

HIGHLIGHTS**Chicago May Be Next Test Site for Applying Eminent Domain to Mortgages**

A Sept. 12 Chicago city council meeting could shed more light on how local jurisdictions are weighing the use of eminent domain to seize, refinance, and sell performing but “underwater” mortgages to tackle widespread mortgage and housing problems. **Page 634** . . . Elsewhere, the Securities Industry and Financial Markets Association asks the Financial Stability Oversight Council to examine the controversial use of eminent domain in addressing the lingering housing crisis. **Page 635**

THE ECONOMY: Will the American ‘Recovery’ Ever Gain Traction?

Brad Case of the National Association of Real Estate Investment Trusts writes that U.S. economic indicators are improving but not enough yet to drive growth in real estate. Regardless of the slow pace of recovery, analysts and investors continue to show optimism about the future of REITs. **Page 645**

Court’s Property Valuation Reversed; Expert Used Flawed Figures, Methods

The Commonwealth Court of Pennsylvania rules that a trial court could not credit one property valuation expert’s approach for purposes of determining fair market value without a clear and credible explanation as to why one expert’s methodology was chosen over another’s. **Page 653**

For Green Buildings, Cost Savings, Reuse Trumps New Construction

Retrofitting and reuse of existing facilities have substantially less environmental impact than new construction, and that can translate into cost savings for building owners, according to a new study by the Preservation Green Lab of the National Trust for Historic Preservation. **Page 658**

6th Circuit Rejects NIMBY Aesthetic Complaints in Cell Tower Dispute

The U.S. Court of Appeals for the Sixth Circuit rules that in determining whether a state or local government’s regulations regarding the placement of new cellular facilities “prohibit or have the effect of prohibiting the provision of personal wireless services” in violation of the Telecommunications Act, one factor a court should consider is “whether a provider is prohibited from filling a significant gap in *its own* service coverage.” **Page 660**

INDUSTRY SPOTLIGHT: PACENow Sees Bright Future for Retrofit Finance

After years of working as an investment banker specializing in municipal finance, **David Gabrielson** found himself as a city councilman in Bedford, N.Y., working on a way to finance energy-efficient retrofits of local homes. Now he is the executive director of PACENow, a group that advocates Property Assessed Clean Energy financing for energy-efficient retrofits of residential and commercial properties. **Page 649**

ENVIRONMENT

ENERGY: Industry groups say the federal government’s use of the Leadership in Energy and Environmental Design building rating system is creating a monopoly and that other green building ratings should be considered. **Page 656**

PUBLIC FINANCE

INFRASTRUCTURE: The Urban Land Institute says a national infrastructure bank would create new opportunities for commercial real estate, without much risk for investors. **Page 661**

RETAIL

LAND USE: The U.S. Court of Appeals for the Sixth Circuit sends an equal protection challenge to a city ordinance that destroyed landowners’ real estate sales agreement with Wal-Mart back to the district court for a new trial. **Page 639**

LODGING

ELECTRONIC COMMERCE: Online travel website TripAdvisor LLC’s list of dirtiest hotels, based on customer reviews, could not be read as conveying facts and so is not defamatory, the U.S. District Court for the Eastern District of Tennessee rules. **Page 643**

are “no alternative sites which would solve the problem.” The court said that the former test provided more flexibility, and prevented the provider from “endlessly hav[ing] to search for different, marginally better alternatives.”

The First Circuit recently upheld a municipality’s denial of a cell tower permit on a finding of substantial evidence of aesthetic objections, but remanded the case to district court for a determination of whether the denial led to an effective prohibition of wireless service in the area (5 REAL 624, 8/21/12).

Because T-Mobile had “made numerous good-faith efforts to identify and investigate alternative sites,” and the township had offered no additional, alternative sites, the court found that T-Mobile had met the “least intrusive” standard. Accordingly, the township’s denial of T-Mobile’s application effectively prohibited the provision of wireless services, and, therefore, violated the TCA.

Substantial Evidence. The court also found that the township’s denial of T-Mobile’s application violated the TCA because it was not supported by substantial evidence.

The court said that 47 U.S.C. § 332(c)(7)(B)(iii)—requiring that a denial to construct a new wireless facility be “supported by substantial evidence contained in a written record”—is not a “substantive standard,” but rather an “evidentiary inquiry” that “constructs a floor below which the justification for denying a permit cannot fall.” In conducting this inquiry, a court must determine whether the denial was supported by substantial evidence—namely, “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

The court found that none of the township’s stated reasons for denying the permit were supported by substantial evidence. For example, with regard to the township’s aesthetics concerns, the court said that “generalized complaints” from residents that the tower was “ugly” was insufficient evidence on which to based the denial.

Judges R. Guy Cole Jr. and Solomon Oliver, Jr., sitting by designation, joined the opinion.

Broadbuss argued for the township. Thompson argued for T-Mobile.

Full text at <http://pub.bna.com/lw/111568six.pdf>.

Infrastructure Financing

U.S. Infrastructure Bank Could Generate Greater Private Participation and Confidence

A national infrastructure finance bank would improve the sector’s performance and create new opportunities for commercial real estate (CRE), without much risk for investors, according to industry experts.

The Washington, D.C.-based Urban Land Institute (ULI) is exploring different infrastructure bank models, most prominently the European Investment Bank (EIB), established in 1958, and the California Infrastructure and Economic Development Bank (I-Bank), according to an Aug. 1 report by Rachel MacCleery, vice president of ULI. The EIB, which never puts up more than 50 per-

cent of a project’s funds, finances about \$64 billion in European projects each year, according to the report. California-based venture Better Place Aug. 28 secured a \$50 million EIB loan to further develop its global electric car network, which will augment the firm’s over \$750 million of equity financing from investors, according to an Aug. 28 statement from Better Place.

According to MacCleery, a new U.S. infrastructure bank could:

- bring more private equity and debt capital into infrastructure development, which could bring stability and long-term capital to infrastructure projects, and
- provide a vetting process to help promote more merit-based, competitive decision-making, and provide a funding mechanism.

A Basic Building Block. “I don’t know that everything that the EIB does would be relevant or applicable to the U.S.,” MacCleery told BNA Aug. 23, “but there are certain things that we thought were compelling.” She said that the bank has very strong underwriting standards and has seen very few defaults throughout its history. To establish such a bank in the U.S., she said, “the devil [would be] in the details.”

Infrastructure, MacCleery said, “is an important basic building block for prosperity at the metropolitan level and the national level.” Presently, the ULI feels that the United States needs to pay more attention and invest more wisely in infrastructure across the board, she said. “So, to the extent that an infrastructure bank contributes to more competitiveness, more connectedness, faster goods movements, and more efficient movement of people . . . I think it would be a benefit to the real estate industry, and to the [broader] economy.”

In California, the I-Bank, established in 2001, received a \$161 million state appropriation to start its infrastructure investment program, the Infrastructure State Revolving Fund (ISRF). The bank has been able to leverage this seed money into \$400 million in loans so far, according to Stanton Hazelroth, the I-Bank’s chief executive officer, who spoke to BNA Aug. 28. “Also,” he said, “we have grown our bond program from one that in the early days dealt [mainly] with industrial development bonds and non-profits . . . into lending for some major state projects, such as recovering schools and the Bay Bridge [the 23,556 foot bridge between San Francisco and Oakland] expansion . . . so we have gotten into some broader and larger bond financing.”

The I-Bank’s track record is strong, with few restructurings, according to the report. Hazelroth said that there was “only one default” in its portfolio.

America’s Infrastructure Deficit. Every four years, the American Society of Civil Engineers (ASCE) publishes *The Report Card for America’s Infrastructure*, which looks at the current state of 15 national infrastructure categories and grades them on a scale of A through F. The latest, released in 2009, gave the nation’s energy infrastructure a D+. In a 2011 statement, the ASCE stated, “Infrastructure is the lifeline of our economy, and like everything, it has a lifespan. In many areas, the roads, drinking water systems and dams are simply too old.”

“I think the United States infrastructure deficit is well documented and the need to invest more in infrastructure is clear,” MacCleery said. The ULI, she said, fo-

cuses on the amount of money spent, but also on better decision making and better processes for determining what infrastructure to invest in and how to do it. The ULI also works at making the link between infrastructure decisions and land use.

A True Bank. Financing, never easy, may be affected by the current climate of caution in the lending communities, MacCleery said. She pointed to the EIB as an organization that has made headway in this department. The EIB, she said, almost always partners with commercial banks, providing the due diligence, the vetting, as well as confidence. This helps make investors willing to partner in a project. "Certainly, a carefully conceived, carefully set up infrastructure bank for the U.S. could have the effect of helping to channel private investment into infrastructure," she said.

The EIB lends at a profit, she said. "It is a true bank, with leveraging and bonding." An American national infrastructure bank would issue bonds, which would generally reduce borrowing costs, she said. This has been the case in California, where Hazelroth said that the I-Bank finances infrastructure projects at a rate of approximately one-third the rate of a typical A-rated bond.

Sens. Jay Rockefeller (D-W.Va.) and Frank Lautenberg (D-N.J.) introduced the American Infrastructure Investment Fund Act of 2011 (S. 936) to create a fund, or bank, to finance projects not already funded by the federal government, according to data from the ASCE, which supports the legislation. The bill would authorize \$5 billion for fiscal years 2012 and 2013, prioritizing projects of regional or national significance. It is de-

signed to provide loan guarantees and finance transportation, energy, water, and telecommunications projects.

Other bills from lawmakers include S. 652 (Building and Upgrading Infrastructure for Long-Term Development), introduced by Sen. John Kerry, (D-Mass.), and H.R. 402 (National Infrastructure Development Bank Act of 2011), introduced by Rep. Rosa DeLauro, (D-Conn.). The bills currently sit in committee. President Obama has proposed financing an infrastructure bank since 2009, but the idea has gotten little traction, according to published reports.

"Right now the chances [for a national infrastructure bank] are pretty small," MacCleery said. "I think right now a lot of the energy is going to looking at other loan programs that were established as part of the latest re-authorization of the Federal Surface Transportation Program."

An infrastructure bank, properly conceptualized, MacCleery said, could put people to work and channel additional resources to infrastructure.

"It is not the only solution that is out there in terms of our infrastructure challenges," MacCleery said, "and the United States will survive without an infrastructure bank. But it is certainly a model that has worked elsewhere. We think it could be an important tool in the infrastructure toolbox."

BY KEVIN LAMBERT

The ULI report can be found at <http://www.uli.org/centers-initiatives/infrastructure-bank/>.

The ASCE statement is located at <http://www.asce.org/Public-Policies-and-Priorities/Public-Policy-Statements/Policy-Statement-532---National-Infrastructure-Bank/?elqTrack=true>.