

The Building and Realty Institute's (BRI's) Inaugural Vendor Showcase Receiving a Favorable Reaction

By Jeff Hanley, Impact Editor
WHITE PLAINS

The response to the Inaugural Vendor Showcase of The Building and Realty Institute (BRI) has been strong, association officials recently said.

The showcase - scheduled for Thursday, Oct. 13, from 6 p.m. to 10 p.m. at The Crowne Plaza Hotel in White Plains - will feature representatives of virtually every sector of the building, realty and construction industry.

"This is truly a unique event, and the strong response we have received from exhibitors (a total of 30 exhibitors as of Aug. 31) offers proof of that," said Albert Annunziata, executive director of the BRI. "We do not recall a local event that will feature a total representation of the building, realty and construction industry. It is a show that our members, as well as the general public, will not want to miss."

Event officials said that the showcase will feature an exhibition of:

- ✧ Builders and Developers
- ✧ Remodelers
- ✧ Contractors and Sub-Contractors
- ✧ Service Firms and Professionals Who Serve Those Sectors
- ✧ Service Firms and Professionals Who Serve Residential Buildings and Complexes
- ✧ Service Firms and Professionals Who Serve Commercial Buildings and Complexes
- ✧ Property Managers of Residential and Commercial Buildings and Complexes

"All BRI members, as well as non-members, are welcome to exhibit at this event," said Maggie Collins, event coordinator and director of membership for the BRI. "The program will also feature Break-Out Presentations and Workshops. It is a program well-worth attending for anyone affected by the building, realty or construction industry. We are delighted by the response to the event that we have received."

Exhibition Space can be reserved by contacting Collins at maggie@buildersinstitute.org, or at the BRI offices at (914) 273-0730. Event officials said that exhibition spaces - at \$300 per table for BRI members and \$500 for non-members - are still available. Officials are urging prompt reservations due to the strong response from exhibitors.

Admission to the showcase is free for BRI Members and the general public. Advance Reservations are mandatory. BRI Members, or members of the general public, can confirm their attendance to maggie@buildersinstitute.org, or to jeff@buildersinstitute.org. Reservations are also being accepted at (914) 273-0730, event officials said.

The BRI, also known as The Builders Institute (BI), is a building, realty and construction industry membership organization. The association has more than 1,800 members in 14 counties of New York State. Members of the organization are involved in virtually every sector of the building, realty and construction industry, association officials said.

Based in Armonk, the BRI has been commemorating the 70th anniversary of its formation throughout 2016.

Of Horses and Affordable Housing, Continued from p. 1

able/workforce units by the year 2000) included a revised housing goal of 239 affordable/workforce units by 2015.

The IMA in Section 5.7 also stated "if the required number of middle-income workforce housing...are not developed in the town by 9/1/13...the parties agree that upon demand of the county, the town shall pay to the county Five Hundred Thousand (\$500,000) Dollars."

The Sep. 1, 2013 deadline has come and gone. As of this writing, the Town of Lewisboro has still to meet its housing obligations under the Inter-Municipal agreement. The county has not yet called in its "marker" based on Section 5.7 of the Inter-Municipal Agreement. Aside from the fact that it's a tidy sum that might go to a number of affordable housing-related investments and programs, Lewisboro's action - or lack of it - is a significant blow to the local and regional demand for much-needed affordable/workforce housing. It is also a missed opportunity for builders out there who are ready, willing and quite able to meet that housing demand.

In 2008, a planning consultant to the county was asked to assist the Town of Lewisboro by conducting a study of four sites within the town where the zoning could be changed to allow for multi-family housing, thus laying the groundwork for the development of affordable/workforce housing and making it more feasible.

By increasing the density to only three units per acre, dozens of townhome or garden apartment affordable/workforce units could be developed on these sites.

The town has yet to seriously consider these proposed zoning changes. If the town had rezoned the properties and no developers expressed interest in developing affordable housing on them, then one might have reasonably concluded that the town had made, at least, a good-faith effort.

Lewisboro was one of the 31 municipalities included in the original Westchester Housing

Settlement based on violation of the federal Fair Housing Ordinance. The Federal Housing Monitor appointed under the settlement, James Johnson, reviewed the municipal zoning in these 31 municipalities under the Berenson and Huntington fair housing tests.

The Berenson fair housing criteria, based on *Berenson v. Town of New Castle* (1977), requires that each municipality, in its zoning, provide for both its own determined housing requirements, as well as its share of the regional need for a full range of housing. The Huntington standard, based on the case *NAACP v. Town of Huntington* (1988), states that a zoning ordinance violates the federal Fair Housing Act if it has a disparate *Impact* on a protected class by having a disproportionate adverse *Impact* on a minority group, or by perpetuating segregated housing patterns.

Lewisboro's zoning was found by the Federal Monitor to be in violation of both the Berenson and Huntington tests. In this respect, Lewisboro is joined by only two other municipalities, all sharing a comparable and lamentable record when it comes to failing a good-faith accommodation of fair and affordable housing. The other two localities are the Town of Harrison and the Village of Pelham Manor (more on these municipalities in a subsequent issue of *Impact*).

In addition, the Town of Lewisboro is one of the few municipalities that has refused to adopt the Model Housing Ordinance (developed by the Westchester County Planning Department) included in the Housing Settlement that requires a 10 percent set-aside for affordable/workforce housing.

Getting back to the open space acquired with county money back in 2003, it is now something called "the Old Field Preserve." It is a beautiful, exclusive chunk of open space and it has been well received - and undoubtedly appreciated - by Lewisboro's affluent equestrian community.

Counsels' Corner

The Unexpected Can Happen When it Comes to Elections for Board Members of Cooperatives and Condominiums

By Kenneth J. Finger, Esq., Carl L. Finger, Esq. and Daniel S. Finger, Esq., Finger and Finger, A Professional Corporation, Chief Counsel, Builders Institute (BI)/Building and Realty Institute (BRI)

WHITE PLAINS

Every Board of Directors, for a Cooperative, or Board of Managers, for a Condominium, has an election for its members on an annual basis.

While the procedure would seem simple and lead to the election of the Board Members - provided, of course, that a quorum is present - one Board recently found itself with a problem that seemed easily correctible. Not so fast, said the Court!

An Election

The facts are that the Cooperative sent out a notice for the Annual Election of Board Members. As with many Co-ops, the terms of the Board Members were staggered, and three members were up for election.

The By-Laws of this Co-op provided, as also with many Co-ops, that voting can be either in person or by proxy. The By-Laws also provided that "ballots and proxies shall be voted and counted at one and the same time."

The By-Laws also provide for Inspectors of the Election. The By-Laws are silent as to miscounting or recounting of ballots. The Annual Meeting of the Directors is to take place immediately after the shareholders' Annual Meeting. The Annual Shareholders' Meeting took place and three Board Members were elected and the results announced. Shortly after the meeting, a shareholder asked to examine the proxies and did so the next day.

An Exam

Upon the examination of the proxies he found that one proxy was not counted. The Board was notified and, due to the inclusion of the proxy erroneously omitted and not counted, the election results changed and the Board changed the results and the "certificate" of the results of the election were signed with the changed Board Members.

Within three days of the election, a letter was sent to all shareholders advising of the changed election result due to the mistake and the recount (as he said he did in all cases, particularly in close elections).

The Board Member who was not elected brought a lawsuit challenging the action of the Board (and the Election Inspector) in changing the election results. The Board argued that the proxy was timely submitted and omitted from the count due to an error. The "petitioners" argued that the announced results of the election should be confirmed regardless of the mistake and that by changing the results the Board breached its fiduciary duty.

The Court reviewed the case and issued a lengthy decision stating, among other things, that: "A corporation's (the co-op's) scope of authority is defined by the Business Corporation Law (BCL) and the corporate By-Laws. Where a Co-op's By-Laws are clear, they must be followed."

The Court, citing the BCL, said a court has the authority to confirm an election, order a new election or "take such other action as justice may require." It then stated that "however, the election may be set aside only where it is so clouded with doubt or tainted with questionable circumstances that the standards of fair dealing require it." A lack of proper notice of the election is one such ground.

The Court cited prior precedent that, as to balloting, absent any By-Law or statute to the contrary, votes cannot be added after the "polls have closed and the results formally announced." The Court went on to opine that a crucial action is the announcement of the final vote.



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A Citation

Citing the BCL, the Court also said that "no ballots, proxies, consents, nor any revocation thereof or changes thereto, shall be accepted by the inspectors after the closing of the polls and that the polls shall close at the end of the meeting and the inspection shall determine the result of the meeting." Moreover, a certificate of the results is not a legal requirement to finalize the election, but is required if requested.

In this case, the By-Laws were silent as to a miscount or a recount. However, the Court believed that the intent of the By-Laws was that the votes are counted "at a single point in time, and that that time be at the Annual Shareholders Meeting, and not sometime after, and not twice."

The Court affirmed the practice of this Board to announce the results at the end of the Annual Meeting and that was the 'common practice' of this Board, which also should be respected. The Court found that even though there was an "overlooked proxy," that did not violate the "fair dealing" requirement and that this mistake did not cloud with doubt or taint the election with questionable circumstances so that the election had to be set aside.

"What do we learn from this case? Among other things, compliance with the By-Laws is essential and consistency with precedent is significant."

Concluding that "like any other corporate board, the board of a residential cooperative has a fiduciary duty to the shareholders" and the Court found that the respondents (the Board) did not violate their fiduciary duty, nor were any monetary damages caused the petitioners. The Court found and held that the initial results held up and the count the next day was invalid.

What do we learn from this case? Among other things, compliance with the By-Laws is essential and consistency with precedent is significant. We recommend to our clients that the Inspectors of the Election sign a certification as to the count and the count be closed and verified at the end of the Annual Meeting. Doing so should confirm the election and avoid later disputes.

Editor's Note: The authors are with Finger and Finger, A Professional Corporation. Finger and Finger is chief counsel to The Builders Institute (BI)/Building and Realty Institute (BRI) of Westchester and The Mid-Hudson Region. The firm is based in White Plains. The preceding report originally ran in the July/August 2015 issue of Impact. It is being re-printed due to its popularity.

Reviewing and Understanding the New & Lengthy Major Capital Improvement (MCI) Applications

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

WHITE PLAINS

For those Landlords and Managers whose multiple dwellings are subject to the 1974 Emergency Tenant Protection Act (ETPA), the only way to recoup the cost of capital improvements from those tenants who are still subject to the controls of ETPA is through an application to the Division of Housing and Community Renewal (DHCR), now known as Homes and Community Renewal (HCR).

The application process, over the years, has been an arduous one, with a two-year limitation as to when the application can be brought after the work is done.

DHCR has, effective Sep. 1, 2016, issued a new application form, RA-79, for rent increases based on Major Capital Improvements (MCI's). Among other things, the new procedure allows an Owner to file an MCI application more than two years after the completion of the capital improvement work, provided that the delays in obtaining the government approvals was not the fault of the Owner, or its Contractor, and "all government permits and approvals were filed for in a timely manner."

DHCR has issued a new set of instructions for RA-79, consisting of five pages, for the new RA-79 form (nine pages).

It is noted, at the very start of the instruction form, that an MCI is available if the Owner has "completely installed, paid for, and applied for, or secured all required approvals and/or Certificates of Operation for building-wide improvements, such as windows, roofs, plumbing, electrical, burner/boiler, etc."

It is noted also that there are situations where a Cooperative or Condominium can file an application by the Managing Agent on behalf of the corporation and all shareholders, including the Sponsor.

Reference should be made to DHCR Fact Sheet No. 33, which is the "Useful Life Schedule for Major Capital Improvements," and DHCR Policy Statement 93-2 for "Definition of Room for Major Capital Improvements."

The useful life information is required on the new form. The new form also includes the different calculations for the amortization periods of buildings with 36 or more apartments, and those with 35 or less apartments. There are six (6) supplement forms attached to the application that must be completed before entering the requested rent increase on page 1 of the application.

These supplements are (1) The Owner and Contractor Affirmation; (2) Required information for specific MCI's; (3) Invoice Contract and proof of payment worksheet; (4) MCI Cost Allocation for commercial tenants; (5) Schedule of Tenants and (6) Co-op/Condo questionnaire.

The applicant must also include supporting documentation, including contracts for the work, cancelled checks and bank statements, proposals, invoices and municipality approvals. Different types of work require different documentation. If there are violations for hazardous conditions, these violations must be cured before the increase will be approved.

A Long Checklist

There is an Owner Checklist (on page 2 of the application form) that should make it somewhat easier to file a completed application. That checklist reminds the applicant to: (1) Submit all contracts, proposals and /or invoices signed by both parties; (2) Submit all cancelled checks, bank statements and other proof of payment; (3) Assure that the contracts/proposals/invoices equal the claimed cost of the MCI (and if not, explain why); (4) Itemize each cost in the contracts/proposals/invoices; (5) Make sure that the Contractor/Vendor has signed all relevant supplements; (6) Complete supplement two for certain MCI items; (7) Submit all government permits/approvals for the MCI installations; (8) All payment proof - checks - equal the claimed costs (again, if not, explain why); (9) Complete supplement four as to commercial properties at the subject premises; (10) Assure that supplement five contains a current tenant list (accurate within 30 days of filing); (11) Compare room count in the application with prior MCI applications and explain any discrepancies; (12) Complete the Co-op/Condo Questionnaire, if applicable; (13) If required, is the building currently, and for four prior years, registered?; (14) If there are Lead Paint Violations for the building, are they removed?; and (15) Is the application - and all relevant supplements - signed?

An original and one copy of the MCI application and all supplements and all supporting information and documentation should be filed.

All Owners and Managers are encouraged to read and digest both the instructions and the form for the MCI so that all requirements are met. Mistakes and omissions will only delay the process. Good Luck!

Editor's Note: Kenneth J. Finger, Daniel S. Finger, and Carl L. Finger are with Finger and Finger, A Professional Corporation. The firm, based in White Plains, serves as Chief Counsel to The Building and Realty Institute (BRI) and its affiliate associations, The Apartment Owners Advisory Council (AOAC), The Cooperative and Condominium Advisory Council (CCAC) and The Advisory Council of Managing Agents (ACMA).

Tech Talk

Some Words of Warning to All - You Better Be Wary of the Cerber Virus!

By Andrea Wagner

DANBURY, CT

Beware of the Cerber Virus!

It could happen to you. It happened to me and I'm pretty computer savvy. There is a new form of malicious ransomware out there that is plaguing the business industry.

Ransomware is a computer virus that you get from opening a malicious document or email. It can even be from people you know, because their email addresses are being stolen.

When you open the malicious file in your pc, your computer will either freeze, or ask to run the app. Files will suddenly become encrypted and documents from the ransomware will be dropped into every folder.

The message is something like this:

Cannot find the files you need? That is because the files have become encrypted. Great! You are now part of a community, Cerber Ransomware.

It goes on to say that unless you have the encryption key, you cannot access your files and if you try to remove the virus on your own, the files will be permanently destroyed.

You usually have a few weeks to comply with their instructions to pay for the software and the key. They demand each victim to pay 1.25 in Bitcoins, which is approximately \$512 in U.S. dollars.

In February, Hollywood Presbyterian Medical Center handed over \$17,000. In June of this year, 57 percent of Microsoft Office users (source: SCMagazine) were hit.

Prime Healthcare, which runs a few hospitals, and Kansas Heart Hospital were forced to pay to retrieve thousands of patient files. But Kansas Heart paid and didn't get their files back.

It is strongly recommended not to pay the ransom as the Cerber key may not decrypt the data entirely. Also, it helps to perpetuate this nasty business. Security experts recommend removing the Cerber virus as soon as the victim notices that the computer has been compromised by it.

Luckily, I did not pay and I did not lose data. I had two backups, one on an external hard drive, and one in the cloud called Carbonite. I did not pay the ransom, but called upon my trusted Computer Troubleshooters (in Brookfield, Conn.) who immediately scanned my computer using malware and AVG cleaners.

"You should be particularly careful about opening any attachments that come from unknown sources and are accompanied by suspicious emails. They may pose as representatives of governmental or law enforcement institutions, so it is recommended that you always check the legitimacy of such emails."

Key Facts

Here are some tips:

- ❖ Cyber criminals mostly distribute this virus via spam emails, so make sure you do not open any suspicious emails that come from unknown senders. Even though most of such malicious correspondence comes up as "Spam," there is no guarantee that a virus-carrying email will not slip to your regular Inbox as well.
- ❖ You should be particularly careful about opening any attachments that come from unknown sources and are accompanied by suspicious emails. They may pose as representatives of governmental or law enforcement institutions, so it is recommended that you always check the legitimacy of such emails.
- ❖ Make sure you have a good backup in place. If you back up to an external hard drive, remove it during the day and back up at night once all is okay.
- ❖ Have a trusted IT professional make sure your malware protection is up-to-date. This is not fool-proof, but it can help you avoid a costly problem.

Editor's Note: Andrea Wagner is president of Wagner Web Designs, Inc. The firm, a member of The Building and Realty Institute of Westchester and The Mid-Hudson Region (BRI), specializes in optimized small business Web Sites.

BRI's Annual Golf Outing

is raising funds for

SHORE

Sheltering The Homeless Is Our Responsibility

Monday, September 26th, 2016

Willow Ridge Country Club

123 North Street, Harrison, NY 10528

Raffle Grand Prize: \$1500 Cruise Credit

\$325 per Golfer, Price includes caddies, golf cart, plus dinner & drink

Schedule:

Registration 11:00 am

Lunch 11:30 am

Shotgun Start 1:00 pm

Networking Dinner 6:00 pm

For questions or to register please call Margie Telesco at (914) 273-0730 or email Margie@buildersinstitute.org