

COUNSEL'S CORNER

By Kenneth J. Finger,
Carl L. Finger and
Daniel S. Finger

Finger & Finger, Chief Counsel,
Building & Realty Institute (BRI)



WHITE PLAINS—As many of you may be aware, at the Nov. 12 General Membership Meeting of the Building and Realty Institute (BRI), Charles V. Martabano presented the Institute with a discussion of the recent and not so recent history of the litigation surrounding the Town of Kent (Putnam County).

An analysis of the Appellate Division opinion in the case of Kent Acres Development Co., Ltd., v. City of New York, et al., ("the Kent Manor case"), the case presented at the meeting, reveals the importance of this especially as said case since it pertains to the issue of "Vested Rights."

We should use this decision not only as a source of support for the proposed "Vested Rights" legislation being supported by the BRI, but also as a precedent for future cases that may be brought in efforts to enforce the rights of builders, developers and others against municipalities who would attempt to circumvent and infringe upon those rights.

Key Points

In his presentation, Martabano discussed the case and presented a detailed history of the litigation, including the facts that gave rise to and provided support for the Plaintiffs' claims of conspiracy and damages. In addition, Martabano discussed the recent settlement of the case, including not only how it was arrived at but also some of the future ramifications of the settlement in terms of damages.

In listening to Martabano and in analyzing this case, it is apparent that the decision of the Court directly relates to the building and realty industry's on-going discussions on the issue of "Vested Rights" and it further underscores the necessity for that legislation. It is interest-

ing that the Court came upon a set of facts that goes to the heart of the "Vested Rights" issue and that the Court's decision so eloquently describes the rationale behind the BRI's position.

Initially, in its decision in Kent Acres Development Co., Ltd., v. City of New York, et al., 41 A.D.3d 542, 841 N.Y.S.2d 108 (2nd Dept. 2007), the Court discussed the specific facts and history of this case and, based on those facts, went on to state that:

[u]nder the particular circumstances of the instant case, the Supreme Court properly directed the Town to consent to the participation of Kent Acres and Lexington in the POPP. As properly found by the Supreme Court, by entering into the 1989 Stipulation of Settlement, Kent Acres, the Town – through its Planning Board (see Town Law §§ 60, 65) – and the homeowners' group unequivocally and knowingly agreed to discontinue the then-pending proceeding in exchange for the downsizing of the Project and the Plant as well as all necessary approvals following that reduction. By the stipulation of settlement, which was "so-ordered" on December 21, 1989, the Town approved the revised and reduced development Project. Pursuant to the Town's approval and its legally-issued permits, Kent Acres, and then Lexington, demonstrated a commitment to the purpose for which the approvals were granted by commencing construction, effecting substantial changes in the land and incurring substantial expenses to further the development Project.

The Court's rationale demonstrates that in a situation such as the present one, where a town enters into an agreement with regard to a development and the developer takes certain actions based on that agree-

ment, the town must abide by the agreement and grant all approvals as they agreed. The BRI has championed this exact issue in its pursuit of legislation on the issue of "Vested Rights."

If enacted, the "Vested Rights" legislation would help avoid this type of confusion and/or bad faith by requiring municipalities to adhere to the approvals granted and to apply the laws as they existed at the time of said approvals. The Court expanded further on this rationale by associating the Developer's rights under the 1989 agreement as contractual. The Court stated:

the Town...failed to comply with the gist of its contractual obligations under the so-ordered stipulation of settlement, when it declined through its counsel to consent to Kent Acres' participation in the POPP in 1999. Participation in the new POPP had become essentially a condition precedent to the completion of the Town's previously-approved Kent Acres development as agreed upon under the stipulation of settlement.

An Important Step

Under the Court's rationale, the Town was, and remains, contractually bound to provide the developer with all necessary approvals for the developer to complete the project. The Court's recognition of the contractual rights of a developer in "Vested Rights" circumstances is an important step and an important aspect of the "Vested Rights" philosophy. The Court concluded with a discussion of the breaches by the Town and the resulting damages incurred by the Developer, stating:

In light of the actions and substantial expenditures by Kent Acres and Lexington in relying upon the Town's position and previous approvals, the Su-

Kent Manor—An Analysis of the "Vested Rights Issue"

preme Court properly annulled the Town's determination to withhold consent to the Plant's inclusion in the POPP. The record amply supports the conclusion that Kent Acres and Lexington not only had sufficiently committed the land to the use authorized by the approvals and permits prior to the Town's change of position (see *Bower Assoc. v. Town of Pleasant Val.*, 2 N.Y.3d 617, 627, 781 N.Y.S.2d 240, 814 N.E.2d 410; *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 52-53, 643 N.Y.S.2d 21, 665 N.E.2d 1061; *Matter of Lombardi v. Habicht*, 293 A.D.2d 474, 475-476, 740 N.Y.S.2d 101), but Kent Acres had been conditionally approved by the DEP to participate in the POPP, and to construct on-site and off-site mechanisms to

reduce the level of phosphorous consistent with the DEP's watershed protection program.

Because the Developer had, relying on the approvals of the Town, taken actions and made substantial expenditures based thereon, the Court determined that the Town was not entitled to refuse the additional approvals (for inclusion in the POPP) that the Developer required.

Highlighting the Need

This case not only highlights the necessity for "Vested Rights" legislation so as to avoid unnecessary and protracted delays and litigation, but it also provides a framework and basis for "precedent" (at least in similar circumstances) upon which future cases may be based.

Continued on page 9

BRI Elects Its Officers for 2010

Continued from page 1

with Houlihan-Parnes/iCap Realty Advisors of White Plains, was elected chair of the Apartment Owners Advisory Council (AOAC) of the BI-BRI. Houlihan will be serving his fourth term. Camille Sprio, the principal of Camille Realty of Bedford, was re-elected vice chair for a fifth term.

Property Managers Elect Their Officers

The Advisory Council of Managing Agents (ACMA) of the BI-BRI re-elected David Amster, a principal of Prime Locations of Yonkers, as its chair. Amster will chair ACMA for the fourth consecutive year. Amster served as chair of the BRI's Negotiating Committee during the association's Labor Contract Negotiations with Local 32-BJ Service Employees International Union (SEIU) in 2006.

The council also re-elected Jeff Stillman, a principal of Stillman Management of Mamaroneck, and John Bonito, a principal of Garthchester Realty of Scarsdale, as vice chairs. Stillman will serve his fourth term. Bonito has been a vice chair since 2003. Both Stillman and Bonito are former chairs of ACMA.

Homebuilders Select Their Officers

Bob Bossi, the principal of Northern Westchester Builders of Katonah, was elected chair of the Home Builders Advisory Council (HBAC) of the BI-BRI. Bossi is entering his fourth term. He has been a member of the BI-BRI since 1977.

The HBAC also elected Doug Esposito of Esposito Builders of Peekskill as vice chair. Esposito has held that position since 2004.

Messer to Lead Remodelers

Eric Messer, the principal of Sunrise Building and Remodeling of Briarcliff Manor, was re-

elected chair of the Remodelers Advisory Council (RAC) of the BI-BRI.

Messer will be serving his fourth term in 2010. He has been a member of the BI-BRI since 1987. He has served on several sub-committees of the association. He has been a member of the BI-BRI Board of Trustees since 2002.

The RAC also re-elected Chuck Pateman, a principal of C.M. Pateman and Associates of Irvington, as its vice chair. Pateman has held that role since 2007. He is a former vice president of the BI-BRI. A member of the BI-BRI since 1997, Pateman has also been chair of the group's Residential Builders Advisory Council (RBAC). Bob Rossi, a principal of Carpet Giant of Ossining, was also re-elected as a vice chair of RAC. He will be entering his second term in 2010.

Commercial Builders Appoint Their Officers

The Commercial Builders Advisory Council (CBAC) of the BI-BRI re-elected Edward Lashins Jr. as its chair. Lashins is the principal of Lashins Development Corp. of Armonk.

The CBAC also re-elected Lee Lasberg of Lasberg Construction Associates of Armonk as its vice chair. Lasberg has served in that role since 2003.

BI-BRI Officers

BI-BRI officials also announced the association's slate of senior officers for 2010.

Nilsen will serve as chairman/immediate past president of the BI-BRI. Amster, Bossi, Houlihan, Ed Lashins, Messer and Virrill will all serve as vice presidents. Susan Fasnacht of WSP-Sells of Briarcliff Manor will be secretary-treasurer.

The BI-BRI is a building, realty and construction industry membership organization. The association has more than 1,700 members in 14 counties of New York State.

RICHARD G. BACCARI & COMPANY, LLP

Certified Public Accountants

WE UNDERSTAND YOUR BUSINESS

- Accounting and Auditing
- Tax Return Preparation and Planning
- Full Service Payroll
- Outsourcing All Accounting Functions
- Business Planning and Consulting

We work closely in all your accounting and financial needs.

10 Mitchell Place Suite 202
White Plains, NY 10601
(914) 686-1201
(914) 686-1281 fax
rich@rgbcpa.com

Richard G. Baccari, CPA, MBA
Managing Partner