

BEDMINSTER TOWNSHIP, SOMERSET)
COUNTY MOTION TO CONFIRM)
PRICING AT PARKSIDE)

COUNCIL ON AFFORDABLE HOUSING
DOCKET NO. COAH 02-1409

OPINION

This motion is filed by Bedminster Township, Somerset County ("Bedminster" or the "Township"). The Township seeks an order from the New Jersey Council on Affordable Housing ("COAH" or the "Council") confirming the pricing on certain affordable units in the Hills development. The Hills Parkside Associates ("HPA") have filed a cross-motion in response to the Township's pricing motion which asks COAH to confirm pricing of these units as newly created units.

Bedminster Township, Somerset County, received a final judgment of compliance and six-year judgment of repose from the Honorable Eugene Serpentelli, J.S.C., in 1984 for an 819-unit, court-determined, affordable housing obligation. In 1992, the final judgment was modified to reduce the Township's obligation to 698 units, the period of repose was extended until December 31, 1995 and the court required Bedminster to petition COAH for substantive certification before the Township's judgment of repose expired.

On May 1, 1996, COAH granted substantive certification to Bedminster's second-round housing element and fair share plan. That plan addressed Bedminster's COAH-determined affordable housing obligation of 177 units for the period of 1987-1999 (153 new construction and 24 rehabilitation). Bedminster's compliance with the 1984 court settlement resulted in the creation of affordable housing units that exceeded its COAH-determined second round affordable housing obligation by 559 units. At the time of substantive certification, the Township's remaining need was zero and the surplus units were to be credited toward the Township's third round obligation. On March 6, 2002, COAH extended Bedminster's second-round substantive certification for up to one year after the effective date of the adoption of COAH's third- round methodology.

Under COAH's grant of substantive certification, the Township received COAH credit for 518 for-sale units at the Hills development, 102 family rentals at the Hills development (54 in the Parkside neighborhood and 48 in the Cortland neighborhood), 24 for-sale units at Timberbrooke, 50 age-restricted rental units at Pluckemin, 38 rental bonuses and 4 rehabilitation credits. These motions concern the 54 family rentals at Parkside. Parkside contains for-sale low and moderate-income units and the low-income rental units currently in question, but does not contain any market-rate units. The affordable rental units at issue were created as part of a court-approved compliance plan arising from Mount Laurel litigation.

Pursuant to the court's order these 54 rental units possess 30-year deed restrictions. These deeds explain that during the first 15 years of the 30-year restriction, units are to be rented to income-eligible families; however, at year 16, these units are to be sold to the occupants or other eligible purchasers and restricted as affordable sale units for the remaining 15 years of the 30-year restriction. It has now been 15 years since these units were initially deed restricted, as such, after December 2002, 54 units at Parkside will become low-income sales units and after December 2003, 48 units at Cortland will become low-income sales units. This motion deals only with the expiration of the Parkside Neighborhood rental component of the court-approved deed restriction.

The Township of Bedminster filed a notice of motion with COAH on September 30, 2002, through its attorney, Jeffrey Lehrer, Esq. The Township requested that COAH confirm the sales pricing of certain affordable housing units within the Parkside Neighborhood, as calculated by the administrative entity for this project, the Bedminster Hills Housing Corporation ("BHHC").

The Township's motion relies on the certification of Sharon DeCicco, the Executive Director of BHHC. The BHHC was formed pursuant to the court's mandate, and monitors the Township's affordable housing stock. Based on Ms. DeCicco's certification, the Township contends that the units in question should be priced as resale units because the original owner, the Hills Development Company, sold the Parkside Neighborhood units to the Hills Parkside Associates in 1987. The Township argues that the court-imposed rental restriction is now expiring and the units are being sold to income eligible buyers. Therefore the Township argues that the sale of the Parkside Units should be treated as resales.

The Township relies on the Parkside Neighborhood Condominium's Declarations and Covenants as recorded with the Somerset County Clerk in August of 1987, ("Parkside Declarations") to further support its position on the pricing of these units. The declaration states "resale restrictions shall not apply to any condominium units that are for rental to persons of low or moderate income until...the rental condominium units are returned to the affordable housing purchase market."

In determining how to price these units, Ms. DeCicco utilized the formula set forth in the Parkside Declarations to calculate the prices at which these units should be sold to the current tenants or other qualified persons. This calculation is equal to the sum of the purchase price of an equivalent condominium unit sold as affordable in 1987 multiplied by the appreciation index of 78.47 percent (based on the Census Data from the US Department of Labor, median household income index) and \$625 for attorney fees and a fire inspection or

purchase price = (price of equivalent unit in
1987 x 78.47%) + price of
equivalent unit in 1987 + \$625.

For example, using this formula, a low-income efficiency unit would be priced as follows:

Purchase price = equivalent base price of \$29,966 +
(equivalent base price x cost
escalator of 78.47 %) + \$625 for
attorney fees/fire inspections.

Or, purchase price = \$29,966 + \$23,514 + \$625
Thus, purchase price = \$54,105

Attached to Ms. DeCicco certification was a chart which summarized the requested pricing for the four different types of units at Parkside -

Type A (efficiency):	low \$39,859	to high	\$54,105
Type B (one-bedroom):	low \$43,968	to high	\$59,116
Type C (two-bedroom):	low \$56,273	to high	\$74,682
Type D (three-bedroom):	low \$67,429	to high	\$88,814*

On October 18, 2002 HPA filed through its attorney, Stephen Pastor, Esq., a brief in opposition to the Township's pricing motion and a cross motion.

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In a conversation with COAH staff Ms. DeCicco explained that she calculated the 'value' of the rental units when they were originally rented, by utilizing Hills' own sales report, dated August 5, 1988, which sets out the original purchase prices previously paid by each buyer of the 162 affordable sales units within the Parkside Neighborhood. As the low-income rental units are identical to the low-income sales units sold in 1988 and per the map attached to the sales report, are interspersed amongst the sales units, Ms. DeCicco utilized the highest price point of the three affordable prices paid for a similar size affordable low-income sales unit - three prices were originally assigned to the low-income for-sale units - low, mid and high- for each type of unit - efficiency, one bedroom, two bedroom and three bedroom. Thus, the Township contends that the initial price or value which it has assigned to the affordable low-income rental units have a direct correlation to the initial sales price of comparable affordable low-income sales units.

HPA contends that the resale restrictions set forth in the Parkside Declaration documents do not apply to the sales at issue here because, HPA asserts, the transfer of these units from the Hills Development Company to the HPA was an "assignment" and this assignment did not trigger the resale restrictions. In addition, HPA asserts that the sale of the affordable rental units will not be between two qualified affordable housing applicants, but between the successor in interest to the original grantor and a qualified affordable housing applicant. HPA states that the Parkside Declarations define two classes of members, one being all owners except the grantor and the other being the grantor or its assigns, and that this differentiation contemplated the transfer to another entity that would not be an affordable housing applicant. HPA further contends that the resale restrictions apply only when "the rental condominium units are returned to the affordable housing purchase market" and that this has not yet occurred. Thus, HPA claims the units are not yet 'for-sale' units subject to the resale restrictions set forth in the declarations and covenants.

HPA argues that the sales prices as proposed by the Township are incorrect because "the resale restrictions included the original pricing for the other low and moderate-income sales units units in Parkside, but did not apply to or establish prices for the 54" rental units at issue here. HPA proposes to set the sale prices for these 54 Parkside units at a price that is "the same for any affordable housing for sale unit which would now for the first time be offered for sale to qualified affordable housing applicants."* HPA

* COAH staff calculated illustrative new sales prices for these units, based on COAH's current formulas for determining new sale prices. Based on these general guidelines the efficiency units would range from \$51,390 to \$69,249, the one bedroom units \$56,493 to \$75,628, the two bedroom units \$71,801 to \$94,762 and the three

disagrees with the Township that these units cannot be priced as "new" for-sale units. HPA notes that COAH's regulations at N.J.A.C. 5:93-7.4 discuss "the initial price of a low and moderate income owner occupied single-family housing unit" and not a "new" or "newly constructed" unit.

On November 8, 2002 Jeffrey Lehrer, Esq., for the Township, replied to the opposition brief and cross-motion filed by HPA. The Township asserts that HPA misinterprets the meaning of the Parkside Declarations and claims that the true purpose of the provision at issue was to make it clear that, pursuant to the Court's mandate over fifteen years ago, that the fifty-four units at Parkside were required to be maintained as rental units. The Township states that the declaration expressly provides that the resale restrictions would apply to the Parkside units from the moment they become for-sale units.

The Township also contends that the COAH regulation relied upon by HPA applies to new inclusionary developments, and as Parkside is 15 years old, its units cannot be priced as new units. The Township claims that COAH's regulations are guidelines to the pricing of newly constructed or newly created (as from conversion or gut rehabilitation) affordable housing units and that the regulations do not contemplate the use of their pricing guidelines for inclusionary developments that have been occupied by low-income tenants for fifteen (15) years.

Lastly, Bedminster asserts that the transfer of these units between the Hills Development Company and the Hills Parkside Association in 1987 was a sale and not an assignment, and as such, filed an Affidavit of Consideration or Exemption. Moreover, the Township asserts that HPA's predecessor admitted that these units

bedroom units from \$86,088 to \$112,621.

were subject to resale controls because it marked off the section "subject to resale controls" when it sought a partial exemption from the Realty Transfer Fee pursuant to N.J.S.A. 46:15-5 et seq.

At its December 4, 2002 meeting COAH considered this motion and cross-motion on the papers submitted. At that time the Board voted to grant the Township's motion and deny HPA's cross-motion. This opinion memorializes that decision.

As an initial matter the Board notes that Bedminster received substantive certification of its second-round fair share plan from COAH in 1996. That substantive certification was based in large part on the excess number of units resulting from the 1984 court settlement. In addition, the Council notes that as a general rule COAH accepts a previously court-approved plan even if the plan utilizes mechanisms not generally used or endorsed by COAH. Accordingly at the time of substantive certification, COAH relied upon and honored the court-approved original deed restriction, unit pricing and resale pricing procedures. COAH continues to honor these court-approved mechanisms, in particular the resale provisions set forth in the Parkside Declarations now at issue.

The Parkside Declaration states:

NOW, THEREFORE, Declarant does hereby declare and publish its intentions and does hereby submit the real property described in Exhibit A attached to this Declaration to be conveyed, occupied and used subject to the covenants, conditions, restrictions, charges, obligations, and Liens (from now on referred to as "Restrictions") as set forth below and as provided for in the following documents...except that the Resale Restrictions of this Declaration shall not apply to any Condominium Units that are hereafter designated by Declarant, the Non-profit Corporation, or their successors and assigns for rental to Persons of Low or Moderate Income Levels (from now on referred to as "Rental

Condominium Units"), pursuant to a Court Order issued on May 28, 1987, by the Superior Court of New Jersey, Law Division, in the case of Allan-Deane Corp. v. Township of Bedminster, Docket Nos. L-36896-70 P.W. and L-28061-71 P.W., until the Rental Condominium Units are returned to the affordable-housing purchase market in approximately fifteen (15) years from the date of this Declaration, provided that the said exception shall terminate and the Resale Restrictions of this Declaration shall begin to apply to the Rental Condominium Units at such time as the Rental Condominium Units are returned to the affordable-housing purchase market.

The Council finds that the plain language of the Declaration indicates that the resale restrictions at issue here shall apply to the units in question. This declaration states that the resale restrictions, which the Township now seeks to enforce in its pricing of these rental units, shall apply when these rental units are returned to the affordable housing market. The 54 Parkside rental units are now to be returned to the affordable housing purchase market. Thus, pursuant to the court-approved declaration, the resale restrictions will now begin to apply to these units. Although HPA has argued that these restrictions should not apply at this time because the units have not yet been returned to affordable housing market, the Council does not find this argument compelling. The units in question are currently in the process of being returned to the affordable housing market, and as such are subject to the resale restrictions of the Parkside Declarations.

Although HPA argues that the resale restrictions are not applicable here because, it claims, the initial transfer of these units were "assigned" and not sold, the Council is not convinced by

this argument.* When HDC initially transferred its interest in the Parkside property to HPA a Deed and Affidavit of Consideration were recorded with the County Clerk. The Deed sets forth the consideration provided for the conveyance of the property, and also explains that this conveyance was made subject to the covenants, restrictions, conditions, etc., set forth in, among other documents, "The Parkside Neighborhood Condominium Declaration of Covenants, Conditions and Restrictions of Resale." In addition, the Affidavit of Consideration or Exemption recorded with the clerk stated that that transfer of title was exempt from the Realty Transfer Fee because it contemplated the sale of affordable housing and would be subject to future resale controls. Thus, the Council finds that HPA's arguments concerning the assignment issue unpersuasive and finds that the resale restrictions at issue in the Declaration are applicable here.

The Council also finds HPA's reliance on N.J.A.C. 5:93-7.4 inappropriate. While this rule discusses the process for establishing rents and sales prices of affordable units, HPA attempts to read one sentence of this rule in isolation, and thereby loses the overall intent and meaning of the entire regulation. HPA cites N.J.A.C. 5:93-7.4(g) which explains that "municipalities shall require that the initial price of a low and moderate income owner-occupied single-family housing unit be established so that, [the initial price does],... not exceed 28% of the eligible gross monthly income." Because this small portion of the rule does not specifically refer to the term "newly constructed unit," HPA argues that the sale prices for the Parkside units should be calculated

* HPA did not provide COAH with a copy of the "Agreement of Assignment" but referred to the Court's approval of the same in its December 30, 1987 Order.

using current formulas for the pricing of new units and thus substantially increase the prices for these sale units. However, N.J.A.C. 5:93-7.4, when read in its totality, explains that certain criteria be used in order to determine the maximum possible sales prices and rents for affordable units. The rule specifically notes that its criteria be used together with "realistic market information." Here, the fact that these units are actually 15 years old is of critical importance to the pricing of these "new" sale units. Clearly, the age of these "new" units is an aspect of the realistic market information which must be considered in the pricing of the same. Accordingly, HPA's argument that these units be treated and priced as essentially new or "newly constructed" units loses credence.

The pricing proposed by the Township for these units rationally follows the initial pricing of comparable low-income for-sale units within the Parkside Neighborhood. Because there was pricing information available on identical for-sale units in 1987, the Township was able to assign a price to the units in question which have a direct correlation to the initial sales-price of identical units sold 15 years ago. Moreover, the pricing suggested by the Township utilizes the same formula as that used in determining other affordable resale units in Parkside, a formula which was previously approved as part of the Court's judgment in the Mount Laurel litigation. Furthermore, if the units were priced as suggested by HPA, a situation would be created wherein identical units--both 15 years old--were being sold at substantially different prices. Thus, an original owner-occupied for sale unit being sold today would be significantly more affordable than the same unit which had been renter-occupied, rather than owner-occupied, for the last 15 years. HPA has not provided any justification for this differing

treatment of the essentially same unit. Moreover, there is no indication from the original court-approved plan that such differing treatment was ever contemplated, much less sanctioned, by the Court.

For the foregoing reasons the Council on Affordable Housing grants the Township's motion to confirm pricing on certain affordable units and denies HPA's cross-motion on the same issue.



Renee Reiss, Secretary
New Jersey Council on
Affordable Housing

DATED: *January 8, 2003*