

REPORT:

Builder Confidence Posts an Historic Decline Due to the Coronavirus Pandemic

WASHINGTON, D.C.

Reflecting the growing effects of the Coronavirus COVID-19 Pandemic, builder confidence in the market for newly built, single family homes plunged 42 points in April to 30, according to a building and realty industry report.

The National Association of Home Builders (NAHB)/Wells Fargo Housing Market Index (HMI) released on Apr. 15 said the decline in April was the largest single monthly change in the history of the index. NAHB added that it marks the lowest builder confidence reading since June of 2012.

NAHB officials said that it is also the first time that builder confidence has been in negative territory (below 50) since June of 2014.

"This unprecedented drop in builder confidence is due exclusively to the Coronavirus outbreak across the nation, as unemployment has skyrocketed and gaps in the supply chain have hampered construction activities," said NAHB Chairman Dean Mon, a home builder and developer from Shrewsbury, N.J.

Mon added: "Meanwhile, there continues to be some confusion over builder eligibility for the Paycheck Protection Program, as some builders have successfully submitted loan applications while others have not been able to. NAHB is working with the White House, Treasury and Congress to get the broadest builder participation possible. Home building remains an essential business throughout most of the nation, and as the pandemic shows signs of easing in the weeks ahead, buyers should return to the marketplace."

"Before the pandemic hit, the housing market was showing signs of strength, with January and February new home sales at their highest pace since the Great Recession," said NAHB Chief Economist Robert Dietz. "To show how hard and fast this outbreak has hit the housing sector, a recent poll of our members reveals that 96 percent reported that virus mitigation efforts were

hurting buyer traffic. While the virus is severely disrupting residential construction and the overall economy, the need and demand for housing remains acute."

Dietz added that as Social Distancing and other mitigation efforts show signs of easing the health crisis, NAHB "expects that housing will play its traditional role of helping to lead the economy out of a recession later in 2020."

Specifics

Derived from a monthly survey that NAHB has been conducting for 30 years, the index gauges builder perceptions of current single family home sales and sales expectations for the next six months as "good," "fair" or "poor," NAHB officials said.

The survey also asks builders to rate the traffic of prospective buyers as "high to very high," "average" or "low to very low." Scores for each component are then used to calculate a seasonally adjusted index where any number over 50 indicates that more builders view conditions as good than poor, NAHB officials added.

The HMI index gauging Current Sales Conditions dropped 43 points to 36. The component measuring Sales Expectations in the next six months fell 39 points to 36 and the gauge charting the Traffic of Prospective Buyers also decreased 43 points to 13, NAHB officials said.

Looking at the Monthly Averages Regional HMI Scores, the Northeast fell 45 points in April to 19, the Midwest dropped 42 points to 25, the South fell 42 points to 34 and the West dropped 47 points to 32, the index said.

NAHB officials said that the HMI survey was conducted between Apr. 1 and Apr. 13.

The index, NAHB officials added, is strictly the product of NAHB Economics and is not seen or influenced by any outside party prior to being released to the public. HMI tables can be found at nabh.org/hmi. More information on housing statistics is available at housingeconomics.com

Housing Affordability Down Due to Economic Losses Stemming from COVID-19, Continued from p. 2

Other major metros at the bottom of the affordability chart, the report added, were in California. In descending order, they included Anaheim-Santa Ana-Irvine; San Diego-Carlsbad; and Oxnard-Thousand Oaks-Ventura.

All five least affordable small housing markets were also in the Golden State. At the very bottom of the affordability chart was Salinas, where 15.3 percent of all new and existing homes sold were affordable to families earning the area's median income of \$75,800, the report said.

In descending order, other small markets at the lowest end of the affordability scale included San Luis Obispo-Paso Robles-Arroyo Grande; Merced; Santa Cruz-Watsonville; and Napa, the study added.

The index is a measure of the percentage of homes sold in a given area that are affordable to families earning the area's median income during a specific quarter. Prices of new and existing homes sold are collected from actual court records by Core Logic, a data and analytics company. This release incorporates the use of Freddie Mac's 30-year fixed effective interest rates series, following the discontinuation in mid-2019 of the FHFA series previously used in HOI calculations, NAHB officials said.

National and metropolitan area HOI numbers were revised back to the first quarter of 2012 using Freddie Mac's interest rate series, according to NAHB officials.

Construction Compensation Insurance Group Reports A 20 Percent Dividend for Its Members, Continued from p. 1

Group 530 Announces Its Dividend

New York State Workers Compensation Group 530, the compensation insurance group for The Cooperative and Condominium Advisory Council (CCAC), The Apartment Owners Advisory Council (AOAC) and The Advisory Council of Managing Agents (ACMA) of The Building and Realty Institute (BRI), recently announced a 22.5 percent dividend for the policy year ending June 1, 2019.

Group spokesmen said that the dividend is in addition to the maximum 20 percent upfront discount. The announcement was made during the group's Annual Meeting (a virtual event) on May 14.

A total of 477 cooperatives, condominiums, apartment buildings and office buildings participate in the program, spokesmen said. Group 530 was formed in 1990.

Builder Confidence Posts Solid Gain in May Following April's Historic Drop, Continued from p. 1

charting the Traffic of Prospective Buyers rose eight points to 21.

A Regional Look

Looking at the monthly average regional HMI scores, the Midwest increased seven points to 32, the South rose eight points to 42 and the West posted a 12-point gain to 44. The Northeast fell two points to 17, NAHB officials said.

NAHB officials said that the index is strictly the product of NAHB Economics. Officials added that the index is not seen or influenced by any outside party prior to being released to the public. HMI tables can be found at nabh.org/hmi. More information on housing statistics is also available at housingeconomics.com.

Counsel's Corner

Good News from the N.Y. State Court of Appeals

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

WHITE PLAINS

The New York State Court of Appeals, in a split (4-3) decision, struck down a portion of the 2019 Housing Stability and Tenant Protection Act (HSTPA), giving New York State's multi-family rent regulated industry some very good news.

When one considers the fact that this is the first high court decision involving the HSTPA, there is a hope that this portends positively toward a favorable decision involving the lawsuit of the Builders Institute of Westchester and Putnam Counties, Inc. - also known as the Building and Realty Institute (BRI) - challenging the HSTPA, which is presently pending in the United States District Court in White Plains.

While it is unusual for the Court of Appeals to decide an HSTPA issue involving a case that started well before the effective date of the HSTPA, the Court accepted four (4) cases upon the request of the parties after giving them all the chance to brief the issue as to the impact of the HSTPA. The court had the option of sending the issue back to a local court, but interestingly chose to decide it and decided it on constitutional grounds.

The legal background for this case started with *Roberts v. Tishman Speyer*, (13 NY3d 270 [2009]), where the Court of Appeals ruled that apartments in buildings with J-51 tax abatements could not be decontrolled when rents rose above the statutory threshold, and that case overturned a prior Division of Housing and Community Renewal (DHCR) of N.Y. State advisory opinion from 1996 which said that landlords could utilize luxury decontrol even when receiving J-51 tax abatements, and while the Court of Appeals set aside this DHCR advisory opinion, it found that since Landlords who did decontrol pursuant to DHCR's opinion essentially did so in good faith and did not do so fraudulently, thereby not increasing the "lookback" period.

The Court of Appeals in this case, *Regina Metro Co. LLC vs. DHCR* held that in examining a rental unit's history to find the last regulated rental rate, a court could not look beyond the four year statute of Limitations and it violated the due process protections of the US Constitution to do so.

The issue in *Regina Metro Co. LLC vs. DHCR*, one of four cases that were heard together, was set forth by the Court that the: "four appeals, ...[presented] a common issue under the Rent Stabilization Law (RSL): what is the proper method for calculating the recoverable rent overcharge for New York City apartments that were improperly removed from rent stabilization during receipt of J-51 benefits prior to ... [the Court of Appeals] 2009 decision in *Roberts*." The Court of Appeals stated:

"As explained below, when leave was granted in these cases [several years ago], the RSL [Rent Stabilization Law] mandated that, absent fraud, an overcharge was to be calculated by using the rent charged on the date four years prior to filing of the overcharge complaint (the "lookback period") as the "base date rent," adding any legal increases applicable during the four-year lookback period and computing the difference between that legal regulated rent and the rent actually charged to determine if the tenant was overcharged during the recovery period.

In such cases, consideration of rental history predating the four-year lookback and statute of limitations period was prohibited. While the appeals to this Court [of Appeals] were pending, the Legislature - as is its prerogative - enacted the Housing Stability and Tenant Protection Act of 2019 (HSTPA), making sweeping changes to the RSL, the majority of which are not at issue in these appeals. As relevant here, Part F of the HSTPA includes amendments that, among other things, extend the statute of limitations, alter the method for determining legal regulated rent for overcharge purposes and substantially expand the nature and scope of owner liability in rent overcharge cases (see L 2019, ch 36, Part F). The tenants in these cases urge us [the Court of Appeals] to apply the new overcharge calculation provisions to these appeals that were pending at the time of the HSTPA's enactment, some of which seek recovery of overcharges incurred more than a decade before the new legislation."

The owners effectively and successfully argued that "the effective date language does not evince legislative intent to apply the new overcharge calculation provisions retroactively, particularly to cases no longer pending in DHCR or the trial court and further contended, in any event, that retroactive application of the new overcharge calculation methodology to these appeals would violate due process protections in the State and Federal Constitutions."

Before the enactment of the HSTPA, overcharge claims were subject to a four-year statute of limitations that precluded the recovery of overcharges incurred more than four years preceding the imposition of a claim. Under the HSTPA, Part F, examination of rent history that predates the period covered by the former lookback rule was no longer precluded. Instead, DHCR and courts were, pursuant to the HSTPA, required to "consider all available rent history which is reasonably necessary" to investigate overcharge claims and determine legal regulated rent, regardless of the vintage of that history and including records kept by owners, tenants and agencies (id. § 26-516[a][i], [h]). Part F likewise lengthened the four-year record retention period to six years and provided that an owner's "election not to maintain records" does not limit the authority of DHCR or a court to examine the rental history further (id. § 26-516[g]). Whereas the RSL previously provided for only two years of treble damages for willful overcharges, treble damages are now recoverable for the entire six-year limitations period (id. § 26-516[a][2]).

The Court of Appeals stated that significant issues existed as to whether or not the "presumption against retroactive application of statutes" and the statutory changes comported with constitutional due process. The Court opined that "Retroactive application of the overcharge calculation amendments would create or considerably enlarge owners' financial liability for conduct that occurred, in some cases, many years or even decades before the HSTPA was enacted and for which the prior statutory scheme conferred on owners clear repose. Because such application of these amendments to past conduct would not comport with our retroactivity jurisprudence or the requirements of due process, we resolve these claims pursuant to the law in effect when the purported overcharges occurred" and the Court thereupon determined that the retroactive application was unconstitutional.

When one considers the investments made in multi-family housing, as well as investments made in Major Capital Improvements (MCI's) and Individual Apartment Improvements (IAI's) prior to the June 14, 2019 HSTPA effective date, it is hoped that when the BRI's federal case is decided, the Federal Court will look to this reasoning and apply it to other provisions of the HSTPA, which although not specifically retroactive, have a retroactive impact by denying increases that were legal when the investments were made, such as investing in an MCI or an IAI prior to the statute's effective date, but not getting the approval before said date, thereby leading to a denial of an increase that would have been allowed prior to said date, a retroactive application of the HSTPA.

The Court of Appeals held that the overcharge calculation amendments cannot be applied retroactively to overcharges that occurred prior to their enactment, stating that the HSTPA would impose new liability and thus have, without legislative history supporting it, a "retroactive effect" - altering substantive rights in multiple ways and that "Expansion of the limitations period from four to six years clearly has a retroactive effect because it permits recovery for nonfraudulent conduct occurring during an additional two years preceding the former recovery period - conduct that was beyond challenge under the prior law. Likewise, the imposition of treble damages for four additional years of overcharges - conduct not previously subject to treble damages - clearly increases the scope of liability for past wrongs if applied retroactively" and would impose new liability altering substantive rights in multiple ways.

The Court went on to state that "this retroactive effect becomes even more pronounced when considered in tandem with the HSTPA amendments to the record retention requirements." The Court stated the HSTPA amendments "... expand the retention period by two years and, although the provision still nominally permits



Ken Finger



Carl Finger



Dan Finger

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SURVEY ON ECONOMIC IMPACT OF COVID-19: Westchester County Businesses Are Anxious About Their Survival Businesses Are Also Frustrated with the Loan Application Process, Survey Reports

WHITE PLAINS

Reeling from the economic impact of the COVID-19 pandemic, Westchester businesses are highly anxious about their survival and frustrated with the process of applying for financial assistance.

Westchester businesses are also looking for the county and local chambers to be their advocates as they struggle through this unprecedented crisis.

Those are among the results of a survey released on Apr. 29 by the Westchester County Office of Economic Development to assess the economic impacts related to COVID-19. The county said the survey results will inform strategies to speed recovery and will shape emergency relief programs and support.

The survey, which was sent to the County Economic Development Office's email list as well as to all the chambers, received more than 700 responses. It was also sent out by the Business Council of Westchester, Today Media and the Westchester County Business Journal, officials said.

Here are key findings from the survey:

- ◆ A total of 58 percent said that they will lose 75-100 percent of their revenue as a result of COVID. However, 56 percent said they have not let anyone go as of the date of the survey.
- ◆ More than half of the businesses in the survey were from retail, personal services, administrative and professional services. A total of 60 percent are either solo Entrepreneurs or businesses with less than five employees.
- ◆ A total of 85 percent need financial assistance with 64 percent applying for SBA loans. A total of 39 percent need help with the application process.
- ◆ A total of 29 percent of respondents report annual gross revenue over \$1,000,000 and 25 percent under \$100,000. Small businesses have a broad spectrum.
- ◆ The majority of respondents do have some part-time employees and for some

businesses this represents the majority of their work force.

- ◆ A total of 65 percent have been in business for more than 10 years so they are part of the fabric of Westchester.
- ◆ A total of 70 percent need help addressing or changing business models or marketing to help keep customers/clients. They are concerned with immediate situations with regards to cash flow, rent, paying employees and trying to figure out if and how to continue after.
- ◆ Businesses are looking to their chambers or business organizations for information and advocacy for state and federal programs; help with marketing and promoting the businesses in the community; networking and connection with one another and where they can find help.
- ◆ Businesses are also looking to the Office of Economic Development to help them connect to resources; accurate and up-to-date information; webinars; help with applications and grants or incentives.

"The results of this survey clearly show that the Westchester business community is struggling to survive during this crippling economic downturn and needs help. This survey provides the county with valuable information on what services and assistance these companies need to remain in business as our economy recovers from the pandemic," said Westchester County Executive George Latimer.

"We are appreciative that so many business owners took the time to complete the survey. While each business is dealing with their own specific set of circumstances, the survey helped us to find the common ground and to identify how best to allocate our resources to address the needs. This is like running a marathon on an obstacle course with obstacles we have never seen before," said Shari Rosen Ascher, advocacy and community liaison for the Office of the Westchester County Executive. "The survey is only the beginning of an open dialogue between the County Executive's office and the business community."

Study: Builder Confidence in the 55-plus Housing Market Drops Sharply in the First Quarter Due to COVID Concerns

WASHINGTON, D.C.

Builder confidence in the single family 55-plus housing market dropped 30 points to 38 in the first quarter, according to a recently released building and realty industry report.

The report, The National Association of Home Builders' (NAHB) 55-plus Housing Market Index (HMI), was released on Apr. 30.

The study said that the reading is the lowest since the fourth quarter of 2012.

The 55-plus HMI measures two segments of the 55-plus housing market: single family homes and multifamily condominiums. Each segment of the 55-plus HMI measures builder sentiment based on a survey that asks if Current Sales, Prospective Buyer Traffic and Anticipated Six-Month Sales for that market are good, fair or poor (high, average or low for traffic), the study said.

"Before the coronavirus pandemic, the 55-plus housing market was doing very well and was poised to continue on that path moving forward," said Harry Miller III, chairman of NAHB's 55-plus Housing Industry Council and president of Regal Builders LLC in Dover, Del.

Miller added: "Now, many builders are in a holding pattern as potential home buyers in that age bracket are concerned about visiting sales centers and are waiting to see how the crisis will impact their ability to sell their existing homes."

Key Data

For the three index components of the 55-plus single family HMI, Present Sales fell 25 points to 48, Expected Sales for the Next Six Months dropped 41 points to 34 and Traffic of Prospective Buyers fell 33 points to 18, according to the report.

The 55-plus multifamily condo HMI fell 29 points to 29—the lowest reading since the fourth quarter of 2012. All three index components posted decreases from the previous quarter: Present Sales fell 24 points to 36, Expected Sales for the Next Six Months dropped 34 points to 27 and Traffic of Prospective Buyers fell 39 points to 14, the study said.

All four components of the 55-plus Multifamily Rental Market went down compared to the previous quarter: Present Production dropped 18 points to 47, Future Expected Production fell 24 points to 42, Present Demand decreased 32 points to 50 and Future Expected Demand dropped 34 points to 49, the report added.

"Like the broader housing market, the 55-plus housing market has taken a significant hit due to the effects of the pandemic," said NAHB Chief Economist Robert Dietz. "While we expect to see some further impacts in the short-term, we do expect the housing market to stabilize later this year and help lead the economy back to more solid footing. Recent stock market gains will also help the 55-plus housing sector."

The full 55-plus HMI tables can be accessed by visiting nabh.org/55hmi, NAHB officials said.

Back From the Pause

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

WHITE PLAINS

Now that the Governor has given permission for many businesses to re-open, businesses, multi-family dwellings, cooperatives and condominiums (which we will refer to as "Owners") are faced with the issue of what to do and how it should be done.

As to multiple dwellings, there are many issues that come to the fore. First, one must look at what Owners have been doing during the COVID-19 pandemic. As a result of the "pause," virtually no work has been undertaken at multi-family dwellings, whether to the buildings themselves or in apartments. Moreover, common area facilities, whether tennis, or pools or gyms have been generally closed.

Move-Ins and Move-Outs were usually not allowed, unless the buildings were "garden apartment" types. Deliveries were limited and in many cases non-existent with most deliveries, if allowed, only to the lobbies. Guests, visitors, relatives were frequently prohibited (except for home health aides). No realty showings of units have been allowed to date, as the only industries opened in Phase I are basically construction, manufacturing and wholesale.

With the new "relief" from the "pause," questions have been raised from both Owners and residents as to "what now?" Many buildings are now allowing unlimited deliveries, work in buildings and apartments, moving in and out of buildings and visitors. Among other things, restrictions will still be likely as to Move-Ins and Move-outs, as well as deliveries of furniture and appliances, with limitations on the use of elevators or stairways so as to continue to maintain appropriate distancing as well as the cleanliness of the buildings and the units.

It is also important to note that in order to assure these items Owners should at a minimum, if possible, note the names of the persons who are actually attending at the building and possibly in some situations question those personnel first to make sure that no one with an illness can attend at the building. Getting the names is important for "tracing" purposes if anyone tests positive for COVID-19.

However, while obtaining names is optimum, if not practical, the Owners should require the suppliers, contractors and sub-contractors to police their own personnel to assure that no one who is positive for COVID-19 goes into a building. Moreover, adequate insurance should be provided, in advance, naming the Owner as an additional insured as well as a "hold harmless" and indemnification agreement from the contractors to the Owners.

Proper Wear

There should be assurance that anyone who attends on the various premises will wear masks, gloves and have hand disinfectant available. The Owner should also be prepared to cleanse and disinfect the areas utilized by the movers or contractors, whether an elevator, stairway, entrances and the like. Notification should be given to other residents that there will be deliveries or moves and they should be wary of running into the deliveries, contractors or movers and the times of the moves, deliveries and construction work should be limited.

Regarding contractors working at buildings, they should be prepared to comply with the building requirements as set forth above. Also, some Owners are requiring an indemnification agreement from contractors in addition to the usual compliance with alteration policies as promulgated by the cooperatives, condominiums and owners. The Owners should communicate with staff regarding this transition process so that staff is fully aware of the "opening"

requirements as well as assuring that staff still continues to comply with distancing, masks, gloves and frequent washing of the hands. The Boards of the Co-ops and Condos should monitor the compliance with this program. Employee safety must be emphasized, as well as resident safety.

Considerations

Owners should also consider barriers if there are entrance desks / counters and should emphasize to doormen and staff of the continued nature of the safety requirements. Signage at work areas may also be helpful. It also appears that touchpoints should be minimized and with additional visitors to buildings steps should be taken to continue safety measures such as social distancing, continued sanitizing and more frequent cleaning than even during the pandemic period.

In common areas, including elevators, laundry areas and grounds, social distance minimums should be maintained and emphasized to all residents, as well as visitors, contractors, employees and staff.

Contractors should be required to follow and comply with the Guidance for Construction Activities as promulgated by the New York State Economic Development Corporation (EDC) and the New York State Department of Health (DOH), including, among other things, providing employees, at no cost, with acceptable face covering that must be used when in direct contact with customers or members of the public during the course of the work; urging that its employees maintain safe social distancing measures to the extent possible of at least six feet; requiring other Personal Protective Equipment (PPE) where a higher degree of protection is required; modifying and restricting work stations and employee seating areas to keep workers six feet apart; requiring proper cleaning and disinfecting work areas and equipment between uses; preventing employees congregating; following hand hygiene and cleaning guidelines; reporting symptoms of or exposure to COVID-19; maintaining records of suppliers and visitors to the work site for tracing purposes in accordance with the EDC, State and other Guidelines and promulgations.

Proper Distancing

Residents of the buildings, as well as visitors, should make every reasonable effort to maintain social distance of at least 10 feet from any worker at the premises, and where possible, remain in a different part of the premises or outside the premises while the work is being undertaken in a unit. Residents should also cooperate in limiting in-person presences at the premises during all times when work is being performed at the premises.

There should be a continuation of reporting if any guest or visitor present at the premises has COVID-19 symptoms or is taken ill or tests positive for COVID-19 and all areas used or visited by the ill person, such as bathrooms, offices, common areas, kitchen, etc., should be extensively cleaned and disinfected. Any worker who came in contact with a sick person or person who tested positive for COVID-19 or has COVID-19 symptoms shall, in accordance with CDC guidelines and state requirements, be tested and removed from the premises and quarantined for a minimum of 14 days.

Similarly, if a resident has been diagnosed with COVID-19, or tested positive for COVID-19 or has displayed COVID-19 symptoms it should continue to be reported to the Owner and building management.

Editor's Note: The authors are with Finger and Finger, A Professional Corporation. The firm, based in White Plains, is Chief Counsel to the Building and Realty Institute (BRI) and its affiliate organizations.

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Building and Realty Industry Representatives Participating in Another “Guidelines Season,” Continued from p. 1

“All of this is on top of small landlords facing consistent struggles (with increases in operating expenses),” Ciuffetelli said. “We have to be our own bookkeepers, rental agents, and secretaries.”

Ken Nilsen, a member of the Board of Directors of the AOAC and a former chair of the association, also asked members of the guidelines board to remember the membership composition of the AOAC.

“Most of our landlords are small owners,” said Nilsen, a former president of the BRI. “And the guideline increases that the board has given in recent years have not kept up with inflation. The guidelines of the last 10 years have fallen short. Our costs just keep going up.”

Lisa DeRosa, vice chair of the AOAC and a member of the Board of Trustees of the BRI, also cited the increases in expenses that Owners and Managers have faced as a result of the COVID-19 pandemic. She stressed the increases in disinfecting and sanitizing routines in buildings that owners are currently conducting and their related expenses, as well as costs associated with having staff members working remotely (expenses from computers and their accessories, etc.).

“My vacancies are now over five percent, and factors such as heat and water are still going up,” said DeRosa.

Tim Foley, executive director of the BRI and the AOAC, reviewed the appearance of Abel Rodriguez, the building super at 16 North Chatsworth Avenue in Larchmont, on the May 29th segment of “Building Knowledge with the Building and Realty Institute (BRI),” a radio program of the BRI that airs live, every Friday, from 11:30 a.m. to 12 noon on WVOX 1460AM and wvox.com. Rodriguez is also a member of Local 32-BJ Services Employees International Union (SEIU).

Foley said that the added Cleaning and Disinfecting routines in buildings, as well as the enactment of safety protocols, have added processes that Rodriguez said are part of the biggest challenge he has faced in his 26 years as a building super. Those routines, Foley stressed, have also produced added responsibilities for owners.

“All of the extra cleaning and protection comes with added costs to landlords,” Foley said.

Jerry Houlihan, chair of the AOAC and a member of the Board of Trustees of the BRI, also reviewed the burdens placed upon owners as a result of the COVID-19 pandemic (the increases in cleaning and disinfecting processes in buildings and the related costs that add expenses for owners). He also reviewed the many negatives owners have faced since the enactment of the Housing Stability and Tenant Protection Act (HSTPA) in New York State on Jun. 14, 2019.

Houlihan cited the enactment of the law as “devastating” to owners. He noted that the major revisions to the Major Capital Improvement (MCI) and Individual Apartment Improvement (IAI) formulas and the associated financial negatives to owners as a result of the revisions have been major negatives. Houlihan stressed that the revisions and their associated financial negatives to owners have prevented maintenance and improvement processes in buildings and complexes.

“In your deliberations, please consider the negative effects of the Housing Stability and Tenant Protection Act (HSTPA),” Houlihan said. “Please help buildings and apartments remain safe and liveable (with the passage of fair guideline increases).”

Other Cost Increases for Owners

Matthew Persanis, Esq., labor counsel to the BRI/AOAC, reviewed the increases in labor costs that owners will face in the months ahead. He noted that owners who are part of the BRI’s labor contract with Local 32-BJ Service Employees International Union (SEIU) – the labor union representing building supers, porters, etc. – will face overall increases of 3.2 percent per year until 2022.

“The agreement between the BRI and Local 32-BJ represents about 82 percent of the buildings in Westchester County, which is a large percentage,” Persanis said.

Jason Schiciano, a co-president of Levitt-Fuirst Insurance, the insurance manager for the BRI, the AOAC and its other affiliated organizations, said owners are currently facing significant increases in insurance costs.

“And, insurance expenses will continue to rise,” Schiciano said. “Please consider fair-minded (rent) guideline increases. The increases in insurance in recent years outpace the (rent) guidelines that have been issued by the board by a 3-to-1 ratio.”

The AOAC represents more than 300 Owners and Managers of more than 17,000 rental units, association officials said. The association is a component organization of the BRI. The BRI has more than 1,800 members in 14 counties of New York State. Those members are involved in virtually every sector of the building, realty and construction industries, association officials said.

Good News from the N.Y. State Court of Appeals, Continued from p. 3

an owner to destroy some records - now after six years - the new law states that “an owner’s election not to maintain records shall not limit the authority of [DHCR] and the courts to examine the rental history and determine legal regulated rents” (RSL § 26-516(g)).

Thus, the HSTPA effectively provides that an owner can be penalized indirectly for a disposal of records that was legal under the prior law but will now hinder the owner’s ability to establish the legality of (and non-willfulness of any illegal) rent increases outside the lookback period, which - under the new legislation - impact recovery even in the absence of fraud.”

The Court opined that “The Constitution merely mandates that a landlord earn a reasonable return,” and no party doing business in a regulated environment like the New York City rental market can expect the RSL to remain static, as we have repeatedly made clear in cases challenging prospective legislation altering the formula for rent increases under prior schemes (citations omitted). But applying these amendments to past conduct is not related to legislative decisions about proper division of economic burdens going forward, and it does not simply upset expectations about the continuing future availability of a favorable regulatory mechanism. Rather, by increasing overcharge exposure relating to owners’ past acts, retroactive application of the provisions would undermine considerable reliance interests concerning income owners already derived from rents collected on real property years - if not decades - before.”

Because the overcharge calculation provisions and treble damages, if applied to past conduct, would impact substantive rights and have retroactive effect, the presumption against retroactivity is triggered.” The Court concluded that “This retroactivity period cannot be characterized as brief; rather, the Legislature appears to have intended that the retroactive period be bounded only by the length of the apartment’s rental history. Such a vast period of retroactivity upends owners’ expectations of repose relating to conduct that may have occurred many years prior to the recovery period. Having reasonably relied on pre-HSTPA statutory and regulatory provisions to destroy records (citations omitted)- records that are now needed under the HSTPA to establish the legality of prior rent increases and a lack of willfulness - owners may be held liable under the HSTPA for purported historical overcharges that were once supported by documentation. Turning to the treble damages provisions, where owners are unable to meet their burden to prove a negative - lack of past willfulness - the HSTPA makes treble damages mandatory for all six years of the new recovery period, rather than the two years preceding filing of the complaint. These provisions either increase the penalty or impose a new penalty for damages that previously were not trebled.

There can be no doubt here that the HSTPA Part F amendments represent a clear rejection of prior rent stabilization enforcement policy and effectuate a sig-

nificant readjustment of substantive rights relating to overcharge recovery....” For the above reasons the Court held this portion of the legislation unconstitutional.

Moreover, the Court of Appeals went on to say that retroactivity concerns are further heightened where, as here, the new statutory provisions “affect[] contractual or property rights, matters in which predictability and stability are of prime importance” (Landgraf, 511 US at 271). The Court stated that “While the lease agreements between the owners and tenants were necessarily subject to the requirements of the RSL, curtailing the parties’ freedom of contract in significant degree, when the governing law (essentially incorporated in the annual leases) is altered retroactively years later, long after the expired contracts have been performed, the impact on contract rights is unusually significant. Such alteration - if applied retroactively - impairs real property rights by diminishing or possibly eliminating the constitutionally protected return on investment owners realized in the past related to the use of their properties (see generally I.L.Y.F. Co., 11 NY2d at 492).

The HSTPA does much more than require a party to shoulder a new payment obligation going forward - and its destabilizing effect is especially severe.” This language is particularly apt when one considers that it refers to the “constitutionally protected return on investment owners realized in the past.” This is very similar to arguments propounded by the BRI in its federal litigation.

All in all, this decision is very positive, both in terms of the result of the issue presented, as well as the language of the decision relative to the arguments made by the BRI, the Apartment Owners Advisory Council (AOAC) and multiple landlords who are challenging the constitutionality of the HSTPA.

Among other things, issues can be raised as to whether the HSTPA Part K - which substantially changes the way Major Capital Improvements (MCIs) and Individual Apartment Improvements (IAIs) are conducted - is also an unconstitutional application by the HSTPA, denying a landlord an increase that was anticipated pursuant to existing law after the investment had already been made; whether the HSTPA can constitutionally abolish deregulation for applications long in the “hopper;” the impact on “owner-occupancy” cases pending before June 14, 2019, and whether in fact even prospectively, the HSTPA’s impact on overcharges is constitutional; whether leases that were entered into years ago can be modified by the HSTPA by limiting security, among other things.

While time will tell, this decision gives landlords hope for positive results in the future before the Court of Appeals in cases interpreting the HSTPA as well as in the BRI’s federal court case.

Editor’s Note: The authors are attorneys with Finger and Finger, A Professional Corporation. The firm, based in White Plains, is Chief Counsel to the BRI and its component associations.

REPORT: The Housing Sector Is Ready to Lead the Comeback of the Economy

WASHINGTON, D.C.

As the home building industry observes National Homeownership Month in June, recent housing data indicate the important role the residential construction industry will play in leading the U.S. economic recovery from the coronavirus pandemic, according to the National Association of Home Builders (NAHB).

The latest NAHB/Wells Fargo Housing Market Index (HMI), released on Jun. 1, revealed that the housing market is showing signs of stabilizing and gradually moving forward in the wake of the pandemic, as builder confidence in the market for newly-built, single family homes increased seven points to 37 in May. The rise in builder sentiment follows the largest single monthly decline in the history of the index in April, NAHB said.

Even with the recent decline, single family starts remain one percent higher for the first four months of the year compared to the first four months of 2019, the index said.

“NAHB anticipates that housing will help lead the economy out of this period of uncertainty and is likely to rebound faster than other sectors,” said Dean Mon, chairman of NAHB and a home builder and developer from Shrewsbury, N.J. “Pent-up demand for housing and low-interest rates can pave the way for a potential industry bounce back as we head into the summer months.”

To underscore the home building industry’s commitment to building homes, creating jobs and boosting manufacturing during this critical time, NAHB released a new public service announcement available on nabh.org. As stay-at-home orders continue to be lifted across the country, the industry is shifting its business environment to ensure all safety precautions are exercised throughout the home building and buying process, such as offering virtual model home tours and online closings, association officials said.

“Homeownership remains the cornerstone of the American Dream. As our living spaces this year turned into offices, schools and playgrounds, a place to call home is important now more than ever,” said Mon.

Tech Talk

Marketing During the COVID-19 Pandemic

By Andrea Wagner, President, Wagner Web Designs, Inc

DELRAY BEACH, FL

Consumers have been forced to change their buying behavior. People are shopping online more than ever.

Some demographics, like older consumers, who were once uncomfortable with buying groceries and other goods online, are now getting used to this new normal. Almost 40 percent of online grocery shoppers (in March) made their first online purchases during that month.

Stores have made it easier to shop online by offering options such as curbside pickup and free delivery.

Consumers will want to work with companies that focus on customer and employee safety and it’s important that you let your customers know that you are ready.



Andrea Wagner

Key Steps

Consider some of these steps in preparedness: Video services like Zoom allow networking meetings, personal coaches, IT consultants and many other types of professionals to continue to do business. Learn how to set up virtual meetings and offer services online. Doctors and other medical professionals have been offering virtual sessions online to see patients who have non-emergency conditions. Consumers have gotten used to this new routine and will continue to shop online and may be hesitant to return to the brick and mortar store, at least until there is a vaccine for the coronavirus.

Communication Is Key.

First make your plan. Once you have your plan, the key is to inform your customers in your marketing materials to make them feel comfortable doing business with you. Don’t assume they know you are ready to do business. Tell them what steps you have taken to ensure their safety.

- ◆ Separate desks, tables and office waiting room chairs to keep social distancing while at work. Tell customers what you are doing and make them feel comfortable by explaining how they will be coming to you.
- ◆ Be prepared to add sanitizers to lobbies, store-fronts and offices. Yes, they are out of stock, or low in supply, but back order now.
- ◆ For contractors, will your workers be required to wear face masks when entering a home or building? Will you offer virtual services? Advertise that.
- ◆ Add a pop-up on your webpage assuring customers that you have their health in mind and list steps you have taken to ensure their safety.
- ◆ Anyone can offer virtual consultations, or promotions for services. Teachers have been forced to learn new ways of teaching. If you offer any kind of professional instruction, consider adding the options of virtual classes, as well.
- ◆ Prioritize your services on your website or any of your marketing materials that reflect the new buying trends. For instance, I have an interior designer whose virtual design service is now more prominent than her in-home service. My clients who are personal trainers and voice coaches that offer virtual instructions are actually doing quite well compared to those sitting and waiting for the pandemic to pass.

It’s tempting to stop spending on digital marketing now that business is slower than usual, but now is the time to get in front of your competitors by promoting the steps you have taken to adapt. Getting in front of this is better than falling behind.

Editor’s Note: Andrea Wagner is President of Wagner Web Designs, Inc. The company specializes in optimized small business websites and digital marketing. Questions can be directed to Wagner at (914) 245-2626.