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Recent Court Decision Interprets New Jersey Condominium Act To Determine Voting Rights of Investor Owners

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For investment purposes, many people purchase condominium units with the intention of renting the unit. On occasion, sophisticated investors will purchase, either individually or more typically through a Limited Liability Company (LLC), blocks of units in a condominium, and subsequently rent those units to tenants in the ordinary course of business.

Do investor owners who rent units to tenants in this manner lose the right to vote for members of the board of trustees of the condominium association? That was the issue posed in a recent case, *275 Prospect Equities, LLC v. Prospect Towers Association, Inc.*, in which the New Jersey Superior Court Chancery Division was called upon to interpret the New Jersey Condominium Act.

Greenbaum, Rowe, Smith & Davis LLP represented four LLCs that had obtained ownership of approximately 80 units in a 192-unit condominium located in East Orange. The units had been acquired through various means, including sheriff sales resulting from foreclosures and other private sales. The condominium association announced its decision to preclude the LLCs from voting for members of the board of trustees at the annual election. The association based its decision on the definition of the word “developer” in the Condominium Act, and on the language of another provision therein restricting the right of “developers” to vote in a board election after transition.

Developer is defined in the Condominium Act to include any person or persons who “lease, sell or offer to lease or sell ... units of a condominium in the ordinary course of business.” Once 75% of the units in a condominium are sold to the public, the unit owners “other than the developer” are entitled to elect all of the members of the board of trustees of the condominium association.

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Published Articles (Cont.)

The firm filed an Order to Show Cause on behalf of the four LLCs and obtained a restraining order enjoining the election until the Court could determine whether the LLC had the right to vote.

In September 2016, the Court ruled that the legislature did not intend the four LLCs to be deemed a “developer” as defined in the Condominium Act, or to be precluded from voting in board elections. The Court reviewed the legislative history and found that the legislature only intended to bar the original sponsor or developer (or its assignees who obtained the rights of the original sponsor or developer) from voting after transition.

The Court reasoned that were it otherwise, there could be multiple developers at any given time in a single condominium, and that each developer would be entitled to an automatic board seat if they offered units for sale pursuant to the Condominium Act. Such a result would increase exponentially the number of non-developer unit owners required to serve on the board to ensure that the board was not dominated by a “developer.”

In making its ruling, the Court reviewed the 1995 unreported decision in *Zausner v. Prospect Towers Association, Inc.* involving the same condominium association. The Court adopted the reasoning in *Zausner* that the legislature could not have intended the term “developer” to include all investors or non-resident owners, and that the definition of “developer” includes: 1) the original creator of the condominium units; 2) the original converter of existing property to condominiums; and 3) a person whose profession or livelihood is selling or leasing condominium units according to the common customs.

In order to determine whether “a person is in the business of selling or leasing condominium units,” the court adopted the *Zausner* factors, including:

1. if the units are purchased by a bulk purchaser;
2. if the person succeeds to any special rights of the original creator under the governing documents;
3. what the person’s business or livelihood is; and
4. if the person registered as a sponsor with the New Jersey Department of Community Affairs.

The Court applied these factors to the four LLCs who owned 80 units and found that only one of the four factors applied (factor number three), and therefore determined that the plaintiffs were not “developers” and could vote in the upcoming board election. The Court reasoned that any alternative ruling would disenfranchise the plaintiffs and deprive them of their rights as unit owners, and that the public interest would be irreparably harmed if such owners were deprived of the right to vote in board elections.

This ruling is instructive for investors concerned about losing the right to have a voice in the governance of any condominium association in which a significant investment has been made.

To learn more about the impact of this decision, please contact the author of this Alert, **Darren C. Barreiro**, a partner in the firm’s Litigation Department. Mr. Barreiro, with support from associate **Robert J. Flanagan**

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III, represented the plaintiffs in this matter.