely and peculiarly serves the public welfare at  
5 a particular site. With respect to an application for a variance or other  
6 relief under this section involving a health care facility, as defined  
7 under section 2 of P.L.1971, c.136 (C.26:2H-2), "inherently beneficial  
8 use" means a use that by its essential nature or character serves the  
9 public good and promotes the general welfare.

10 (cf: P.L.1991, c.445, s.10)

11

12 2. This act shall take effect immediately.

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14

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#### STATEMENT

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17 This bill is intended to define the term "inherently beneficial use"  
18 and clarifies that a variance involving an inherently beneficial use may  
19 be granted only if an applicant that is not a health care facility  
20 demonstrates that the proposed use uniquely and peculiarly serves the  
21 public welfare at a particular site and will not be a substantial  
22 detriment to the public good and will not substantially impair the intent  
23 and purpose of the zone plan and zoning ordinance.

24 The bill would further clarify that there must be an independent  
25 showing that a variance involving an inherently beneficial use can be  
26 granted without substantial detriment to the public good and will not  
27 substantially impair the intent and purpose of the zoning ordinance.  
28 The bill would narrow the definition of "inherently beneficial use" as  
29 a use which uniquely and peculiarly serves the public welfare at a  
30 particular site, except with regard to an application made by a health  
31 care facility, in which case "inherently beneficial use" would be defined  
32 as a use that by its essential nature or character serves the public good  
33 and promotes the general welfare.

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38 Defines "inherently beneficial use"; modifies treatment under  
39 "Municipal Land Use Law."

# ASSEMBLY LOCAL GOVERNMENT COMMITTEE

## STATEMENT TO

[Second Reprint]

**SENATE, No. 824**

# **STATE OF NEW JERSEY**

DATED: FEBRUARY 3, 1997

The Assembly Local Government Committee reports favorably Senate Bill No. 824 (2R).

Senate Bill No. 824 (2R) establishes that a variance involving an inherently beneficial use must be granted under subsection d. of section 57 of P.L.1975, c.291 (c.40:55D-70) and not under subsection c. of that section. This bill also provides that there must be a showing that a variance involving an inherently beneficial use can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

Senate Bill No. 824 (2R) is identical to Assembly Bill No.672 with committee amendments, which was also reported by this committee on February 3, 1997.



SENATE COMMUNITY AFFAIRS COMMITTEE

STATEMENT TO

**SENATE, No. 824**

**STATE OF NEW JERSEY**

DATED: JUNE 3, 1996

The Senate Community Affairs Committee reports without recommendation Senate Bill No.824.

This bill would provide that a variance involving an inherently beneficial use may be granted only if an applicant that is not a health care facility demonstrates that the proposed use uniquely and peculiarly serves the public welfare at a particular site and will not be a substantial detriment to the public good and will not substantially impair the intent and purpose of the zone plan and zoning ordinance.

The bill would further clarify that there must be an independent showing that a variance involving an inherently beneficial use can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zoning ordinance. The bill would narrow the definition of "inherently beneficial use" as a use which uniquely and peculiarly serves the public welfare at a particular site, except with regard to an application made by a health care facility, in which case "inherently beneficial use" would be defined as a use that by its essential nature or character serves the public good and promotes the general welfare.

STATEMENT TO  
**SENATE, No. 824**

with Senate Floor Amendments  
(Proposed By Senator SCHLUTER)

ADOPTED: NOVEMBER 7, 1996

With these amendments this bill would clarify that there must be an independent showing that a variance involving an inherently beneficial use can be granted without substantial detriment to the public good and will not substantially impair the intent and purpose of the zoning ordinance.

STATEMENT TO  
[First Reprint]  
**SENATE, No. 824**

with Senate Floor Amendments  
(Proposed By Senator SCHLUTER)

ADOPTED: DECEMBER 19, 1996

These amendments would clarify that there must be a showing that a variance involving an inherently beneficial use can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance. Without these amendments, the bill requires an "independent" showing.

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