

HORACK•TALLEY

ATTORNEYS AT LAW

MEMORANDUM

TO: NAIOP Members

FROM: John W. Bowers & Henry N. Pharr III

DATE: November 5, 2010

RE: Brief Summary of *Signature Development LLC v. Sandler Commercial at Union LLC*

In late 2008, early 2009, an important case for NAIOP and its members was decided in Union County Superior Court. The trial court held that the project manager could not recover for a breach of contract for failure to pay a substantial participation fee by the property owner. The Court found the project manager met the definition of a general contractor under the North Carolina licensing statutes but did not have a general contractor's license and was therefore barred from recovering from the property owner. The project manager appealed this decision to the North Carolina Court of Appeals contending that it was not a general contractor under the North Carolina statutes. NAIOP filed a legal brief in support of the project manager arguing that project managers are not and should not be considered general contractors under the North Carolina law.

On November 2, 2010, the Court of Appeals reversed the trial court's ruling and held that the project manager did not have "the requisite control over the project to be classified as a general contractor and instead indicate that [the project manager] served solely as [the owner's] agent under a pure project management arrangement." In reaching this conclusion, the Court held that the critical factor to determine whether a person or entity will be a general contractor "is the degree of control to be exercised by the contractor over the construction of the entire project." The Court found the parties' contract terms and actions showed the project manager did not have sufficient control over the project to make it a general contractor.

This decision has important implications on the construction and real estate development industries. NAIOP's members need to be aware of the following points with respect to this decision:

- The decision did not hold that all construction managers or project managers will not be considered to be general contractors under North Carolina law. Some construction management agreements certainly could meet the Court's control requirements.

- The courts will look to the terms of the agreements between the property owner and the manager to determine whether sufficient control is exercised by the manager over the entire project. Contracts that limit the manager's authority subject to the direction, control and approval of the owner and that make the manager act simply as the owner's agent with respect to the project will help such a manager avoid being deemed a general contractor.
- Giving the owner control over the approval of architects, engineers, general contractors, and others will also be critical to the outcome. All contracts should be in the owner's name rather than in the manager's name and all plans and specifications should be approved by the owner. To the extent possible, the manager should attempt to assume no responsibility for costs, timeliness or quality of the project.
- Finally, a licensed general contractor must be hired to perform the general contractor role. Such a general contractor should work onsite and meet the statutory definition of a general contractor.
- Project management/construction management agreements should be reviewed by an attorney familiar with this case and other relevant North Carolina laws.

JWB/cjw