DEVELOPER LIABILITY FOR “BENEFITS DERIVED” AND REAL ESTATE TAXES FOR PHANTOM UNITS IN CONDOMINIUMS AND OTHER COMMON INTEREST COMMUNITIES

By: Wendell A. Smith, Esq.

On August 14, 2015, the Appellate Division of the New Jersey Superior Court rendered an opinion in the case of High Point at Lakewood Condominium Association, Inc. v. the Township of Lakewood, which concluded that 136 unbuilt or phantom units within a condominium were subject to real estate taxation. In addition, the decision recognized the potential for the imposition of common expense assessments against such units, both retroactively and on a prospective basis.

In reaching its decision, the Court stated that the liability of the owner(s) of unbuilt or paper units in a condominium for common expense assessments is consistent with liability for taxation. The Court also stated that phantom units could be assessed because N.J.S.A. 46:8B-17 of the Condominium Act did not include any limitation on the assessment of common expenses to be charged to owners of partially built or unbuilt units, and that the regulations promulgated under the Planned Real Estate Development Full Disclosure Act (PREFDFA) contemplated assessments on units “individually owned and under development, in proportion to the benefit derived by the unit from the items included in the budget.”

Importantly, the Court might have reached a different conclusion if there were any provisions in the master deed or by-laws for the High Point at Lakewood Condominium which provided for other proportions for the sharing of common expenses to be charged against each unit as permitted by N.J.S.A. 46:8B-17 and by the New Jersey Department of Community Affairs (DCA) in the administration of PREFDFA registrations for common interest communities. Presumably no such provisions existed.

As most developers of common interest communities and their attorneys are well aware, the assessment and calculation of “benefits derived” is a pervasive and unsettled issue in New Jersey. No formal guidelines have been promulgated by DCA and such claims are usually fact sensitive and are resolved on an ad hoc basis between developers and the associations which administer and manage the common interest communities. Presumably no such provisions existed.

The High Point case is a complex one which addressed a variety of other issues, such as the validity of the developer’s reserved power of attorney, a partial revocation of the Condominium, the foreclosure of tax sales certificates for the phantom units, statutes of limitations and equitable defenses, issues that are beyond the scope of this article. Importantly, however, the Court did endorse the concept of phased development to help minimize liability for taxes and common expense assessments when it stated “if a developer is uncertain whether economic conditions will justify the complete build out of a planned condominium, the developer

Continued on page 17
plan and the many committees that bring welcome member volunteers to tackle the many tough issues facing our industry.

We know that construction has improved recently due to a growing economy and rising consumer confidence. This signals the start of many new projects coming on line over the next few years. Given this, I would like to have a team of subcontractors who have the best interests of our industry at heart, and I’m confident that you are one of them. Please read the information I’ve enclosed so you understand the value of membership and how joining can put money back in your pocket.

As an added point, the check you are receiving today for work performed for my company is, in large part, due to the efforts of the (local HBA) on behalf of the building industry.

Uniting together through the (local HBA) will only help improve all of our futures.

Sincerely,

Builder Member, Inc.

-----End Sample Letter-----

Consider adding to your signature any NJBA or Local Chapter leadership position, i.e. - President, State Director, Local Officer, Committee Chairmanship, etc. and perhaps the number of years you’ve been a member or the year you joined. This demonstrates your personal membership commitment.

In conclusion, the officers and I thank you for your commitment to NJBA and we ask that each one of you assist us in our goal to double our membership this year!