

Legal Opinion: CIM-0107

Index: 3.300

Subject: Eligibility of Low-Income Hsg for Assistance--LIHPRHA

January 25, 1995

Mr. Joseph F. Carabetta  
General Partner  
Carabetta Developers  
200 Pratt Street  
Meriden, CT 06450

Dear Mr. Carabetta:

This is in response to your January 11, 1995 letter seeking an appeal of the decision by the Hartford Office which rejected a Notice of Intent ("NOI") filed on June 5, 1992 requesting participation under the Low Income Housing Preservation and Resident Homeownership Act of 1990, as amended ("LIHPRHA") (12 U.S.C. Sections 4101 et seq.), for the project, Southford Park Apartments, located in Waterbury, Connecticut ("Southford Park").

It is our understanding that the Hartford Office rejected the NOI based on Paragraph 2-4 of Handbook 4350.6 "Processing Plans of Action Under the Low Income Housing Preservation and Resident Homeownership Act of 1990." Paragraph 2-4 provides that projects which received a flexible subsidy loan on or after December 21, 1979 are not eligible for assistance under LIHPRHA. This project received a flexible subsidy loan after December 21, 1979 and executed a Use Agreement which was recorded on July 29, 1983.

The Hartford Office was correct in its determination. In addition to the Handbook provision, Southford Park is ineligible for assistance under LIHPRHA pursuant to Section 248.101 of the regulations (24 C.F.R. Section 248.101) because Southford Park is subject to a Use Agreement in effect until the maturity date of the mortgage. Section 248.101 defines "Eligible Low Income Housing" as:

"Any project that is not subject to a use restriction imposed by the Commissioner that restricts the project to low and moderate income use for a period at least equal to the remaining term of the mortgage . . . ."

Southford Park is subject to a Use Agreement which requires that the project be operated in accordance with the provisions of Section 221(d)(3) of the National Housing Act and the regulations thereunder until the maturity date of the mortgage note. Accordingly, Southford Park is not eligible for assistance under LIHPRHA because the project is subject to a Use Agreement that "restricts the project to low and moderate income use for a period at least equal to the remaining term of the mortgage."

In your letter you cite to Footnote (A) of the Use Agreement and state that it was designed to permit Southford Park Realty Co. to prepay the HUD insured mortgage twenty years after final endorsement. You further indicate that you are appealing the decision by the Hartford Office to reject the NOI because of "the extenuating circumstances as described in the footnote." The Footnote states as follows:

"(A) The Commissioner will consider a request from the owner for permission to cease operation under Section 221(d)(3) of the National Housing Act. Under certain circumstances such permission will not be unreasonably withheld."

While the Footnote permits prepayment of the mortgage note, Southford Park would still, pursuant to Paragraph 2 of the Use Agreement, be subject to a low and moderate income use restriction in effect until the maturity date of the mortgage which makes it ineligible for LIHPRHA under Section 248.101. Paragraph 2 of the Use Agreement contains the use restriction and reads as follows:

"2. In the event that certain Regulatory Agreement dated 5/69 between the Housing Owner and the Commissioner is terminated by prepayment in full of the insured or HUD-held mortgage loan, the Housing Owner covenants and agrees that it will continue to operate the project in accordance with Section 221(d)(3) of the National Housing Act, or any successor legislation, and the regulations thereunder until\*\* [maturity date of the mortgage note]. . . ."

Accordingly, Southford Park is not eligible for assistance under Handbook 4350.6 and Section 248.101 of the regulations. Both the Handbook provision and Section 248.101, however, may be waived since the condition that a project is not "eligible low income housing" if it has a low and moderate income use restriction in effect until the maturity date of the mortgage is not statutory. See 12 U.S.C. Section 229(1). The Handbook provision may be waived since it is an administrative requirement. Section 248.101 may be waived pursuant to Section 248.7 of the regulations which provides:

"Upon making a determination and finding of good cause, the Commissioner may waive any provision of this part, subject to statutory limitations. Each waiver shall be in writing and shall be supported by documentation of the facts and reasons which form the basis for the waiver." 24 C.F.R. Section 248.7.

Since the conditions set forth in 24 C.F.R. Section 248.101 and Paragraph 2-4 of Handbook 4350.6 may be waived, we contacted the

Office of Housing for a determination regarding whether the Commissioner would waive the requirements of these provisions. The Office of Housing has decided that good cause does not exist to waive Section 248.101 of the regulations and Paragraph 2-4 of

Handbook 4350.6. Therefore, Southford Park is not eligible for assistance under LIHPRHA.

Since Southford Park is not eligible for assistance under LIHPRHA, you may continue to operate the project under the Use Agreement currently in effect. In the alternative, you may request permission to prepay the mortgage note under Footnote (A) of the Use Agreement. If you make a request to prepay the mortgage note, you will be required to continue to operate the project in accordance with Section 221(d)(3) of the National Housing Act and the regulations thereunder as required in Paragraph 2 of the Use Agreement. In light of the termination of the Regulatory Agreement as part of the prepayment, the Department may require the execution of an additional document to establish requirements in accordance with the Use Agreement executed by you in connection with the flexible subsidy loan on Southford Park.

I hope this response fully answers all of your concerns.

Sincerely,

Nelson A. Díaz  
General Counsel