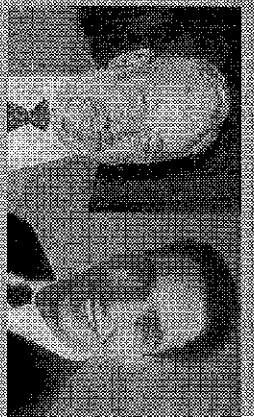


Let The Board Make The Decision – More Pullman

COUNSELS' CORNER:

By Kenneth J. Finger
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WHITE PLAINS - Once again we have the opportunity to report on the seminal case of 40 West 67th Street v. Pullman.

This case was the subject of two prior articles in *IMPACT*, but for those who are not familiar with its principle, the Court of Appeals, in *Pullman*, held that when the shareholders of a cooperative corporation voted to terminate a shareholder's proprietary lease because the shareholder was deemed to be objectionable, the decision of the cooperative would be upheld and basically subject to a very limited court review under the *Levandusky* principle of the business judgment rule.

That edict set forth the rule that the Court should defer to the Cooperative and accept the Cooperative's decision and action unless the Board acted in bad faith or illegally.

The Importance

The significance of *Pullman* was that, previously, in order to terminate a proprietary lease on the ground of objectionable conduct, the court had to affirm that determination generally after extensive litigation, motions and a trial and basically, the Court had the obligation to review, in depth, the grounds for the termination.

Pullman ended this, finding that where the shareholders voted (in that case unanimous among those voting) to terminate a shareholder's lease, that unless the cooperative corporation acted in bad faith or illegally, the cooperative, as opposed to the Court, would be the decision maker as to whether the shareholder's conduct was objectionable enough as to justify the termination of the shareholder's proprietary lease and the court would not conduct an extensive review of the grounds or to determine whether or not the Court agreed with the Board.

An Important Reference

Recently, we reported on the case of 13315 Owners Corp. v. Kennedy, which said that *Pullman* was not applicable where a decision was made by the Board of Directors. We pointed out at that time, "bad cases make bad law" and we opined that in a proper case a Board of Directors would have the same rights as the shareholders in *Pullman* and a decision of the Board, made in good faith, should be upheld by the Courts under the business judgment rule.

True to our prediction, in the recent case of *London Terrace Towers, Inc. v. Davis*, decided in December, the New York County Civil Court held, in a

lengthy and detailed exposition of the law in this regard, that a vote of the Cooperative's Board of Directors to terminate a Proprietary Lease was entitled to deference by a Court under the business judgment rule that a shareholder was objectionable.

The Court - citing among other commentators, your authors' article in the September/October 2004 issue of *IMPACT*, which supported extending the business judgment deference to board votes to terminate tenancies for objectionable conduct - agreed with this position.

In fact, the Court specifically noted our recommendation that cooperative boards have to follow proper voting procedures, review notices scrupulously, review notices scrupulously, review notices scrupulously,

lously and afford fundamental fairness to shareholder-tenants whose tenancy the board is considering terminating, and found that in *London Terrace*, the vote finding the shareholder tenant's conduct objectionable was validly made.

More Data

In fact, in *London Terrace*, the Board leaned over backwards and gave the shareholder "another chance to correct his behavior."

Among other things, he was accused of allowing his dog to run without a leash (he stated it was only on his floor and the dog was well-behaved); he slammed his door repeatedly and created loud noises in his apartment (he denied this); lit candles in the hall (he admitted this and said it was to see in his apartment); was the subject of another resident's harassment complaint; stole laundry from a laundry room (he said he thought someone threw away a jacket); and once

ran through the building's public hallways wearing only a shirt and one sock (which he stated was due to sleepwalking).

After the shareholder did not cure, and the problems continued, the Board held a special meeting. The Respondent had a full and fair opportunity to answer all the allegations at the special meeting and the Board, after finding the Respondent's responses unpersuasive, unanimously passed a resolution to terminate his tenancy.

The Court, in *London Terrace*, found that the Cooperative sent the shareholder tenant numerous written notices about his objectionable conduct, asking him to correct his behavior, held the special meeting, and set forth a detailed statement of his objectionable conduct in the termination notice.

The Backing

By reason of the fact that the cooperative board followed the

cording tax for 12 counties in the New York City area.

The recording tax is expected to raise \$100 million. A host of Department of Motor Vehicle increases are also on the table, including a 33 percent hike in registration fees for most vehicles, and an increase of 75 percent more for heavy trucks. The registration increase would add \$29 million this year and nearly four times that figure in future years.

The Reaction

In reacting to the Executive Budget, Senate Majority Leader Joseph Bruno, along with Assembly Speaker Sheldon Silver, said that they both dislike the tax and fee plans and suggested that the

Governor's education budget is inadequate.

Pataki's school aid commitment would rise to \$15.9 billion. That growth is smaller than the Senate and Assembly proposed last year in separate packages which attempted to deal with a Court of Appeals order to provide more money for New York City public schools.

The Governor is also proposing \$201 million more in additional school aid and \$325 million from the state's video lottery casinos from a special "sound, basic, education" fund for 270 needy school districts. The Court panel however, has recommended a \$1.4 billion increase just for New York City for next year.

procedures contained in the proprietary lease, the Court upheld the termination of the shareholder's tenancy and issued a judgment granting the Cooperative possession of the apartment.

Thus, as we have recommended repeatedly, if the Board acts in good faith, follows the dictates of the proprietary lease and provides the shareholder with fundamental fairness, one can now point to *London Terrace* as support for the principle that the business judgment rule should be applied to action by a Cooperative Board terminating a shareholder's proprietary lease.

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Commentary: Pataki's Budget Proposal Poses Big Challenges

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Pataki is aiming to fill the gap mostly by reducing spending and using money the state gained from the conversion of Empire Blue Cross/Blue Shield into a stock company. He also is proposing a one-time adjustment of pushing pension costs into the future to save local governments \$621 million and the state \$321 million.

This plan does not have the endorsement of the State Comptroller, Alan Hevesi, the sole trustee of the pension fund.

Other Facts

The Executive Budget also includes a \$36.6 billion five-year transportation plan which would be financed partly by an added 1 percent real estate re-

based in the county is important.

The county's commercial real estate vacancy rate is between 12-to-13 percent. The county, he added, is looking for readings in the single digits.

Westchester, based on a report from its Housing Opportunity Commission, needs 15,000 housing units by 2015. The county, Spano said, will attempt to create that housing. "We'll build some affordable units," he said. "Resistance on it is very specific. We're open to anything to get it done."

Westchester County government understands the problems that the building and realty industry faces from the state's Environmental Quality Review Act (SEQRA) and the related no-growth attitudes of the county's local municipalities. "We are working on it," he said.

The county is continuing its efforts to enhance its international trade opportunities. Talks have been held with China, Canada and Italy, Spano said.

He added that the county is "now structured so that we can handle international growth."

The county is continuing its efforts on programs with the Business Council and the Westchester County Association in attempts to further improve economic growth.

Westchester County government is operating with 500 fewer workers than in 1998.

The county has added a Department of Emergency Services, as well as a new, state of the art emergency disaster center.

The county has downsized certain commissions, as well as its former Department of General Services.

The county's government is in good shape, and boasts a Triple AAA Bond Rating.

The financial burdens imposed by Medicaid and the uncertainty surrounding the Westchester County Medical Center are "two things that threaten us."

Other Observations

Carrera cited that the county's initiatives stress:

The availability of Industrial Development Agency (IDA) Benefits to companies considering relocating to Westchester.

The county's Office of Economic Development and Real Estate offers "one-stop shopping" to corporations. "What used to take three-to-four months, we now do in five days," he said.

The county's quality of life

"makes it happen" when related to economic development and corporate relocations.

A Summary

Spano stressed that the county's biggest negative is not from the state level, but from the county's taxing localities (local governments).

"Companies consistently ask us about local governments and their taxes," he said. He added that growth will be seen in the county's cities.

"Our quality of life is our most important asset," Spano said. "Westchester County has to consistently face the constant balance between our quality of life and business."

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