

IN RE PETITION FOR SUBSTANTIVE)
CERTIFICATION OF FREEHOLD)
TOWNSHIP, MONMOUTH COUNTY)

COAH DOCKET NO. - COAH 91-302

OPINION

At its public meeting on February 6, 1991, the Council on Affordable Housing (COAH) granted Independence Square at Freehold Associates' (ISF Assoc.), request to allow it to market 40 affordable units in its' Independence Square development in accordance with N.J.A.C. 5:92-12.15. This opinion is intended to memorialize the Council's oral decision.

The facts of the matter are as follows. ISF Assoc. is the developer of Independence Square, a 312 unit development in Freehold Township. Sixty-three of the 312 units are designated as low and moderate income units. At the time ISF Assoc. made this request, 40 of the affordable units were constructed and ready for occupancy. As set forth in the affidavits of Barry L. Johnson and Lisa R. Russo, ISF Assoc. marketed these units independently as well as through the Affordable Housing Management Services (AHMS) of the Department of Community Affairs. In May 1990, ISF Assoc. ran a 1/4 page ad in the Asbury Park Press explaining the affordable housing opportunities at Independence Square. Both ISF Assoc. and AHMS continued to market these units until the present time. In addition, in September 1990, ISF Assoc. ran another ad in the Asbury Park Press as well as the Star Ledger. In an effort to attract income qualified households, ISF Assoc. also reduced the prices of the low and moderate income units on two separate occasions in the hopes that more low and moderate income households would qualify to purchase the units. Despite these efforts, only 13 of the 40 units were able to proceed to contract. One of the main difficulties in securing purchasers has been the difficulty low and moderate households have in obtaining a financing commitment. ISF Assoc. has contacted the New Jersey Housing and Mortgage Finance Agency (NJHMFA) in an effort to secure funding to enable some of these low and moderate income households to purchase the units.

ISF Assoc. argues that despite nine months* of marketing, 27 affordable units have not been sold. Therefore, ISF Associates contends

* The nine months are calculated from May 1990, when ISF Assoc. first began marketing the units to February 6, 1991 when COAH orally granted ISF Assoc.'s request.

they should be granted a hardship waiver pursuant to N.J.A.C. 5:92-12.15 Freehold takes no position on the motion, provided it does not lose credit for the units in question..

The Public Advocate objects to the allowance of a hardship waiver and argues that there are numerous low and moderate income households who should be able to purchase these units and therefore ISF Assoc. should not be permitted to sell them to non-income eligible households. The Public Advocate states that NJHMFA may have financing available and ISF Assoc. should fully exhaust that possibility before any hardship waiver is allowed. While the Public Advocate raises these concerns, the Advocate does not dispute any of the facts set forth in the affidavits in support of ISF Assoc.'s request.

Initially, as stated, the Public Advocate does not dispute the facts set forth in the Johnson and Russo affidavits and COAH finds no basis to dispute them. Accordingly, for the purposes of this motion COAH accepts the facts set forth in these affidavits.

N.J.A.C. 5:92-12.15, allows a party to sell a low and moderate income unit to a non-income eligible household. For example, if a hardship waiver is granted, a low income unit can be sold to a moderate income household and a moderate income unit can be sold to a household earning more than 80 percent of median income. The waiver applies to the initial sale and all affordability control restrictions must remain in the deed to assure continued affordability.

COAH recognizes that today's real estate market is a slow market and that lending institutions have significantly tightened their standards for granting mortgages. At the same time, COAH shares the Public Advocates concerns that there are low and moderate income households that need units and may be able to purchase some of these available units in Independence Square. Accordingly, before COAH grants ISF Assoc.'s request, it would like additional marketing done so that COAH may be satisfied that there are no eligible low and moderate income households that may be able to purchase any of these units. In this way, COAH can be assured that every effort was made to sell the units to income qualified households and that a hardship waiver is truly necessary. ISF Assoc., therefore, will be required to aggressively market these units, in conjunction with AHMS, for an additional 60 days (starting February 6, 1991). If, after the 60 days, some units remain unsold, COAH will allow ISF Assoc. to sell the units in accordance with N.J.A.C. 5:92-12.15. ISF Assoc. will not have to make another request to COAH, rather it will have to submit information to COAH staff on the remaining units and the efforts that were made over the 60 days to sell these units to qualified income households. If there are no irregularities in the information provided, ISF Assoc. may sell the units to non-income eligible households in accordance with N.J.A.C. 5:92-12.15.

After COAH made this decision at its February 6, 1991 meeting, it received a letter from ISF Assoc. which demonstrated some confusion over exactly which units were the subject of the hardship waiver. ISF Assoc. apparently is under the impression that COAH granted the waiver for all 63 low and moderate income units in Independence square. The Public Advocate, on the other hand, understood that the waiver applied only to the 40 units that were ready for occupancy and that had been marketed over the past months. COAH did indeed grant the hardship waiver only for the 40 units. N.J.A.C. 5:92-12.15 is applicable only after a party has tried to market and sell the units and has been unsuccessful in his efforts. Units that have not been constructed are not eligible for a hardship waiver. COAH's decision, then, applies only to the 40 units and if ISF Assoc. encounters difficulty in marketing and selling the remaining 23 units it can then request a hardship waiver for those units at the appropriate time.