

copy

COUNCIL ON AFFORDABLE HOUSING  
DOCKET NO. COAH 88-101

IN RE PETITION FOR SUBSTANTIVE )  
CERTIFICATION BY TOWNSHIP OF )  
FREEHOLD )

OPINION

The Township of Freehold, upon Notice of Motion, has requested the Council on Affordable Housing (Council) to waive the requirements of N.J.A.C. 5:92-14.3 on age restricted units, allow it to receive credit towards its fair share obligation for the units provided in the John L. Montgomery Home and waive any requirement that Freehold bond to fund its proposed regional contribution agreement (RCA). The Public Advocate opposes all three requests while Hovbilt, Inc. opposes the waiver for age restricted units and any credit for the Montgomery Home. The Council rendered an oral decision at its public meeting on March 21, 1988 whereby it denied all three requests. The purpose of this Opinion is to set forth in writing the basis of the Council's decision.

Before addressing the reasons for the Council's decision, it would be helpful to summarize the various parties' positions. Freehold argued that all three requests are appropriate and should be granted. First, Freehold indicated that it would like to exceed the 25% limit on age restricted units and provide more than 25% of its fair share through senior citizen housing. Freehold argued that its definition of senior citizen is 52 years of age rather than the standard 65 years and therefore the amount of persons qualifying as senior citizens will be larger than in municipalities which use

65 years. Freehold also argued that it has a higher percentage of senior citizens than other areas in the state and that percentage will continue to increase and therefore a waiver is appropriate. Freehold also requested that the Council grant it credits for 107 units located in the Montgomery Home. Freehold argued that the home is an "alternate living arrangement" as set forth in N.J.A.C. 5:92-11.2(c) and therefore is allowed under Council rules. Freehold argued that the Home is a "residential health care facility" that is entitled to credit because the residents are low income. Finally, Freehold requests a waiver from any Council requirement which would compel it to adopt a Resolution agreeing to fund a bond ordinance to fund an RCA. Freehold argued that the Fair Housing Act (Act), N.J.S.A. 52:27D-301 et seq. has safeguards which make bonding unnecessary. Freehold also argued that it had other options to fund the RCA.

The Public Advocate opposes all requests made by Freehold. The Advocate argued that the Council after careful consideration decided to limit age restricted units to 25% of the fair share obligation. This restriction represents sound policy in accordance with the fair share obligations from which the Council should not deviate. Finally, on this point, the Advocate pointed out that there is nothing to prevent senior citizens from occupying units open to the general public. In regards to the credit request for the Montgomery Homes, the Advocate argued that it is not an "alternate living arrangement" permitted by the Council. The Advocate argued that the Montgomery Home is a long term health care facility which accepts only persons requiring medical attention and is not therefore open to the general public

and does not satisfy a housing need. The Advocate pointed out that other statutes deal with such facilities. Finally, the Advocate argued that it is appropriate for the Council to require alternate financing mechanisms for an RCA where a municipality relies upon a mandatory housing trust fund ordinance given the legal uncertainty of such ordinances.

Hovbilt, Inc. specifically opposes Freehold's requests for a waiver of the age restricted units and credit for the Montgomery Home. Hovbilt argued that the factual basis for Freehold's claim that a waiver is appropriate is faulty. Additionally, Hovbilt argued that the Council adopted the Rule in question after considerable thought and it is not appropriate to waive such a Rule, especially since a waiver in this instance will most likely necessitate waivers in other instances. Hovbilt also opposed any credit for the Montgomery Home. First, Hovbilt argued that Freehold could not receive rehabilitation credits for the units. Hovbilt indicated that the Home was rennovated between 1980 and 1987, however, there is no evidence that the Home was below applicable code standard pursuant to N.J.A.C. 5:92-6.1. Hovbilt also pointed out that there is no evidence the Home has affordability controls. Finally, Hovbilt argued that the Home provides medical care and is not primarily housing and thus is not entitled to credit.

\* The Council will not waive N.J.A.C. 5:92-14.3 to permit Freehold to exceed the age restricted limit of 25%. The Council adopted the regulation in question after careful thought and consideration on the issue. The Council promulgated this regulation in order to prevent a municipality from satisfying

a substantial portion of its fair share obligation through age restricted housing thereby diminishing the availability of affordable housing to other groups. This regulation also sought to ensure that there is a variety and choice of affordable housing and affordable housing is not limited to one group to the detriment of others. Moreover, at the time the Council promulgated this regulation, it was cognizant of the fact that some areas in the state may have more senior citizens than others. If the Council were to grant Freehold's request, it very likely could open a floodgate of such requests from municipalities similarly situated as Freehold. The intent behind the promulgation of the regulation would be frustrated and the availability of affordable housing to non-senior citizen low and moderate income households could be impermissably reduced. Finally, the Council notes that there is nothing to prevent senior citizens from applying for and receiving non-age restricted units provided they meet the income requirements. The Council has never granted such a request and it sees no reasons at this time to do so.

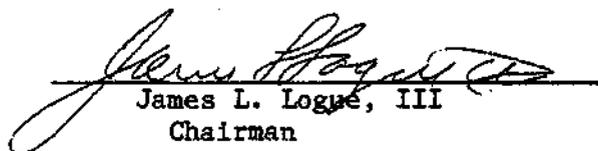
The Council also finds that Freehold is not entitled to credits for units in the Montgomery Home. The Home very clearly is a medical care facility and is not open to the general public. According to Dora Kirby, administrator of the Home, the Home is only open to persons who have medical, emotional or physical limitations. Moreover, the home is licensed by the Department of Health as a "long term care facility". Such facilities clearly exist to

provide healthcare needs. Thus, the Home is not open to the general public and in fact is limited to a very select group. It is clear from the facts presented that the Montgomery Home is primarily a health care facility and not primarily housing. Such a facility was not intended by the Council to be an "alternate living arrangement" entitled to credit.

Finally, the Council denies Freehold's request that it be exempt from any requirement that it bond to provide funds for the proposed RCA. While the Council is denying the motion, the Council notes that this decision does not require Freehold to bond for its RCA funds. The only requirement the Council has is that Freehold, and all municipalities entering into an RCA, have a definite stable funding source. The Council is charged with ensuring that a municipality which seeks substantive certification provides a realistic opportunity for the provision of its fair share N.J.S.A. 52:27D-314. The Council's requirement that a municipality entering into an RCA demonstrate that it has sufficient financial capabilities to carry out the terms of the RCA is a function of the Council's responsibility to ensure that the requisite realistic opportunity does indeed exist. A municipality may demonstrate this in several ways, however, it must be clear that the funds exist for the RCA. The Council has made it clear that it does not consider a mandatory housing trust fund ordinance sufficient to provide the necessary realistic opportunity since such ordinances are of questionable legality and in fact have been struck down in several courts. Thus, the Council will not permit Freehold to rely on such ordinances at this time as a funding mechanism for its RCA and the Township must demonstrate to the Council that it has adequate funds available for the RCA from other sources. Of course, if Freehold has received

developer contributions pursuant to a voluntary agreement rather than a mandatory ordinance, the Council may permit Freehold to rely on those funds.

An appropriate Order embodying this Opinion has been entered.

  
James L. Logue, III  
Chairman

Dated: 4/4/88

D1044h