

# Housing

## *Green Building*

### **Benefits of Energy-Efficient Homes A 'Win-Win' Situation, Experts Tell Senate**

**R**aising energy-efficiency levels in America's homes will cut the country's energy costs, help the environment, make housing more affordable, and even lower mortgage defaults, but so far bankers consider green financing to be "too much extra work," industry experts told a Senate panel June 30.

The hearing before the Senate Banking Subcommittee on Housing, Transportation, and Community Development, chaired by Sen. Robert Menendez (D-N.J.), focused on the proposed Energy Efficiency in Housing Act of 2009 (S.1379).

Sen. Sheldon Whitehouse, (D-R.I.), who drafted S.1379 with Menendez and Sen. Charles Schumer (D-N.Y.), said energy-efficient housing connects policies on climate change, energy independence, and government cost-cutting to innovations in renovation, design, and construction.

S.1379 authorizes programs and incentives to encourage green construction and retrofitting, a move that Whitehouse said would "energize the market for energy-efficient and location-efficient mortgages by directing the Department of Housing and Urban Development (HUD) secretary to develop up-front incentives for homebuyers." The lower energy costs would put more homeowners in the green homeowner category, who, the senator said, have a "slightly" lower rate of mortgage defaults.

Rep. Ed Perlmutter (D-Colo.), who has proposed ways to increase green housing and energy-efficiency since his election in 2007, including the introduction of the Green Resources for Energy Efficient Neighborhoods Act (H.R. 2336), told the committee that HUD estimates it spends approximately \$5 billion annually on both direct and indirect energy costs, making energy one of HUD's biggest line items. Adopting H.R. 2336 principles would save taxpayers \$1 billion over the next five years, he said.

Ron Sims, deputy secretary at HUD, agreed with that number and said that a "modest savings of just 5 percent per year could generate savings of \$1 billion over the next 5 years."

Utility costs in assisted housing have been steadily increasing, Sims said, totalling \$1.85 billion in 2006.

Trisha Miller, director of Green Communities at Enterprise Community Partners, which has invested more than \$700 million to create green, affordable homes in 32 states, said that green housing can create better communities. She said "an estimated 55 million Americans live in unaffordable, overcrowded, or substandard housing. Green development offers proven, cost-effective ways to address current and long-standing housing energy and transportation challenges . . . that

will lower our carbon dependency and build thriving communities."

Citing a study by the Center for Housing Policy that examined families earning \$20,000 to \$50,000, Miller said housing and transportation costs make up the largest share of the average household budget.

David Caldwell Jr., vice president of North Kingstown, R.I.-based custom home builders Caldwell & Johnson Inc., testified about his retrofitting of a local foreclosed and abandoned house. Greening it cost just \$5,000 more, he said, and the home is expected to be almost "twice as energy efficient as a comparable new house."

Caldwell estimated that it will cost \$1 per day more to own and operate the house, but the owner will save \$2 per day in energy costs. He added that the house was a hit. "If I had 20 more of these houses, I could sell them all," he said.

**Too Much Work?** Kenneth Gear, executive director of the trade organization Leading Builders of America Inc., testified that "a prospective homebuyer looking at an energy-efficient home should be facing a win-win situation. An energy-efficient home is good for the environment and the homebuyer will enjoy reduced energy costs." He said that S. 1379 "recognizes the need to help homeowners finance the incremental up-front costs associated with purchasing energy-efficient new homes by providing energy-efficient mortgages . . ."

However, current mortgage underwriting and appraisal processes have not caught up with improving building techniques, Gear said, creating a definite disincentive. "One of the first steps in the mortgage underwriting process is calculating the cost of home ownership," he said, through a 60-year old process commonly called PITI (principal and interest and property tax and insurance premiums). Any calculations for the anticipated annual energy costs, he said, are "conspicuously absent," even though a recent analysis by the Institute for Market Transformation found that average energy costs exceed both insurance and property taxes.

Also, Gear said, current residential appraisal standards do not provide "for a consistent and accurate way to value energy-saving features in a home," which discourage potential homeowners from installing energy-saving features or buying more energy-efficient homes, since those features are not considered in an appraisal, and cannot be financed in a mortgage.

Asked by Sen. Jon Tester (D-Mont.), who called the benefits of energy-efficient homes a "no brainer," why bankers don't factor energy savings into the mortgage process, Caldwell replied that the Federal Housing Administration does have energy efficient mortgage programs on the books, "and they're good. [But] the banks won't use them because . . . it's a lot more work [for] the appraisers, [who] make the same commission."

Gear said that housing finance firm Freddie Mac had a model for green mortgages, but so far it has not come on line because "it required a little bit more work from

the banks and the underwriters. At the time, credit was free flowing and nobody needed a green mortgage. Today, they do.”

**Help for Construction Industry.** Menendez asked if enactment of green housing initiatives would help the construction industry. Gear replied that there is a “pent-up demand out there for green homes. The bill would allow possible buyers to finance green homes, and if the home is greener, there will be more features in the home that will require people to get back to work to install [them]. It would definitely be a boost to an industry that is hurting right now.”

BY KEVIN LAMBERT

## Zoning

### Zoning Board's Flip From Special Exception To Variance Needed Citizen Notice, Testimony

**T**he Commonwealth Court of Pennsylvania vacated a trial court's approval of a zoning variance given to a condo developer June 29, ruling that objectors were not given the required notice and opportunity to be heard at the zoning board's hearing (*Keebler, et al. v. City of Pittsburgh*, Pa. Cmmw., No. 1287 C.D. 2009, 6/29/10).

The objectors, a collection of neighborhood residents, did not receive notice of the city of Pittsburgh's zoning board hearing because the condo developer originally applied for a special exception to change a property's usage from one nonconforming use to another. However, the zoning board granted the developer's application as a variance, ruling that a special exception was not available.

The court acknowledged that a zoning board may approve a zoning application on different grounds from those the application specifies, but it noted that did not waive the obligations of the zoning board to adhere to the requirements of the variance it ultimately granted the developer.

**Past Nonconforming Usage.** The property that developer Landmark Property Development LLC sought to turn into a multi-family condo building accommodated a variety of uses prior to Landmark's proposal. The property was previously zoned for light industrial use, and later for residential use. However, the last use on record was for a police station jail. Kimbrough & Associates LLC bought the property in 2001 and sought to turn the former jail into an office building, but no occupancy permit was ever issued.

Kimbrough sold the property to another entity, which in turn sold it to Landmark in 2007. At that time the building was deemed structurally unsafe and was demolished, though the foundation remained. The property was zoned as Single-Unit Attached Residential-Very High Density at the time the structure was demolished.

Landmark filed its application to turn the property into a condo development in January 2008. The proposal called for 15 residential units and 16 parking spaces, and asked the zoning board to grant a special exception to change the prior nonconforming use of a jail to a different nonconforming use, the condo development.

**Zoning Board Grants Variance.** At a March 27, 2008, zoning board hearing, Landmark further altered its proposal, shrinking the development to nine residential units, and 12 parking spaces. No objector testimony was given at the hearing, though Landmark met with citizen groups and residents four times prior to the hearing.

The board rejected Landmark's request for a special exception because, according to the board, the property's prior nonconforming use ended when Landmark demolished the existing structure. The board noted though that the physical condition of the property prevented it from being used as a single-family dwelling, per its existing zoning designation.

However, the board said that under *Appeal of Booz*, 533 A.2d 1096 (Pa. Cmmw. 1987) board could grant Landmark's proposed use a variance, instead of the requested special exception, and did so. The objectors were not notified of the change in legal theory the board used to grant Landmark's requested use. They appealed the board's decision to the local Court of Common Pleas on the grounds that they should have been given notice of the possibility of a variance granting, and allowed to testify. The trial court affirmed the board's decision, however, and the objectors then appealed to the Commonwealth Court.

**Notice, Testimony Required.** The objectors' second appeal was received far better than the first, with the court ruling that the zoning board must allow the objectors to testify on whether Landmark should receive a variance. Judge Jim Flaherty said that although the zoning board was indeed free to grant Landmark its proposed use through means other than those asked in Landmark's development application, the board still must adhere to the requirements that state law imposes on that alternate legal avenue.

The court said the objectors were correct that, also under *Booz*, when the board decided to grant Landmark a variance instead of a special exception, the objectors were entitled to notice and a chance to testify to the possible variance grant. The court noted that the burden a developer must meet for a variance grant is different than that of a special exception, and therefore the objectors' prior notice of the project was not sufficient.

The court also rejected Landmark's argument that it was entitled to a special exception, and therefore the issue of notice for a variance was moot. The court said that the board's initial conclusion that a special exception was unavailable to Landmark was correct, as zoning code § 921.02.B.2 said that when more than 24 percent of a building is removed, a nonconforming use is presumed abandoned.

The court said that since the entire building was removed in this case, the nonconforming use was clearly abandoned, and therefore no special exception could be sought to convert an existing nonconforming use to a different one. Flaherty vacated the trial court's and the zoning board's decisions, and remanded to the board with instructions to afford the objectors an opportunity to present evidence against a variance for Landmark's project.

BY ERIC TOPOR

For the full text of *Keebler, et al. v. City of Pittsburgh*, go to <http://op.bna.com/rel.nsf/r?Open=etor-8767kg>.