

ATTORNEY GENERAL OF THE STATE OF NEW YORK
REAL ESTATE FINANCE BUREAU

In the Matter of

Assurance No. 18-113

**Investigation by BARBARA D. UNDERWOOD,
Attorney General of the State of New York, of**

Fisher Homes, LLC; and Peter F. Hunt,

Respondents.

ASSURANCE OF DISCONTINUANCE

The Office of the Attorney General of the State of New York (“OAG”) commenced an investigation pursuant to General Business Law § 352 and Executive Law § 63(12) into leaks in water pipes at the Fisher Pond Condominium (the “Condominium”). This Assurance of Discontinuance (“Assurance”) contains the findings of the OAG’s investigation and the relief agreed to by the OAG and Respondents Fisher Homes, LLC and Peter F. Hunt (collectively, the “Respondents,” and together with the OAG, the “Parties”).

OAG’s FINDINGS

I. The Respondents and Background

1. Respondent Fisher Homes, LLC is a New York limited liability company with its office located at 430 Dick Road, Depew, New York. Fisher Homes, LLC (“Sponsor”) is the sponsor of the Condominium.

2. Respondent Peter F. Hunt is a Principal of Sponsor.

3. The Condominium is a condominium with twenty eight residential units located at 334-336 South Cayuga Road, Amherst, New York 14221.

II. Legal Standard

4. The Martin Act protects the public from fraudulent practices in the public offer and sale of securities. GBL § 352 *et seq.*

5. The Martin Act requires that before a sponsor (or developer) of a condominium may offer or sell units, the sponsor must submit an offering plan to OAG. GBL § 352-e(2).

6. Sponsors of real estate securities are allowed to make sales based only on the information, statements, literature, or representations in the offering plan. GBL § 352-e(5). All prospective purchasers must be furnished with true copies of the offering plan that have been accepted by the OAG. *Id.*

7. The sponsor and its principals are required to certify the truthfulness of the representations made in the offering plan. 13 NYCRR § 20.4(b).

8. Under the Martin Act, an offering plan must provide an adequate factual basis pursuant to which potential purchasers may make a judgment of whether to invest, and “shall not omit any material fact or contain any untrue statement of fact.” GBL § 352-e(1)(b).

III. Water Use at Fisher Pond

9. On April 7, 2008, OAG accepted for filing an offering plan (“Offering Plan”) for the offer and sale of real estate securities in the Condominium submitted by Respondents.

10. The Offering Plan was amended ten times thereafter. On February 15, 2018, OAG accepted for filing the Tenth Amendment to the Offering Plan.

11. Of the twenty eight units in the Condominium, fourteen of them are commonly metered for water. The other fourteen units are individually metered.

IV. Leaks at the Commonly Metered Units

12. Soil bores conducted in 2007 showed the presence of “slag,” a by-product of smelting, in the soil on the land on which the Condominium was eventually built. Certain studies suggest that the presence of slag in soil may cause copper pipes (normally quite resistant to corrosion) to corrode in the soil.

13. Many of the water pipes at the Condominium are made of copper.

14. In May 2010, Sponsor replaced the main-to-curbstop waterline at [REDACTED] because of leaks in that waterline.

15. In April 2012, Sponsor replaced the main-to-curbstop waterline at [REDACTED] because of leaks in that waterline.

16. Sponsor turned over control of the Condominium to the Unit Owners at a meeting held on September 21, 2017. Prior to turning over control, the Sponsor paid all operating expenses of the Condominium, including water bills of the fourteen commonly metered units.

17. Sponsor never amended the Offering Plan to describe leaks or the increased risk of leaks occurring in units at the Condominium.

18. In November 2017, the Fisher Pond Condo Association hired a contractor to test for leaks at units in the Condominium. The contractor found leaking noise at three units and possible leaks at two others.

19. Additionally, water bills for the commonly metered units were substantially higher than the estimates included in the Offering Plan during the years that the Sponsor paid the water bill for the commonly metered units.

20. Sponsor never amended the Offering Plan to revise the estimate of average monthly water consumption.

21. Water use decreased substantially following repairs to leaks at the commonly metered units. In November 2017, the water bill for the commonly metered units was \$621.96. In December 2017, a leaking pipe was replaced at [REDACTED] which is one of the fourteen commonly metered units. After this repair, the water bill was \$370.94.

22. OAG finds that Respondents' actions are in violation of General Business Law § 352 and Executive Law § 63(12).

23. Respondents admit the OAG's Findings, paragraphs (1)-(21) above. Respondents do not contest the OAG's assertion that their actions violated the statutory provisions cited above.

24. Respondents have agreed to this Assurance in settlement of the violations described above and to avoid the time, expense, and distraction of litigation.

25. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. THEREFORE, the OAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding at any time for violations of General Business Law § 352 and Executive Law § 63(12) based on the conduct described above during the period of May 2010 through October 2018.

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties:

RELIEF

26. General Injunction: Respondents shall not engage, or attempt to engage, in conduct in violation of any applicable laws, including but not limited to General Business Law § 352 and Executive Law § 63(12), and expressly agree and acknowledge that any such conduct is a violation of the Assurance, and that the OAG thereafter may commence the civil action or

proceeding contemplated in paragraph 25, *supra*, in addition to any other appropriate investigation, action, or proceeding.

27. Monetary Relief

- a. *Monetary Relief Amount*: Respondents shall pay to the Fisher Pond Condo Association \$104,300 in restitution (the “Monetary Relief Amount”). Payment of the Monetary Relief Amount shall be made in full within five (5) business days of the effective date of this Assurance.
- b. Payment shall be made by attorney check, corporate or certified check, or bank draft, which shall be made payable to the “Fisher Pond Condo Association”, and shall reference Assurance No. 18-113. Payment shall be addressed to Fisher Pond Condo Association, [REDACTED]

MISCELLANEOUS

Subsequent Proceedings.

28. Respondents expressly agree and acknowledge that the OAG may initiate a subsequent investigation, civil action, or proceeding to enforce this Assurance, for violations of the Assurance, or if the Assurance is voided pursuant to paragraph 35, and agree and acknowledge that in such event:

- a. any statute of limitations or other time-related defenses are tolled from and after the effective date of this Assurance;
- b. the OAG may use statements, documents or other materials produced or provided by the Respondents prior to or after the effective date of this Assurance;

- c. any civil action or proceeding must be adjudicated by the courts of the State of New York, and that Respondents irrevocably and unconditionally waive any objection based upon personal jurisdiction, inconvenient forum, or venue.
- d. evidence of a violation of this Assurance shall constitute prima facie proof of a violation of the applicable law pursuant to Executive Law § 63(15).

29. If a court of competent jurisdiction determines that the Respondent(s) has/have violated the Assurance, the Respondent(s) shall pay to the OAG the reasonable cost, if any, of obtaining such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

Effects of Assurance:

30. All terms and conditions of this Assurance shall continue in full force and effect on any successor, assignee, or transferee of the Respondents. Respondents shall include any such successor, assignment or transfer agreement a provision that binds the successor, assignee or transferee to the terms of the Assurance. No party may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of the OAG.

31. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

32. Any failure by the OAG to insist upon the strict performance by Respondents of any of the provisions of this Assurance shall not be deemed a waiver of any of the provisions hereof, and the OAG, notwithstanding that failure, shall have the right thereafter to insist upon the strict performance of any and all of the provisions of this Assurance to be performed by the Respondents.

Communications:

33. All notices, reports, requests, and other communications pursuant to this Assurance must reference Assurance No. 18-113, and shall be in writing and shall, unless expressly provided otherwise herein, be given by hand delivery; express courier; or electronic mail at an address designated in writing by the recipient, followed by postage prepaid mail, and shall be addressed as follows:

If to the Respondents, to:

Steven W. Klutkowski, Esq.,
Duke Holzman Photiadis & Gresens LLP,
701 Seneca Street, Suite 750,
Buffalo, New York 14210
sklutkowski@dhpqlaw.com

If to the OAG, to:

Ryan Goodland, Esq.
Real Estate Finance Bureau
Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
ryan.goodland@ag.ny.gov

or in his absence, to the person holding the title of Bureau Chief, Real Estate Finance Bureau.

Representations and Warranties:

34. Louis A. Izzo, Jr. and Michael Boron are also Principals of the Sponsor. However, Respondents represent that Louis A. Izzo, Jr. ceased working for Sponsor in 2012 and Michael Boron ceased working for Sponsor in 2010.

35. The OAG has agreed to the terms of this Assurance based on, among other things, the representations made to the OAG by the Respondents and their counsel and the OAG's own

factual investigation as set forth in Findings, paragraphs (1)-(21) above. The Respondents represent and warrant that neither they nor their counsel has made any material representations to the OAG that are inaccurate or misleading. If any material representations by Respondents or their counsel are later found to be inaccurate or misleading, this Assurance is voidable by the OAG in its sole discretion.

36. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by the Respondents in agreeing to this Assurance.

37. The Respondents represent and warrant, through the signatures below, that the terms and conditions of this Assurance are duly approved. Respondents further represent and warrant that Fisher Homes, LLC, by Peter F. Hunt, as the signatory to this Assurance, is a duly authorized officer acting at the direction of the Board of Directors of Fisher Homes, LLC.

General Principles:

38. Unless a term limit for compliance is otherwise specified within this Assurance, the Respondents' obligations under this Assurance are enduring. Nothing in this Agreement shall relieve Respondents of other obligations imposed by any applicable state or federal law or regulation or other applicable law.

39. Respondents agree not to take any action or to make or permit to be made any public statement denying, directly or indirectly, any finding in the Assurance or creating the impression that the Assurance is without legal or factual basis.

40. Nothing contained herein shall be construed to limit the remedies available to the OAG in the event that the Respondents violate the Assurance after its effective date.

41. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance.

42. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held by a court of competent jurisdiction to be invalid, illegal, or unenforceable in any respect, in the sole discretion of the OAG, such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

43. Respondents acknowledge that they have entered this Assurance freely and voluntarily and upon due deliberation with the advice of counsel.

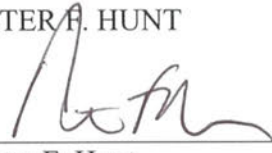
44. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

45. The Assurance and all its terms shall be construed as if mutually drafted with no presumption of any type against any party that may be found to have been the drafter.

46. This Assurance may be executed in multiple counterparts by the parties hereto. All counterparts so executed shall constitute one agreement binding upon all parties, notwithstanding that all parties are not signatories to the original or the same counterpart. Each counterpart shall be deemed an original to this Assurance, all of which shall constitute one agreement to be valid as of the effective date of this Assurance. For purposes of this Assurance, copies of signatures shall be treated the same as originals. Documents executed, scanned and transmitted electronically and electronic signatures shall be deemed original signatures for purposes of this Assurance and all matters related thereto, with such scanned and electronic signatures having the same legal effect as original signatures.

47. The effective date of this Assurance shall be the date the Assurance is signed by OAG.

PETER F. HUNT

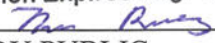


Peter F. Hunt

STATE OF New York)
) ss.:
COUNTY OF Erie)

On this 16 day of October, 2018, Peter F. Hunt personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument, appeared before the undersigned and acknowledged to me that he executed the within instrument by his signature on the instrument.


Sworn to before me this
16 day of October, 2018

NICOLE ROBBINS
Notary Public, State of New York
No. 01RO6379440
Qualified in Erie County
Commission Expires Aug. 13, 2022


NOTARY PUBLIC

Dated: October 19, 2018
New York, New York

BARBARA D. UNDERWOOD
Attorney General of the State of New York
28 Liberty Street
New York, NY 10005

By: 

Ryan Goodland, Esq.
Assistant Attorney General
Real Estate Finance Bureau