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# IMPACT

## BUILDING & REALTY NEWS

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SERVING WESTCHESTER AND THE MID-HUDSON REGION

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### Realty Industry Officials Testify At Guidelines Hearings

By Jeff Hanley, *IMPACT* Editor

ARMONK — Representatives of the local realty industry testified earlier this month on rent guideline increases for rental apartment buildings affected by the Emergency Tenant Protection Act (ETPA).

Industry officials joined with members of The Apartment Owners Advisory Council of Westchester and the Mid-Hudson Region (AOAC) to testify at the public hearings of the Westchester County Rent Guidelines Board. The nine-member board is the entity that annually rules on increases for lease renewals. The board reaches its decision after three public hearings and separate deliberations. The decision will affect rent adjustments for one or two-year leases which begin between October 1, 2005 and September 30, 2006.

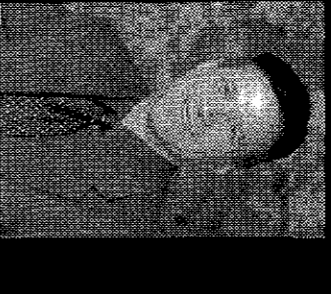
The public hearings were on June 6 (Mount Vernon), June 7 (Yonkers) and June 8 (White Plains). The board, after the public hearings, cancelled its June 14 and June 16 deliberations. The new deliberation dates have not been announced.

#### The Specifics

AOAC Chairman Ken Nilsen, during his testimony at the June 8 public hearing, emphasized that the major function and purpose of the guidelines board, per the language of the ETPA, is that the board, in determining guideline increases, "must review and consider all increases in costs that owners face on an annual basis."

"The phrase is one that must be kept

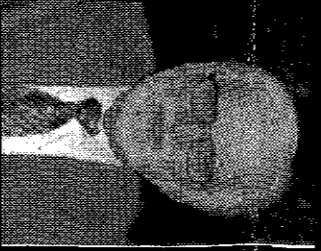
### THE HANLEY REPORT



#### Reviewing the Positives of Large and Quick Responses

By JEFF HANLEY  
see page 3

### CO-OP CONDO CORNER



#### On Financing Issues, The Choice Is Now Yours!

By HERB ROSE  
see page 4



Photo by Barbara Hansen

**AN ECONOMIC UPDATE -** Marc Goloven, a well-known economist, was the guest speaker at the June 16 General Membership Meeting of the Building and Realty Institute (BRI). Goloven issued a mid-year economic update. He also analyzed the effects of current economic conditions on the building, realty and construction industry. Pictured during the meeting at the Crowne Plaza Hotel in White Plains are, from left to right, Ken Nilsen, chairman, Apartment Owners Advisory Council (AOAC); Ken Finger, chief counsel, BRI; Jane Curtis, vice chair, Cooperative and Condominium Advisory Council (CCAC); Goloven; and Albert Annunziata, executive director, BRI.

in mind by members of the board as they decide the guideline rates for the new term," Nilsen said. "The board must address items listed in the law, not other issues, such as the issues of affordability and Major Capital Improvements (MCI's) that are not listed in the law."

#### Incomplete Data

Nilsen stressed that the data provided in the annual Operations and Maintenance (O&M) Cost Surveys

### Co-op & Condo Group Continues to Resist Re-Assessment Legislation

By Jeff Hanley, *IMPACT* Editor

ALBANY — Representatives of a major co-op and condo association are continuing to stress the organization's stiff resistance to two proposed bills that, according to realty industry officials, will produce devastating consequences for the co-op and condo sector.

Officials of The Cooperative and Condominium Advisory Council of Westchester and the Mid-Hudson Region (CCAC) said last week that the association is continuing its "campaign of strong opposition" to A04901 and S2439, two bills that are calling for the amendment of the real property tax law and the real property law in relation to the assessment of specific condos and co-ops.

### Special Report and Commentary: Supreme Court Upholds a City's Right to Take Property Through Eminent Domain

By Daniel S. Finger, Esq.

WASHINGTON - In a greatly anticipated and important case, the U.S. Supreme Court, in a controversial 5-4 decision last week, upheld the power of the City of New London (Conn.) to seize the homes of certain residents by eminent domain for the purpose of proceeding with its plan for "economic development."<sup>1</sup>

This decision will be sure to have far-reaching ramifications for developers and property owners across political, economic, social, and geographic boundaries.

In deciding in favor of the City of New London, the Court determined that the question of "whether the city had satisfied the requirement of "public use" in its plan with regard to the taking of this property should be answered liberally and the Court should give deference to municipalities.<sup>2</sup>

This ruling bestows virtually unfet-

tered power on municipalities with regard to their use of eminent domain. The Court held that "Viewed as a whole, our jurisprudence has recognized that the needs of society have varied between different parts of the nation, just as they have evolved over time in response to changed circumstances. . . . For more than a century, our public use jurisprudence has widely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power."<sup>3</sup>

#### The Creation of Questions

The decision by the Court seems to create as many questions as it answers. Most notably, the Court failed to address the issue of municipalities effectuating transfers of property from citizen

Continued on page 5

## Special Report and Commentary:

# Supreme Court Upholds a City's Right to Take Property Through Eminent Domain

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A to citizen B, where such transfer is for the sole reason that citizen B will put the property to a more productive use, but the property in question is "outside the confines of an in-



Daniel S. Finger, Esq.

tegrated development plan...

The Court specifically chose not to establish any bright line rule regarding satisfying the "public use" provision of the Fifth Amendment to the Constitution<sup>5</sup>, opting instead to defer to the judgment of the municipalities.

This case represents a rare occurrence where the municipality used its powers of eminent domain for economic development where no "blight" on the community was argued regarding the property that the municipality was attempting to seize.<sup>6</sup>

In many respects this ruling represents a victory for large developers, while sacrificing the rights of smaller and even mid-sized developers and other property owners, including homeowners.

Without placing any restrictions on the ability of municipalities to seize property or the reasons they must give to be permitted to validly exercise their powers of eminent domain, the Court has enabled municipalities to exercise these powers under virtually any circumstances. Based on this decision, it is difficult to envision any situation wherein the municipality could not argue that a public purpose was satisfied because of the resulting "economic development."

By allowing municipalities to use the "public purpose" of "economic development," the Court has enabled all private property to be seized. Justice O'Connor wrote in a dissenting opinion that "under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded - i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public - in the process."<sup>7</sup>

The City of New London stood to gain substantial economic benefit from the development plan that they sought

to proceed with, but we are still left with the question of whether or not there will ever be a limit to what qualifies as an "economic benefit" or more appropriately a "public use" in order for a municipality to use its powers under the doctrine of eminent domain.

A great deal of focus has been placed on the "economic benefit" and all the other good that the community as a whole would derive from the development plan put together by the City of New London.

### The Lost Factor

What appears to have been lost in the ongoing debate of eminent domain is the undue burden that the City's exercise of its powers under eminent domain places on the citizens whose homes and property it is going to seize. There has been surprisingly little emphasis on measuring and comparing the economic benefit already bestowed on the community by the homes and property as they exist and the hardship that that would place on these property owners versus any other economic benefit gained.

The arguments of Kelo and the other petitioners were based mainly on the idea that a purely "economic benefit" was not a public use within the meaning of the doctrine in the constitution. They emphasized the fact that their properties were not a blight on the community and thus the municipality should not be able to seize their property.

It should be noted also that the Court did "emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."<sup>8</sup>

The result of this decision is a broad definition for the term public use that includes almost anything that bestows any public benefit. (presumably, a greater public benefit than the existing use, although this was not specifically addressed by the Court) on the community.

The limitations, and restrictions, if any, are up to the state legislatures or Courts to determine. Another question that was not dealt with by this decision, or really by the facts of this case, is the issue of whom the municipality can give the condemned land to, or who they are required to give the condemned land to once they have seized it and what are the procedures for determining who should receive the land.

Further, this case did not address what, if any, bidding process should be used to assist the municipality in determining who should receive the development rights. Clearly, these questions, which are currently unanswered, will have to be addressed in later cases. As it

stands, this ruling may place developers in contention with one another as they vie for the development rights in economic development plans.<sup>9</sup>

The Court, in this case, did note the dangers of the use of the powers of eminent domain for purely private purposes (i.e. seizing property for the sole purpose of giving it to another private citizen). Municipalities could obviously avoid this dilemma and potential source of conflict with their use of the powers of eminent domain by awarding their anticipated developments of seized property through open bidding procedures. This would also accomplish the goal of evening the playing field between the various developers potentially vying for these contracts.

Further, there is nothing to say that the municipality cannot retain title to any land upon which they exercise the power of eminent domain. This would not preclude development by ground lease or otherwise and would be a significant benefit to the municipality itself.

### Risks and Benefits

For developers, this decision presents both risks and potential benefits. Obviously, developers risk having their property seized and losing out on

projects to other developers for little or no reason other than political climate. Developers stand to benefit by being able to proceed with developments even in circumstances where they do not own and are not able to obtain, through normal purchase, all of the property necessary for the project to proceed.

Home and property owners, naturally, are at risk of losing their property in almost any circumstance where the municipality has a plan for development and determines that the community as a whole would economically benefit by the proposed development.<sup>10</sup>

The benefit to the community presumably exists in that the municipality would present developments and projects that would result in an economic benefit (i.e. new jobs, increased tax base, etc.) to the community as a whole.

Clearly, this decision will result in a great deal of debate over the merits of eminent domain, as well as the community-oriented projects that stem from its use. Perhaps most significant is the understanding

that limits on eminent domain, if any, will have to be placed on its exercise by the States, their legislatures, and their Courts.

**Editor's Note: Daniel S. Finger, Esq. is with Finger and Finger, A Professional Corporation. The firm, based in White Plains, is chief counsel to the Builders Institute of Westchester and the Mid-Hudson Region (BJ).**

<sup>1</sup> Kelo, et al. v. City of New London, et al., 545 U.S. \_\_\_ (2005).

<sup>2</sup> Id., slip opinion, Opinion of the Court page 1.

<sup>3</sup> Id., slip opinion, Opinion of the Court pages 12-13.

<sup>4</sup> Id., slip opinion, Opinion of the Court page 16.

<sup>5</sup> U.S. Constitution Amdt. 5 ("Nor shall private property be taken for public use, without just compensation.")

<sup>6</sup> Kelo, slip opinion, Opinion of the Court page 4.

<sup>7</sup> Id., slip opinion, Dissenting Opinion of Justice O'Connor page 1.

<sup>8</sup> Id., slip opinion, Opinion of the Court page 19.

<sup>9</sup> It is interesting to note that many of these same issues were recently raised in the recent case of Madison Square Garden v. Metropolitan Transit Authority.

<sup>10</sup> Under Kelo virtually anything could qualify as an "economic benefit" in order to satisfy the public use requirement.

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