

# DIMENSIONS

Newsletter of the New Jersey Builders Association



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*Dimensions* newsletter is produced by the New Jersey Builders Association (NJBA). NJBA is a housing industry trade association of builders, developers, remodelers, subcontractors, suppliers, engineers, architects, consultants and other professionals dedicated to meeting the housing needs of all New Jersey residents and facilitating their realization of the American Dream. NJBA serves as a resource for its members through continuing education and advocacy. The NJBA and its members strive for a better, greener, more affordable housing market. Additional information is available at [www.njba.org](http://www.njba.org).

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NJBA recognizes and appreciates the expertise of its members. In this spirit **we invite and encourage our members to submit articles for publication in *Dimensions***. NJBA reserves the right to make the determination on which articles will be published, the timing of the publication and, if need be, the right to edit articles after consultation with the author. Questions or comments may be sent to Kyle Holder at [kholder@njba.org](mailto:kholder@njba.org).



Dear NJBA Members,



Tom Troy  
NJBA President

### Election Recap

On November 6, voters across the country turned out in record numbers for a mid-term election.

Democrats

picked up at least 35 seats in the US House of Representatives and Republicans expanded their majority in the Senate by at least 1 seat, while several races in both houses are still undecided.

In NJ, voters overwhelmingly voted in favor of Democratic candidates by re-electing Senator Robert Menendez and flipping several House seats from GOP to Democratic control. Democratic incumbents Donald Norcross, Josh Gottheimer, Frank Pallone, Albio Sires, Bill Pascrell, Donald Payne Jr., and Bonnie Watson Coleman were all re-elected while Republican Chris Smith was the only Republican to be reelected. Democrats flipped control of the 2nd, 3rd, 7th, and 11th districts with the election of Jeff Van Drew, Andy Kim, Tom Malinowski, and Mikie Sherrill, respectively. In all 10 of the special elections for NJ Legislative Districts, Democratic incumbents were reelected.

Of particular note, two NJBA past presidents were elected to office - Stephen Shaw won his bid for Morris County Freeholder and Tom Critelli won his race for Holmdel Township Committee. Additionally, the NJBA Strongly Supported "Securing Our Children's Future" bond initiative passed, which dedicates \$500 million to expand educational programs for the building trades.

### Vocational Education Initiative

Watch Tom's interview at the ballot initiative press event.

While the successful passage of the bond initiative will provide the resources necessary for training the next generation of workers, NJBA and our local affiliates continue to build upon my initiative to help address the growing labor shortage in NJ. Though builders face labor shortages, nearly 17,000 students who wished to attend vocational or technical school in NJ were turned away last year due to space constraints.



Trenton high schoolers visit Sharbell worksite.

NJBA has implemented a statewide campaign designed to increase its level of engagement in the multitude of existing state, local and regional career and educational programs. We have partnered with NAHB, which is working with Lowe's on a public relations campaign, Generation T, to encourage students to enroll in skilled trades programs. NJBA has also partnered with the NJ Council of County Vocational-Technical Schools and the County Career and Technical Education Program Advisory Committees. Our local associations and members are also helping by hosting site visits for students. Recently, I had the privilege of hosting high school students from

Trenton at a Sharbell site to highlight the variety of building industry career opportunities. There are numerous ways to help local area students and schools and I encourage all members to get involved.

Finally, NJBA has launched a scholarship trust which will distribute \$2,500 annually to each of our four locals over the next five years. I would like to recognize that these funds were given to NJBA from the estate of Laura Isserman who asked they be used to further the education of students seeking a career in the construction fields.

### Advocacy

Just about six months into the new Murphy Administration, NJBA celebrated a major legislative victory with the enactment of the bill dealing with credits for connection fees. After being pocket vetoed by Governor Christie at the end of the lame duck session, NJBA's legislative initiative, S1247 (Rice) & A2779 (Greenwald), was signed into law on August 10, 2018, by Governor Murphy as P.L. 2018, c.74. The legislation provides connection fee credits for existing sewer connections and expands the 50% connection fee credit on COAH units to apply to all developers, not just non-profit developers. I was pleased to hear from several members that this new law has already saved them significant sums of money.

Earlier this fall, NJBA CEO Carol Ann Short Esq. announced a revamped government affairs team with the promotion of Jeff Kolakowski to COO, Grant Lucking to VP of Environmental Affairs and the addition of Kyle Holder as Director of Legislative Affairs. The new team has been busy engaging on a host of legislative and regulatory issues.

For example, NJBA has been engaged

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## THE RAPID EVOLUTION OF "COMMUNITY NEXT"

By: Steven Y. Brumfield, CMCA, AMS, PCAM

Urban population centers across the country are expanding. As a result, the number of community associations (e.g., homeowner, condominium and cooperative associations) is rising dramatically. About sixty-one percent of new homes built in the United States are encumbered by a community association. Municipal approvals for new communities in New Jersey almost always require the creation of a community association for various reasons. New Jersey is America's most densely populated state. Anyone who has made their living building homes in New Jersey has likely spent countless hours working with community associations.

The Community Associations Institute ("CAI") is an international membership organization with nearly 40,000 members, dedicated to supporting the community association industry. ([www.caionline.org](http://www.caionline.org)). A few years ago, CAI produced its "Community Next: 2020 and Beyond" paper, which explored many influences affecting the future of community associations. Technology, politics, the environment and evolving generations (among many other factors) have a massive impact on how we live as individuals, where we get our information, and how we create and shape the communities we live in. Several factors have evolved significantly over the last few years, and the following are a few examples...

Any discussion of 2020 and beyond would not be complete without prominent mention of the impact of social media. "Facebook," "Twitter," "Instagram," "Snapchat," "Next Door," etc. all affect our lives whether we use them or not. Almost thirty percent of the Earth's population is on Facebook. The current President of the United States does much of his communicating with the American people and even World leaders through

Twitter. You don't need to follow the President on Twitter to get his direct messages, because they are covered by the continuous news cycle of every media outlet. Community associations are able to use social media outlets in much the same way as the President. Residents of community associations, and sometimes critics who are not residents also use these outlets to their benefit (sometimes to the detriment of community associations and their developers). Community associations are well advised to adopt a social media policy, and to use social media to control their message before someone else does.

"Smart homes" are increasingly changing the way we live, especially with the relatively recent, widespread advent of doorbell cameras. Smart devices connect to the internet and operate by remote control allowing users to monitor and adjust them through a smartphone from wherever in the world they happen to be. Homeowners are now able to connect with their homes in "real time" to monitor and communicate with visitors (both wanted and unwanted), adjust thermostats, turn lights on and off, even check their refrigerator temperature. The wave of the future is actually seeing your neighbor's dog relieving himself on your lawn in real time, from your smartphone, and sending the incriminating video footage straight to your community manager...

The use of drones in community associations is increasingly common by residents, community managers, vendors, and developers. Federal laws currently govern the use of most drones and are likely to increase in scope. Businesses who deliver retail goods, food, groceries, etc. might also be using drones in the near future, on a large scale. It's easy to imagine how dozens of drones in the sky near your home could influence

your peaceable enjoyment. Community associations and legislators alike will likely seek to further control where and how drones are operated. As control, camera, and battery technology steadily improve, drones become increasingly efficient tools. For the foreseeable future, this efficiency must be weighed against concerns with safety, privacy and peaceable enjoyment.

Electric cars have been an amazing phenomenon, especially in the last ten years. As their useful range between charges increases, and as companies like Tesla create cars that are luxurious and actually fun to drive, it stands to reason that more and more people will be inclined to buy them. Many states (including New Jersey) are adopting or considering legislation promoting the use and ownership of electric cars. The infrastructure required to provide the electricity to charge these cars is extremely complex and expensive. If you live in a single-family home or townhome with your own garage, the infrastructure may not be much of an impediment for you, but what if you live in a condominium with an assigned parking space? Statutory changes could affect community associations and developers alike by requiring them to install charging stations. Less than two percent of cars in the United States are "plug in" electric. Imagine how the dynamics of condominium parking garages and other common parking areas may change if that two percent became ten percent... Developers should consider growing demands for electric vehicle charging infrastructure. Both community associations and developers should keep abreast of any legislative changes affecting requirements related to approval or installation of this infrastructure.

Alternative energy sources are becoming

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## SHORE BUILDING REGULATIONS FOR BEACHES, DUNES & TIDELANDS: SMOOTH SAILING OR ROUGH WATERS AHEAD?

By: **Melissa A. Clarke, Esq.**

Many parts of the Jersey Shore have witnessed a dramatic change in character and appearance as a result of Superstorm Sandy, which ravaged New Jersey communities in October 2012. Beach bungalows have given way to significantly larger footprints of development, often on elevated foundations, and new parks, boardwalks, and beach replenishment projects have transformed the landscape. But as coastal development continues, many of the post-Sandy relaxations on New Jersey Department of Environmental Protection (DEP) permitting requirements have now sunsetted. As a result, future applicants may face challenges to coastal development efforts under DEP's regulatory framework, even though a neighboring property owner previously received approvals for a similar project.

### I. Building on Beaches and Dunes

DEP considers beaches and dunes "special areas" of the coastal zone, as outlined in subchapter 9 of the Coastal Zone Management (CZM) Rules (N.J.A.C. 7:7). Accordingly, activities on beaches and dunes may require multiple approvals from DEP's Division of Land Use Regulation (DLUR). Regulated activities on beaches and dunes which generally require a Coastal Area Facility Review Act (CAFRA) and/or waterfront development permit include but are not limited to the following: excavation, grading and filling; installation of structures; routine beach maintenance; emergency post-storm beach restoration; dune creation, maintenance and relocation; and development of trails, boardwalks and bike paths. Some of these activities, like

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sand fencing or signage, are authorized by permits-by-rule (PBRs); others, like routine beach and dune maintenance, may qualify for general permits (GPs).

Subchapters 4, 5, and 6 of the CZM Rules set forth PBRs, general permits-by-certification, and GPs, respectively. Coastal PBR 06, for instance, authorizes the reconstruction of a residential or commercial development within the same footprint. Two of the more common GPs in the coastal development context are the GP 04, for development of one or two single-family homes or duplexes, and the GP 05, for expansion or reconstruction of a single-family home or duplex. In some cases, DEP may require the provision of public access as a condition of GP approval.

A challenge occasionally encountered in expanding the footprint of development under a GP is whether and to what extent a portion of the property constitutes a "dune." The seminal case in this State

interpreting a dune is Seigel v. New Jersey Dep't of Env'tl. Prot., 395 N.J. Super. 604 (App. Div. 2007), which concludes that "the waterward and landward slopes of a primary frontal dune must abruptly incline and decline respectively compared with the rest of the subject property or with the other properties in the area immediately adjacent to the subject property." To the extent an applicant proposes development west of the abrupt slope of sand, a project should comport with the test set forth in Seigel. Nonetheless, DEP routinely ignores the language in Seigel and takes a more expansive view of dunes. To contest a permitting decision, a person must submit a hearing request within thirty calendar days after public notice of the decision is published in the DEP Bulletin, a list of permit applications recently filed or acted upon by the Department.

If a proposed project does not meet the requirements of an exemption, PBR, or GP, the project may require a CAFRA, coastal wetlands and/or waterfront development individual permit, which are typically subject to multiple requirements and more rigorous DEP review.

### II. Docks and Bulkheads

Dock and bulkhead construction, repair or replacement may result in impacts to special areas that are regulated by DEP and therefore generally require a permit (or permits) from DLUR. Some activities are exempt from permitting requirements, provided the site and project meet all the criteria in the rule. For instance, the so-called Zane Exemption provides that a waterfront

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#### About the Author:

Melissa A. Clarke, Esq. is an Associate of the firm Giordano, Halleran & Ciesla, P.C. ("GHC"). Melissa represents real estate developers and other clients in environmental and land use matters, including state and federal environmental permitting and regulatory compliance involving wetlands, coastal / CAFRA areas, riparian / tidelands law, flood hazard areas, water and air quality, solid and hazardous waste remediation, and underground storage tank compliance. Melissa has significant experience with related civil and appellate litigation and represents clients before state and federal courts, as well as in alternative dispute resolution forums. GHC is a New Jersey based, full service law firm headquartered in Red Bank, New Jersey, with offices in Trenton and Holmdel, New Jersey, as well as Manhattan, New York.



## OPPORTUNITY ZONE OPPORTUNITIES ABOUND IN NEW JERSEY

By: Matthew J. Schiller and Steven G. Mlenak

The IRS recently released proposed regulations concerning the Opportunity Zone program (OZ Program) created under the Tax Cuts and Jobs Act. The OZ Program encourages development within designated "Opportunity Zones" (OZs) through its various tax incentives. Although numerous outstanding issues remain, it is clear that the OZ Program can benefit developers via direct tax benefits and by creating a new means to raise capital for qualified projects. Accordingly, it is critical for developers to understand the OZ Program and its potential interplay with New Jersey's other incentive programs and laws, including the Local Redevelopment and Housing Law (LHRL) and the Long Term Tax Exemption Law (LTTEL).

### Qualified Opportunity Zones in New Jersey

OZs are qualified census tracts with a poverty rate of 20% or a median family income of up to 80% of the median income of the metropolitan area or of the statewide median income. There are 169 census tracts (in 75 municipalities) in New Jersey that have been approved as OZs (the maximum number allowed under the Tax Cuts and Jobs Act). Accordingly, no additional OZs will be created or designated in New Jersey without further action by Congress.

### What Are the OZ Program's Tax Benefits?

Investing capital gains in Qualified Opportunity Funds (QOFs) as explained below can result in 3 primary tax benefits:

- An appreciated asset is sold after December 31, 2017.
- The capital gain amount is invested

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into a QOF within 180 days from the date the gain would be recognized.

**Tax Benefit: The investor defers payment of taxes due for the capital gain amount invested into a QOF.**

- Upon the earlier of either the sale of its QOF interest, or December 31, 2026, taxes will be due for the deferred capital gain.  
**Tax Benefit: 10% of the deferred capital gain will be forgiven if the QOF interest is held for 5 years or more (the capital gain was invested into a QOF prior to December 31, 2021). If the QOF interest is held for 7 years or more (the capital gain is invested in a QOF before December 31, 2019), an additional 5% (15% total) of the deferred capital gain will be forgiven.**

- The QOF interest is held for at least 10 years after investment.

**Tax Benefit: There will be no tax on the gain realized from its initial QOF investment (i.e., the initial capital gain investment) upon sale.**

### What Are QOFs?

QOFs are investment vehicles organized as a corporation or partnership (which may be an LLC taxed as a corporation or partnership) for the purpose of investing in qualified opportunity zone property (QOZ Property). At least 90% of a QOF's assets must be invested in QOZ Property or as an equity interest in a qualified opportunity zone business (QOZ Business). Investors may invest in an existing QOF or create a new QOF for its own purposes. QOFs will be self-certified to the IRS and must demonstrate satisfaction of the 90% asset test twice per year.

QOFs can either directly acquire, own and develop/substantially improve property located in an OZ or hold an interest in a QOZ Business. To qualify as a QOZ Business, 70% of the tangible property owned or leased by the business entity must constitute QOZ Property both at the time the QOF acquires its equity interest in the QOZ Business and during substantially all of the period that the QOF holds its QOZ Business interest.

QOZ Property is property: (1) purchased after December 31, 2017; (2) whose "original use" commences upon acquisition or is substantially improved upon acquisition; and (3) that is used/located in an OZ. Notably, if acquiring

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#### About the Author:

Matthew J. Schiller and Steven G. Mlenak are attorneys at Greenbaum, Rowe, Smith & Davis LLP, one of NJ's leading business law firms. Mr. Schiller's practice encompasses a wide array of commercial real estate transactional, zoning, redevelopment, taxation and litigation matters. He can be reached at mschiller@greenbaumlaw.com or 732.476.2396. Mr. Mlenak concentrates his practice in the areas of redevelopment, land use, zoning, real estate development, and community association law. He can be reached at smlenak@greenbaumlaw.com or 732.476.2526. Additional information at: www.greenbaumlaw.com.

# DIMENSIONS

## BID PROTESTS ON PUBLIC PROJECTS WHERE PRICE IS NOT THE DECIDING FACTOR ARE AN UPHILL BATTLE

By: Edgar Alden Dunham, IV

Traditionally, public construction projects typically followed a set path. The public owner hired an architect or engineer who prepared plans and specifications, and then released those plans and specifications out for bidding. The project was then awarded to the qualified bidder who provided the lowest responsive bid.

A contractor protesting a bid in those cases had to show that the lowest bid was either from a non-qualified bidder or was not responsive in some fashion. While that can be difficult in a specific case, conceptually, it is relatively simple.

Over the past 20 years or so, public entities have increasingly strayed from the traditional model. Fast-track projects, which are not based on complete plans and specifications, public-private partnerships, and projects in which the price is simply one of the factors to be considered have become increasingly popular.

Public projects where price is simply one of the factors tend to be projects where time is an issue. The public entity will typically set broad parameters for the design, a tight schedule for completion, and other particulars it wants in the project.

Because the award of public projects is not supposed to be done on the basis of favoritism, and because the bidding of such projects is supposed to be open to all, the public entity will establish ostensibly objective criteria for determining the winning proposal. This typically takes the form of a number of categories of different criteria in which each bidder is ranked. To determine the winning bid, the public entity compiles the total scores of each bidder based

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on the rankings in each category. The proposal with the best score receives the award. While the mathematics of determining the winning bidder by compiling the various proposals' rankings in each category is objective and presumably fair, the assigning of rank to each bidder is frequently much more subjective.

Accordingly, attacks on awards in such cases usually center on attacking the individual rankings in each category, arguing that the various rankings by the public entity were incorrect or arbitrary. Unfortunately, for those protesting bidders, however, courts rarely substitute their knowledge and expertise for that of the publicly entity and generally defer to the entity's ranking choices.

A recent example is the 2018 Court of Claims case of *Kiewit Infrastructure Ins. Co. v. United States*. There the Army Corps of Engineers awarded a contract for a dam repair project to the second-lowest bidder, Flatiron/Dragados/Sukut joint venture (FDS). Kiewit Infrastructure West Co. (Kiewit), the lowest bidder, challenged the award. The bid proposals were to be evaluated on the basis of the "best-value tradeoff process" set forth in section 15.101-1 of the Federal Acquisition Regulations. That process permits a tradeoff between price and

non-price factors and allows awards other than the lowest-priced one.

The Corps had a number of non-price factors that were more important than the price for the project. Ratings for each factor ranged from unacceptable to outstanding.

Ultimately, the two highest-ranked bidders were FDS and Kiewit. FDS had a higher technical ranking, and Kiewit had a lower price. Kiewit's technical ranking was "good," the second-highest ranking.

The justification for FDS's higher ranking was subjective. The Corps said that FDS "demonstrated a better understanding of the existing site conditions and project requirements," and that "FDS's exceptional approach . . . resulted in a lower risk of unsuccessful performance." The Corps also noted that FDS had "a superior understanding of the geologic and hydrogeological site conditions."

The court, in ruling on Kiewit's protest, found that the award was not arbitrary, largely because the Corps followed the process set forth in the solicitation for making the award. Regarding Kiewit's detailed arguments on the rankings, the Court said that while there must be more than conclusory statements in the record to support a selection under the Federal Acquisition Regulations, "technical rating decisions are the minutiae of the procurement process . . . which involve discretionary determinations of procurement officials that a Court will not second-guess."

Not surprisingly, Kiewit did not prevail.

Cases like the *Kiewit* case are not anomalies. As *Kiewit* illustrates, it is

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### About the Author:

Ed Dunham, an attorney with the Princeton, NJ office of Eckert Seamans ([url link: https://www.eckertseamans.com/](https://www.eckertseamans.com/)), practices in the area of commercial litigation, with an emphasis in construction law. He counsels contractors, subcontractors, and owners with the negotiation and administration of construction contracts and in dealing with the claims that often arise on major construction projects. He can be reached at 609.989.5021 or [edunham@eckertseamans.com](mailto:edunham@eckertseamans.com).

## GEOTECHNICAL INVESTIGATION: DEAL OR DUD?

By: Walt Keaveny, Risk Manager, MS, PE, PG

As a home builder, have you ever wondered if a geotechnical investigation is needed, or if the benefits support the cost? A geotechnical investigation (a.k.a. soil report) analyzes and characterizes surface and subsurface conditions. It identifies geologic hazards and provides site development and foundation recommendations. Building homes without a geotechnical investigation is a bit like being blindfolded and swinging at a piñata. You can't see what you're doing and hope for the best.

Think about it, without a geotechnical investigation, how can a home builder know:

- If there are geologic hazards like expansive soils, uncompacted existing fill, buried debris, collapsible soils, soft or organic soils, hard rock, sinkholes or unstable slopes?
- If there is shallow groundwater to seep into excavations, crawl spaces and basements?
- If the onsite soils can be reused to balance cut and fill, and how to properly compact fill?
- If the most appropriate and cost-effective foundation will be used?

What are the risks of building without a geotechnical investigation? 2-10 Home Buyers Warranty has been



investigating claims for over 38 years and has found that 80% of all structural claims are due to the impact of soils on the foundation. Builders that use geotechnical investigations are up to 50% less likely to experience structural claims. The cost of the investigation may be offset by using the lowest cost foundation for site-specific conditions, balancing cut and fill to avoid importing fill and avoiding construction delays due to subsurface surprises. A geotechnical investigation can aid a home builder's defense in the event of arbitration or litigation of a structural defect claim.

Instead of using geotechnical investigations, some home builders rely on prior excavation experience in the general area, soil maps or surface-soil grab sample analysis. These methods may work in some low-risk undisturbed areas, but the odds of satisfactory results are unfavorable in the long

run. Subsurface conditions can vary greatly over short lateral distances, such as from lot to lot within the same subdivision. The rule of thumb amongst geotechnical engineers regarding the consistency of subsurface conditions, is that there is no rule of thumb. The only way to really know what lurks below the surface is to explore by drilling or digging.

Home builders often ask, when is a geotechnical report required? In general, home builders should use geotechnical investigations if geologic hazards are likely, if there are past foundation failures in the area or if it is the local standard practice or code requirement. Most industry groups recommend geotechnical investigations, and structural engineers can be found liable for designing foundations without one. A growing number of building departments require them, especially in elevated-risk areas. The International Building Code, Section 1802, specifies that a geotechnical investigation is needed for questionable soils, expansive soils, shallow groundwater table, pile and pier foundations, variable rock strata and for footings on fill material more than 12 inches in depth.

Geotechnical investigation...deal or dud? It appears to be a resounding deal, based on the experience of America's oldest and largest new home structural warranty company.

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### About the Author:

Mr. Keaveny is the Risk Manager and Principal Engineer for the leading new home warranty company, 2-10 Home Buyers Warranty. He earned a Bachelor's degree in Geological Engineering and a Masters in Geotechnical Engineering. He is licensed as both a Professional Engineer and a Professional Geoscientist, and has over 30 years of diverse engineering experience. He serves on the Construction Performance Standards Committee for the Texas Association of Builders, and is an invited speaker and author. Mr. Keaveny's work on the subject of structural claims has been published in major newspapers and has drawn international interest.

# DIMENSIONS

## SUPREME COURT DECLINES TO HEAR UNDESIGNATED REDEVELOPER'S APPEAL

By: Michael A. Bruno, Esq., Kyle J. Campanile, Esq., and Brian J. Shemesh, Esq.

The Supreme Court of New Jersey recently denied a petition for certification in the matter of Applied Monroe Lender v. City of Hoboken Planning Bd. and City of Hoboken, 234 N.J. 10, 187 A.3d 858 (Table). The petitioner, developer Applied Monroe Lender, LLC ("Applied"), owned property that had been designated as an area in need of redevelopment pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1 et seq. ("LRHL") and was subject to a redevelopment plan adopted by the City of Hoboken.

Even though it had never been designated as a redeveloper, Applied sought to develop its property in accordance with the redevelopment plan, claiming that a redeveloper designation was not necessary based on the language of the redevelopment plan. The redevelopment plan did not specifically require such a designation, but made repeated references to "redeveloper" and "redeveloper designation." The City maintained that the plan required a redeveloper designation and refused to deem Applied's submission for site plan approval "complete" until it had been designated.

Applied brought suit in the Superior Court, Hudson County, in April 2015. Ultimately the parties made competing motions for summary judgment, at which point the trial judge found that "the policy as interpreted and in practice requires that a plaintiff who wishes to develop in a redevelopment area must first be qualified and approved as a redeveloper." Applied Monroe Lender v. City of Hoboken Planning Bd., et al., 2018 WL 1219453 at \*2 (App. Div. 2018). On that basis, the judge granted the City's motion and dismissed the case. Applied appealed.

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The Appellate Division heard the case in November 2017 and issued its decision in March 2018. See Id. The Appellate panel affirmed the trial judge's ruling in holding that designation as a redeveloper was required under the plan, emphasizing the plan's repeated references to "redeveloper" and "redeveloper designation." Since Applied never obtained such a designation, it lacked standing to pursue site plan approval.

This ruling confirmed what practitioners have understood to be the law for some time – that once a property has been designated as an area in need of redevelopment and the municipality has adopted a redevelopment plan inclusive of that property, the municipality has the ability to restrict redevelopment of such properties in accordance with the redevelopment plan to qualified redevelopers. See, e.g., Jersey Urban Renewal, LLC v. City of Asbury Park, 337 N.J. Super. 232 (App. Div. 2005). In addition to reaffirming this principle, the

Appellate decision expanded the scope of Jersey Urban Renewal by applying its rule regardless of whether the redevelopment plan contains language explicitly requiring a redeveloper designation.

In denying Applied's petition for certification and refusing to hear its appeal, the Supreme Court of New Jersey leaves the Appellate ruling undisturbed, and, as a result, it will remain as valuable guidance to developers and land use practitioners unless and until the state's high court speaks more fully and clearly on this issue.

It is important to note a possible future limiting factor of the Applied holding and that is in the context of redevelopment areas designated as "non-condemnation" areas under the LRHL. In the Applied case, the applicable redevelopment plan was adopted in 1998 and was therefore subject to the pre-2013 amendment to the LRHL. At that time, the LRHL did not permit municipalities to designate properties as "areas in need of redevelopment" without condemnation power. The 2013 amendment to the LRHL provides municipalities with the ability to designate properties as areas in need of redevelopment with or without condemnation authority.

Designation of a property as an area in need of redevelopment, especially when coupled with the specter of condemnation, is a powerful tool for municipal entities. It confers influence over property owners and developers and facilitates their participation in redevelopment agreements, which further afford municipal entities control in the redevelopment process – enabling them to charge fees, defer various

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### About the Authors:

Michael A. Bruno, Esq., Kyle J. Campanile, Esq., and Brian J. Shemesh, Esq. are attorneys affiliated with Giordano, Halleran & Ciesla, P.C. Mr. Bruno is a shareholder of the firm and the Co-chairman of its Real Estate, Redevelopment and Planned Real Estate Development Department. Mr. Campanile and Mr. Shemesh are associates in the Real Estate, Redevelopment and Planned Real Estate Development Department.



## ADA COMPLIANCE FOR YOUR WEBSITE: WHY IT MATTERS

By: Terry Tateossian

When most people think of the Americans with Disabilities Act (ADA), they think of wheelchair ramps and handicap-accessible stalls, but ADA compliance goes much further than that. It's become equally important for businesses, especially builders whose work is so directly involved with the ADA, to have an ADA compliant website. If your company has 15+ people who work 20 or more hours a week, having a site that isn't compliant puts you at legal risk. Not sure if your website is compliant? Don't worry! We'll show you what these requirements are and how to meet them.

The first thing to know is the top 4 principles that are looked for in ADA compliant website design:

### Perceivable

A perceivable website is one where content is easily available regardless of disabilities. This includes having captions on audio and video content and conversely offering audio files for text to assist those with difficulty seeing and visual impairments.

### Operable

The operability of a website refers to a user being able to navigate the website without being deterred by any sort of functionality issues. Having a highly operable website means having options

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such as keyboard-only navigation and having purposeful titles on all pages to make information as easy to find as possible.

### Understandable

The principle of understandability means web pages need to be easy to read, predictable, and able to account for and correct user mistakes. Elements that make a website more understandable include high-contrast and colorblind friendly text and detailed instructions for any fields that allow for user input.

### Robust

Having a robust site simply means that your site is compatible with existing and future technology that a user may use to assist them when accessing and navigating your website. The robustness of a website is all about ensuring it works with the widest possible variety of assistive technology.

There are 3 levels of ADA compliance:

A, AA, and AAA. Of these rankings, A is the lowest and AAA is the highest. How a site ranks is based upon a set of testable success criteria that determines how well the layout, functionality, and content of your site meets the above principles. While AAA provides the best experience for users with disabilities and is ideally what your business should be shooting for, it isn't always necessary. Your website is compliant as long as it hits at least enough success criteria for an A or AA rating. It's up to you to choose how compliant you would like your website to be when ensuring user-friendliness for all disabilities.

Making a website ADA compliant may seem overwhelming, but its importance can't be overstated, especially for those within the building industry who see first hand the good it does. The ADA has made great strides in easing what are still constant struggles for the disabled community and providing the best experience for all of your customers can only do good things for your business.

### Sources:

<https://www.w3.org/TR/WCAG20/>

<https://www.w3.org/TR/UNDERSTANDING-WCAG20/intro.html#introduction-fourprincs-head>

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#### About the Author:

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## GET A "CLUE" WHEN IT COMES TO SECURITY BREACHES

By: Cathy Coloff

*Clue* is a murder mystery "whodunit" game that is popular the world over for quite some time. The object of the game is to determine who murdered the game's victim, the infamous Mr. Boddy. Poor Mr. Boddy was murdered by one of the six suspects in the game. Who's your favorite suspect? In the business world, no one wants their organization to be a victim of a crime, particularly a security breach. But, unfortunately, security breaches have become all too common.

When a security breach occurs, the game of "whodunit" begins. **Security breaches come both from within and outside of an organization;** therefore, the list of suspects could be much longer than just six suspects as in the game *Clue*. As a result, tracking down the culprit can become very difficult.

In many of the breaches that you hear about in the news, it is often discovered that the actual breach occurred many months prior to it being identified. In one case, the breach occurred over two years prior to discovery. Imagine... having every communication in and out of your company monitored without your knowledge for two years! The investigators determined this by following the bread crumbs left behind—often these bread crumbs are in the security logs. IT Radix frequently finds small-to-medium businesses do not even have logging enabled nor retained for a sufficient length of time.



In these cases, there may be limited to virtually no clues to identify the source of the breach. This can be disastrous because knowing what information was potentially exposed is difficult at best. As a result, we recommend tightening up access to information as much as possible, enabling auditing wherever reasonable, and ensuring that log files are backed up and retained for a period of time. We also recommend monitoring sources like the Dark Web for potential credential exposure. We recently discovered a client had over 50% of their employees' email addresses and passwords available for purchase on the Dark Web.

In the interest of full disclosure, audit logs can become quite voluminous and often require special tools and skills to decipher their content. So, should something occur, it still requires detective work to determine what occurred. If you accept electronic payment of any form, you are obligated to enable and retain audit logs. Sadly, most organizations do not realize this

requirement. In certain industries, you may be held to an even higher standard. Even if you have outsourced the actual payment processing, we find most organizations have more responsibility in this arena than they realize.

**If a breach occurred in your organization, would you know how to respond?** Would you be able to deduce the culprit? Every organization should have, maintain and test a security Incident Response Plan (IRP). Similar to a disaster recovery plan, an IRP helps you determine your security risks, identify what security measures and corresponding auditing need to be put in place, and finally, guides the overall response should a breach occur. We find that at a minimum, a collaborative approach with your insurance agent/company, legal counsel, IT, and of course, management is usually needed to develop this plan. While we can implement technical solutions within your environment, an IRP is not the responsibility of IT alone. We can assist by implementing technical solutions such as the compliance features of Office 365, for example, but much more is required.

**By planning, training and testing your team about security, you can help reduce the potential of a security breach and show the potential perpetrators that you really do have a "clue!" Need help? Give IT Radix a call.**

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### About the Author:

Cathy Coloff is the Managing Member with IT Radix. Recognized in 2018 as one of New Jersey's Best 50 Women in Business by NJBIZ and in 2015 as one of the Top Leading Women Entrepreneurs in NJ, Cathy has 25+ years of experience in network systems. With extensive corporate experience at Exxon and Bear Stearns, Cathy helps IT Radix clients to harness the power of technology to stay up and running, maximize productivity, be secure, reach their goals and achieve success. Cathy can be reached at 973-298-6908, [itsales@it-radix.com](mailto:itsales@it-radix.com) or [www.it-radix.com](http://www.it-radix.com).

## A DECADE ON, THE SRRA CONTINUES TO DRIVE REDEVELOPMENT

By: Sue Boyle and Rodger A. Ferguson, Jr., LSRP

If you look around, you will see New Jersey has come a long way to reclaim once forgotten properties that held the skeletons of an industrial past.

In fact, many of the largest, most complex and most contaminated sites, once considered too complicated or expensive to consider, are now available for redevelopment. This year, New Jersey passed 12,000 environmental cleanups completed under the Site Remediation Reform Act (SRRA) of 2009 and the submission of more than 46,000 reports to document the work.

There are a lot of people to thank for the achievement, including the builders and developers with the vision to take on the projects.

But a great deal of the success must go to the SRRA itself, now in its 10th year. A landmark law, which came at a time when environmental cleanups needed a boost, the SRRA created timeframes for environmental remediation and the Licensed Site Remediation Professional (LSRP) program to guide responsible parties and others through the process. Nearly all, with some exceptions, are required to use LSRPs to guide them through the process.

LSRPs are now an integral part of New Jersey's environmental remediation process and an invaluable resource to both responsible parties and developers. LSRPs know how to work on redevelopment and remedial needs at the same time - keeping projects on track to meet the timeframes of federal, state and local environmental protection agencies as well as the business people and local governments seeking to bring properties back to

productive use.

Before the SRRA, New Jersey identified 26,000 sites in need of remediation and most were on a waiting list for action by the New Jersey Department of Environmental Protection (NJDEP). Now, with even with more sites being added every year, that list has been cut nearly in half.

In fact, there are more contaminated sites actively being worked on today than ever before because of the LSRP program, the NJDEP's hard work, developers and the SRRA. These sites are in every area of the state and are being cleaned faster than ever before with no loss in the quality of the remediation or protections to human health and the environment.

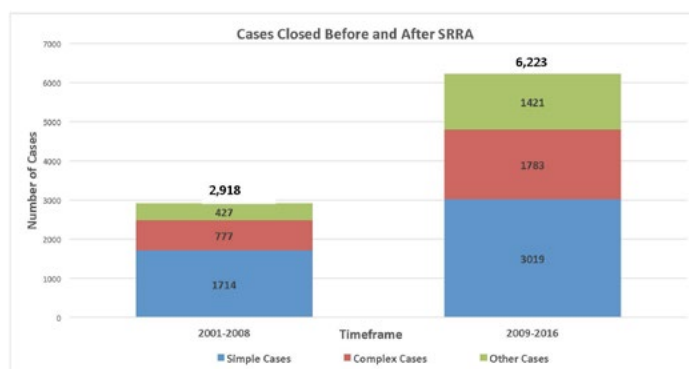
One way to look at the success is the rate of projects completed each year. There has been a dramatic rise in Response Action Outcomes, or RAOs, which is the term for the completion of a remediation project and the equivalent of what was once known as a No Further Action.

Since 2012, when the LSRP program was fully implemented, the number of RAOs rose sharply. The number of remediations completed now averages around 2,000 a year, about four times the rate of completions when the SRRA was implemented in 2009.

Even more impressive, is this chart compiled by the LSRPA using data from the NJDEP that shows all cases

are being completed faster. Simpler cases and complex cases (i.e., multiple areas of concern and impacted media) are both being completed at an accelerated rate with no loss in quality when contrasted with a comparable period before the SRRA.

Of course, there is always room for improvement. Already, key legislators and the NJDEP have begun to collect comments and suggestions for updates and changes in policy, regulations,



Source: NJDEP  
**Simple Cases:** categorized as B - single phase remedial action for soil only, or C1 - no formal design with a known contaminant source and potential ground water contamination.  
**Complex Cases:** Categorized as C2 - formal design with a known contaminant source where ground water may be contaminated, C3 - multi-phase remedial action with an unknown or uncontrolled source, or D - multi-phase remedial action with multiple unknown or uncontrolled sources in multiple media including ground water.  
**Other:** A - emergency and other miscellaneous categories.

and if absolutely necessary, the law. Legislators may begin reviewing potential legislation later this year or early next year.

As the front lines of remediation in New Jersey, LSRPs know how the process is working on the ground and in the groundwater. Through the Licensed Site Remediation Professional's Association (LSRPA), we have begun considering how best to streamline and clarify the state's rules for cleaning up sites.

Builders and developers have begun to consider these issues as well.

One issue LSRPs, developers and the

[Continued on page 18](#)

### About the Authors:

Sue Boyle is the Executive Director of the New Jersey Licensed Site Remediation Professional Association and a senior consultant with GEI Consultants, Inc. Rodger Ferguson, an LSRP since 2009, is the president of the New Jersey Licensed Site Remediation Professional Association and president of PennJersey Environmental Consulting in Milford, NJ. The LSRPA website is [www.lsrpa.org](http://www.lsrpa.org).



## DOING YOUR DUE DILIGENCE ... AFFORDABLE HOUSING STYLE

By: Marge DellaVecchia, PP/AICP

Making sure that we know, understand and trust that a site is reasonably developable is critical for any project. This is what we call 'doing your Due Diligence'. In the world of affordable housing, with the myriad of agreements, financing partners, time constraints and local and state (not to mention housing advocate) requirements – doing the Due ... is a must.

For the issue of affordable housing specifically, often the properties can have plenty of challenges, therefore, addressing site and local conditions and tasks quickly and completely is a sure way to get the best start on a project.

Affordable housing comes in all shapes, sizes and locations. It can be the case that identified parcels are in areas that are in and of themselves challenging. Towns, according to their "Fair Share" mandate may have identified locations for this housing in undeveloped or underdeveloped areas, which can be ripe with site, utility, permitting, environmental and/or historic or cultural constraints and considerations.

PS&S has found that the best path to a development project is a multi-step approach that analyzes and designs the land and site conditions first and walk through the process together hand-in-hand so that the client/developer can make calculated GO/NO GO decisions with reliable advice from their professionals. Ideally .... All decisions are a GO ... Realistically, it's better to spend a dollar today so as not to waste hundreds of thousands tomorrow on sites that just don't make sense.

Basic steps of this type of due diligence include initial site investigation and an assessment of the site's feasibility for acquisition. Of course, this is the true first step. A well-priced parcel is no bargain if it's not developable. Normally this includes some level of conceptual planning and design, understanding pro forma considerations, mapping out the requirements of the project and comparing that with regulatory permitting that may be needed.

While not always necessary, don't skimp on preliminary environmental reviews and evaluations. Heavily wooded sites can be indicative of wetlands or nearby streams. Previously developed and now cleared sites may contain pre-existing environmental conditions. Money is well spent early in the process by engaging the professionals needed to complete a Phase One/Preliminary Site Assessment for the property. With this in hand, the GO/NO GO decision will always be a clearer one.

Meetings with local officials are also an important step. Here is where we learn what the town wants and needs and will find acceptable. It is generally best to have the conversations and make your needs and intentions known. There is always the possibility of a battle, but better to know going in than after we're too far down the road to turn back. Local officials are also our best source of information as it relates to professionals, consultants, approval process and protocol, local (and regional) infrastructure, and on and off-site improvements that may be required or requested.

A good check-list for due diligence

should include, at a minimum, the following items:

Constraint Mapping, Conceptual Land Plan Review, Engineering Feasibility, Phase I/Preliminary Site Assessment and if it exists on or near the site, Wetland Delineation and Stream Top of Bank Delineation. Depending on the site, it may be worthwhile to also consider a "Cultural Resource" due diligence look at the site. This should not be an expensive service but worth the effort to ensure that the proposed project and site are suitable as it relates to the State or Federal Historic Preservation delineation and/or requirements.

Affordable housing is here to stay. Some will say its growing and we are challenged to develop new products that will fit into our communities, cities and neighborhoods.

Relationship to transit, access to services and efficient, well-designed sites and buildings will set the stage for cost effective developments. Don't underestimate the housing that's needed for our aging parents, millennial children, students, special needs friends and family members and neighbors.

Doing the Due Diligence will guide the process so that the decision to move forward is a well calculated one, based on site specific conditions and facts. This information will also set the stage for a project that will be properly budgeted, well timed and executable with minimal interruptions and additional cost requests.

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### About the Author:

Marge DellaVecchia has a long history of experience in Affordable Housing, having been the Executive Director of the New Jersey Housing and Mortgage Finance Agency, and Chief of Staff at the NJ Department of Community Affairs. She is currently a Principal and Vice President at PS&S and responsible for Client Relationships, Business Development and Affordable Housing at the firm.

## SHOULD “STRANDED ASSETS” BE EXEMPT FROM ZONING OR BE CONSIDERED AS BLIGHTED? PROPOSED LEGISLATION SEEKS TO BREAK THE LOGJAM

By: **Anthony F. DellaPelle**

In recent years, suburban office parks, shopping malls and retail centers have experienced spikes in vacancy, with many empty or “dark” stores and buildings popping up around New Jersey. New Jersey’s suburban real estate landscape after World War II was shaped by highway and roadway expansion, with shopping centers and corporate office parks providing jobs and amenities to growing residential communities. But changing demographics have caused the migration of jobs and labor pools away from suburban areas and returning to urban centers, away from highways and near mass transit. These changes have made many formerly vibrant commercial areas obsolete and, while some properties have recently been revitalized through private effort, such as the former Bell Labs facility in Holmdel being transformed by Somerset Development into a two million square foot “metroburbs” known as “Bell Works”, many other commercial properties remain vacant and difficult to market.

In an effort to assist the private sector, the New Jersey Legislature has introduced two bills intended to incentivize the development and redevelopment of these “stranded assets”. One bill A-1309, introduced by Assembly Majority Leader Louis Greenwald in January of this year, remains before the Assembly Housing and Community Development Committee. A-1309 would preempt from local zoning regulations applications to convert certain vacant office parks and retail shopping centers into mixed-use developments. Under the bill, an eligible property is an office park containing at least 50,000 square feet, or a retail center of at

least 15,000 square feet, provided that the property is at least 40% vacant. Eligible properties which are the subject of development applications within two years of the bill’s effective date would automatically qualify as permitted uses under local zoning if they propose at least two types of uses and would either reuse or redevelop the property without expanding the square footage of the improvements. There are other provisions of the bill which allow the local planning boards to condition approvals upon local parking, storm water, sewer, bulk standards and other design requirements. A-1309 had been the subject of an earlier bill from the 2017 legislative session, A-5229, which also failed to get out of committee.

The second bill, A-1700, was introduced earlier this year by Assemblyman Ronald Dancer and Assemblywoman Valerie Vanieri Huttel, and has a companion bill in the State Senate, S-1583, introduced by Senator Nilsa Cruz-Perez and Senator Sandra Cunningham. Both propose to amend the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-1, et seq. (“LRHL”), to modify the statutory criteria of N.J.S.A. 40A:12A-5, to classify certain kinds of stranded assets as “areas in need of redevelopment”. Under these companion bills, “[a]reas with buildings used, or previously used as a shopping mall, shopping plaza, or professional office park, which buildings have been vacant or partially vacant with less than 50% occupancy, for a period of at least two years,” would qualify as “areas in need of redevelopment under LRHL. A-1700 was favorably released from the Assembly Commerce and Economic Development Committee

this fall, while S-1583 remains before the Senate Community and Urban Affairs Committee.

If adopted, these bills would represent the first amendment to the LRHL since 2013, when P.L. 2014, C. 159 permitted municipal agencies to undertake redevelopment projects without the use of eminent domain. That law has generally been lauded by the real estate community, as many municipalities have successfully undertaken redevelopment projects without eminent domain in “non-condemnation” areas.

The current bills propose to amend the LRHL’s blight criteria to include stranded assets as being eligible for redevelopment designation. If adopted, they would allow a municipality to offer private sector partners incentives which are available for areas in need of redevelopment, such as long-term tax exemptions and abatements, and would permit zoning changes or overlays to be achieved through redevelopment plan adoption, in an effort to repurpose these properties and to revitalize areas which were formerly vibrant, but now may be struggling or “stranded”.

Whether the current bills will advance, or would actually create viable redevelopment opportunities, remains to be seen. The incentives offered to the private sector by redevelopment area designation have long been recognized as effective revitalization tools. However, a legislative determination that office parks or shopping centers that are 49% occupied qualify as and constitute blighted areas, thereby allowing a local agency to seize those properties by eminent domain from

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*About the Author:*

Anthony F. DellaPelle is a principal at the Morristown law firm of McKirdy, Riskin, Olson & DellaPelle, P.C., where he limits his practice to eminent domain, redevelopment and real estate tax appeal matters.

## THE WET SUMMER OF 2018 – WHAT BUILDERS SHOULD KNOW AND PREPARE FOR.

By: Doug McCleery

Rainfall has been higher than average in New Jersey this year according to the National Oceanic and Atmospheric Administration. September and October, typically a time for us to start drying out our newly constructed buildings with cooler and drier fall weather, instead gave us more wet conditions to contend with. Hot temperatures, high humidity and lots of rain create difficult construction conditions for builders and trades. The challenges of navigating muddy construction sites while roads are still being built, receiving delivery of wet construction materials, installing roofs and windows quickly to keep the rain out, drying out walls before enclosing them with drywall - all while still meeting construction schedules is a challenge for even the most prepared builders.

What happened this year and how should we in the construction industry be prepared for dealing with similar wet conditions in the future?

If this question is keeping you up at night, you are not alone. Discussions about water and moisture were commonplace on construction sites over the last few months throughout New Jersey and the mid-Atlantic region. There are many factors and variables that play a role in this issue which are summarized below, some are under our control and others are not. Overall we know that the standards and conditions we are building in have changed. Increased energy code standards, wetter weather and health and safety requirements all change how moisture moves and is managed in homes. Let's look at some of the underlying conditions and building science principals that can help us understand and address this

concern going forward.

- New codes and the desire to save energy for our customers have pushed insulation levels higher. More stringent air sealing is also required, not only to reduce operating costs, but to protect our more highly insulated buildings from moisture that can get trapped on the "wrong" side of insulation. Because of tighter construction, the ways that fresh air is introduced into our homes has changed.
- Under previous building codes, naturally ventilated homes introduced more fresh air in the winter months during colder, windier conditions and less fresh air during the summer when temperature differences and wind speeds are typically lower. With building codes now requiring mechanical ventilation in low-rise residential construction, ventilation rates are more constant. For most homes, this means less fresh air during the winter and more during the summer. Residents will benefit from lower heating bills and less dry air in the winter. During the summer, more ventilation often means more moisture entering the homes.
- How we heat our homes and heat our water has changed. Atmospheric combustion furnaces and water heaters we used to use were inefficient by today's standards and relied on air from inside the home to send up the flue. They are certainly less compatible with tighter homes. What we sometimes forget is that they also removed a lot of moisture. Ultimately, this could be problematic, contributing to the need to humidify our homes, but in a new home, those

natural vent systems contributed to the drying of building materials such as dimensional lumber, drywall joint compound and especially concrete.

Some things about home building have not changed.

- We still build most of our homes in an uncontrolled environment – we call it a construction site - at the mercy of the weather. A rainy year turns our "roads" into quagmires, interferes with delivery schedules, fills our foundations with water, delays the delivery of electricity, and increases the moisture content of every building material on site.
- Another thing that has not changed – construction schedules still rule. Homes need to be completed on time and on budget, rain or no rain.

So what do we do to build homes that our customers want, at prices they can afford, while reducing the impact of unusually rainy years like 2018? Here are a few thoughts to help start productive conversations with key stakeholders in your building projects.

- Consider ways to minimize the introduction of moisture into our buildings during construction. Solutions can include the staging of the site to improve drainage during construction, providing protected locations for storage of materials and finding ways to work with your suppliers to protect materials during delivery.
- Place a priority on protecting buildings from rain and moisture during construction. Drain water away from the foundation. Once the roof is on

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About the Author:

Doug McCleery is a NJ licensed professional engineer and Principal at MaGrann Associates (<https://www.magrann.com/>), where he has worked with New Jersey builders for 30 years to provide energy efficient, sustainable, healthy, cost effective and high quality solutions to energy and engineering challenges. Doug serves on the NJBA Construction Codes Committee. He can be reached at [dougmcclery@magrann.com](mailto:dougmcclery@magrann.com) or 856-813-8758.



## A MESSAGE FROM NJBA PRESIDENT

*Continued from page 2*

on legislation to help remedy NJ's worst in the nation foreclosure rate. The Residential Foreclosure Transformation Act – A2115 (Jasey) & S1584 (Cruz Perez), establishes a clearing house within the NJ Housing and Mortgage Finance Agency to purchase vacant and abandoned foreclosed properties. These properties could then be sold and repurposed, if necessary, to be used as occupancy for affordable housing. This legislation will offer some relief to the foreclosure crisis and NJBA will be working diligently to support its passage.

NJBA has also been actively lobbying on S1073 (Smith) & A2694 (McKeon) which would permit the establishment of stormwater utilities by local authorities. In October, I testified before the Assembly Telecommunications and Utilities Committee to highlight the need for critical amendments to the bill. NJBA has been working to secure amendments to ensure developers and owners can retain control of their own stormwater management systems and to clarify fee and credit provisions of the bill.

Also in October, the Assembly Appropriations Committee released A3494 (Burzichelli), which would allow certain restaurants to purchase an annual non-transferable permit that would enable them to serve liquor, wine and beer to dining guests. NJBA continues to work with our coalition partners including NAIOP, the International Council of Shopping Centers and the League of Municipalities, to modernize NJ's liquor laws to support redevelopment projects.

NJBA's advocacy team has also been busy engaging on legislative initiatives opposing well-intentioned but problematic legislation that would severely inhibit our ability to build homes in NJ. The association has engaged on bills relating to lead and mold, mandatory generators in senior housing, mandatory solar panels on all new home construction and a constitutional

amendment to guarantee citizens the right to a healthy environment.

On the regulatory front, the Murphy Administration has begun advancing new rules and guidance that reflect the administration's more progressive stance. NJBA has stakeholders participating on several Department of Environmental Protection (DEP) rulemaking and guidance making processes that include environmental justice, stormwater management, site remediation and coastal resiliency.

In response to Executive Order #23, signed by Governor Murphy this summer, DEP and other state departments are developing guidance for all executive branch departments and agencies for the consideration of environmental justice in implementing their statutory and regulatory responsibilities. NJBA has been involved in the stakeholders' processes and has advocated that guidance reflect the need to encourage redevelopment and revitalization in environmental justice communities.

NJBA has learned that the Stormwater Management rule proposal for nonstructural strategies (Phase 1) is under legal review, but the actual rule language has not been shared. NJBA continues to advocate before DEP for regulatory changes to ensure infiltration will be counted in basin design and functionality and is participating in the DEP's technical stakeholders' group for revisions to the BMP Manual and forthcoming Stormwater Management Phase 2 rule change stakeholders group.

NJBA is also participating in the stakeholders' process re-examining components of the Site Remediation and Reform Act (SRRRA). NJBA has advocated that changes to SRRRA not discourage remediation and has also proposed several regulatory changes that may decrease the cost of remediation.

Finally, NJBA is also participating in a stakeholders' process as part of DEP's

recently announced Coastal Resilience Plan. As part of the plan, DEP will be examining new regulations, policies, and guidance, including sea level rise standards, to help improve resiliency along NJ's coastal areas.

## Atlantic Builders Convention (ABC)

I am very pleased to report on the tremendous progress the ABC Committee has made for our 70th annual convention which will be held in one location at Harrah's Resort in Atlantic City, NJ, April 2 – 4, 2019. In recognition of our 70th anniversary, ABC has unveiled a new logo and launched a revamped website [www.ABCConvention.com](http://www.ABCConvention.com). The new look and new location are both showing promising results as booth sales and sponsorships are well ahead of schedule. I encourage everyone to join us this year.

## Happy Holidays

As evidenced above, our association has been extremely busy over the last several months and I do not anticipate our momentum slowing as we move into the holiday season. However, I do hope all our members have a chance to pause and enjoy some time with their families and friends. At no other time of the year is the importance of our work on behalf of the homebuilding industry better represented than when millions across the country gather in their homes to give thanks and celebrate the holidays. Please do your best to help those who do not have the opportunity to enjoy that privilege this holiday season and be thankful for the successes we have enjoyed. I personally thank the many NJBA members and industry professionals who dedicate their time and expertise to help make our vision of a more vibrant housing market in NJ a reality. On behalf of the NJBA Officers, Board of Directors and staff, I wish you and your families a healthy, safe and joyful Thanksgiving and holiday season.

## SHORE BUILDING REGULATIONS FOR BEACHES

*Continued from page 4*

development permit is not required for the repair, replacement, renovation, or reconstruction in the same location and size of any dock, wharf, pier, bulkhead, or building, legally existing prior to January 1, 1981, that appears on the applicable Tidelands map or coastal wetlands map, or for which DEP previously issued a waterfront development permit. GP 10 authorizes the reconstruction of a legally existing functioning bulkhead, provided that reconstruction is located in-place or upland of the existing bulkhead or that reconstruction of the legally existing bulkhead is: (1) within 18 inches outshore of the existing bulkhead if timber is used; or (2) located up to a maximum of 24 inches outshore of the existing bulkhead when a vinyl bulkhead is used. GP 14 authorizes construction of a bulkhead and associated fill at a single-family home or duplex lot on a natural water body, but it does not apply where the bulkhead is located on a dune or oceanfront beach.

### III. Tidelands

Tidelands, also known as riparian lands, are those lands that are currently or were formerly flowed by the mean high tide of a natural waterway. The Barnegat Bay constitutes tidelands, just as an urban area over which a small tidal stream once flowed may also be deemed tidelands. Artificial waterways such as lagoons are generally not deemed tidelands unless there are lands within the lagoon that were formerly flowed by the mean high tide of a natural waterway. Because the State claims ownership of tidelands and holds them in the public trust, the construction of docks, bulkheads and moorings within tidelands requires DEP's written permission and payment of a fee. DEP may agree to sell the tidelands in the form of a Riparian Grant or to rent the area through either a Tidelands License or Lease. The Tidelands Resource Council, a board of twelve Governor-appointed volunteers, along with DEP staff at the Bureau of

Tidelands Management, oversees the management of New Jersey's tidelands.

### IV. Conclusion

The competing goals of coastal land use include protection of fragile ecosystems, ensuring public access to the waterfront, preventing flood damage, and safeguarding private property rights. Giordano, Halleran & Ciesla's environmental attorneys have extensive experience in addressing the unique challenges inherent in building at the Jersey Shore.

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### THE WET SUMMER

*Continued from page 14*

and the windows are in, keep it dry. The weather can sometimes be your best ally – when it is dry. The weather can also be your biggest enemy, as evidenced in 2018, when rain-free days were hard to come by. Working with trades is key.

- Consider the removal of bulk water from your buildings under construction a top priority. This will likely depend on generator power and temporary pumps.
- Dry, dry, dry. When things are wet and your building is buttoned up, consider ways to actively dry your buildings. Much like providing temporary heat in the winter, can you build in a plan to provide temporary dehumidification? This also requires the cooperation of your trades.
- Find ways to put checks in place to help prevent the covering of wet building materials with insulation and sheetrock. Moisture experts say that the moisture content of a material must be below 19% before it gets covered up to reduce the risk of long term material damage. Giving trades the responsibility and authority to determine when it is appropriate to

do their work can prevent damage and the need for remediation down the road.

- Once the home is complete, right-sized and variable capacity cooling systems are critical to moisture removal. A system that is too large will not run long enough to dehumidify. Right-sized equipment costs less money and works better.
- Consider new ways to condition and ventilate your homes that reduce moisture during the first year of occupancy (when moisture levels are at their peak) and during extreme weather down the road. All ventilation methods are not alike and supplemental dehumidification may be a good investment. Ductless HVAC systems eliminate the risk of condensation and moisture problems associated with sweating ducts.

None of this is easy or free, but considering the alternatives, is prevention less expensive and less risky than remediation?

## OPPORTUNITY ZONE OPPORTUNITIES ABOUND IN NEW JERSEY

*Continued from page 5*

an existing building, the building must be “substantially improved” within 30 months after acquisition (i.e., double the basis of the building), as measured by the additions/improvements made thereto (note: the land need not be “substantially improved”).

Notably, the proposed regulations also provide a “Working Capital Safe Harbor” qualifying cash/financial property as QOZ Property so long as (1) there is a written plan designating the funds for the acquisition, construction or substantial improvement of QOZ Property; (2) there is a written schedule for the planned use of the funds within 31 months; and (3) the funds are actually used in accordance with the schedule.

### New Jersey Laws Can Further Assist OZ Developments

As much of New Jersey is already developed, many developers are now focusing on redevelopment opportunities. To help offset costs and risks associated with such redevelopment efforts, New Jersey affords redevelopers with a variety of tools to encourage redevelopment efforts, such as the LHRL and LTTEL.

The LHRL provides protocols and statutory criteria for a property to be designated as an “area in need of redevelopment,” thus permitting the municipality to amend its ordinance and make the proposed use “as of right” onsite. Under the LHRL, a property may qualify as an “area in need of redevelopment” if it is, among other things, “substandard, unsafe, unsanitary, dilapidated, or obsolescent, or possess any of such characteristics, or are so lacking in light, air, or space, as to be conducive to unwholesome living or working conditions” or upon “the discontinuance of the use of buildings previously used for commercial, manufacturing, or industrial purposes.”

Although OZ designations are based

upon income metrics, there will likely be a nexus between an area’s income and the condition and usefulness of many of the properties located therein. Accordingly, developers may seek to utilize the LHRL’s redevelopment designation process to permit the proposed use “as of right”, circumventing the need for use variance relief, and qualify the development for certain economic incentives, such as a payment in lieu of taxes (PILOT) program under the LTTEL, which could substantially reduce the development’s property tax obligations upon completion.

### What’s Next?

The IRS is currently receiving public comments on its proposed OZ Program regulations. Moreover, additional regulations are scheduled to be released in early 2019. Notwithstanding that the OZ Program is a “work in progress,” developers should be conscious of the limited number of OZ Properties available for development in New Jersey, as well as the December 31, 2019 deadline to take full advantage of the OZ Program’s tax benefits. Given such, there will likely be significant participation in the OZ Program throughout 2019 and beyond.

Accordingly, developers seeking to participate under the OZ Program should consult with their attorneys and accountants to discuss how they can best take advantage of the OZ Program and other New Jersey laws such as the LHRL and LTTEL, to maximize their development opportunities.

## BID PROTESTS ON PUBLIC PROJECTS

*Continued from page 6*

difficult for a disappointed bidder on these projects to protest the award. Generally, the only argument disappointed bidders will have is that the public entity made a mistake in its technical review. But the courts will generally not engage in the type of detailed technical analysis necessary for those arguments, under the theory that to do so would be to second-guess the determination of procurement officials.

Besides making it difficult for disappointed bidders, it is easy for public officials to make subjective determinations in these cases that can result in conscious or unconscious favoritism—something our bidding laws are designed to prevent.

None of this means that contractors should avoid these types of projects. It simply means that when bidding on a project like this, a bidder should fully explain what it is proposing and what it intends to do, and realize that if it is not awarded the project, any attempt to protest the bid will be an uphill battle.

## SUPREME COURT DECLINES TO HEAR UNDESIGNATED REDEVELOPER’S APPEAL

*Continued from page 8*

redevelopment costs to developers, control the project timeline, and impose accountability and timelines upon owners and developers in the form of contractual obligations, enforcement and remedies.

Accordingly, in future cases an important distinction that may impact the Court’s analysis is whether a subject property has been designated as a condemnation or non-condemnation redevelopment area under the LRHL. As of now, whether that distinction is enough to sway the Court’s view of redevelopment by a property owner without an official redevelopment designation remains unclear.



## THE RAPID EVOLUTION OF "COMMUNITY NEXT"

*Continued from page 3*

much more affordable and mainstream, and many states have adopted legislation affecting their use. By way of example, laws exist in several states which protect an owner's right to install solar panels. In contrast, many community associations have architectural guidelines precluding owners from installing solar panels. Strong feelings exist on both sides of the issue. Community associations and developers in unregulated states should balance the (arguable) unsightliness of solar panels with their residents' desire to "go green" and be good stewards of the planet. Community associations and developers in every state are well advised to keep a watchful eye on federal and state legislation pertaining to alternative energy sources.

Seeing a trend here? In most of the paragraphs above, recent or pending statutory changes affecting many aspects of developing or living in a community association have been noted. Community associations and the professionals who develop and serve them are well advised to get involved with the New Jersey Builders Association and CAI to help provide a strong voice to New Jersey lawmakers. You can be that voice, shaping and influencing the future of community associations, for 2020 and beyond...

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## A DECADE ON, THE SRRA CONTINUES TO DRIVE REDEVELOPMENT

*Continued from page 11*

NJDEP should consider together is how best to streamline the requirements necessary to complete remediation projects.

Under the current law and regulations, NJDEP must process a Remedial Action Permit (RAP) before an LSRP can submit the final paperwork for a RAO to declare the remediation is completed and the institutional controls are in place.

From the time it is submitted until the

time it is issued, a RAP can take more than a year, delaying completion of property transactions and redevelopment projects. No one knows better than builders the impacts delays can have on redevelopment.

Some of the delays are caused by improperly completed paperwork or by LSRPs not adequately describing how they reached their professional decisions. The LSRPA has worked with the NJDEP and responsible party organizations to improve training for LSRPs to remove the administrative hurdles. LSRPA also is active on the ongoing NJDEP stakeholder group to improve the current process and has reaffirmed its commitment to continuing education for LSRPs and responsible parties.

But more creative solutions also may be considered to ensure no bottlenecks exist between when the work of remediation is completed and the permit is issued so an RAO can be filed.

Of course, better documentation of an LSRP's decision process for a RAP and RAO should reduce the time necessary for NJDEP reviews. Better documentation also could help to expedite the required inspection and review of other reports.

Another potential solution would allow the LSRP to issue some permits by rule while retaining NJDEP's ability to review the final remediation documents to ensure the necessary controls are in place for the environment and public health.

Also, the regulatory mindset must change so that prospective developers, who now may be listed as the party responsible for the site's pollution, are treated as an ally in the safe redevelopment of contaminated properties. Both builders and stakeholders should work together for that goal.

Whatever the changes, the success of

SRRA is evident. But any program, with enough experience, can be updated and improved. With appropriate and reasonable changes to our state's laws and regulations, we can accomplish even more for the public, the environment and business.

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## STRANDED ASSETS

*Continued from page 13*

the private owners so that they can be given to other private parties, is all but certain to be met with resistance. There are a variety of reasons why commercial properties may have vacancies and many of those reasons would not ordinarily be thought of as creating blight. For instance, a big box retail center may see a single user or anchor tenant vacate, perhaps to a nearby superior location or facility, but the tenant may still be paying rent to the landlord at the original location in order to keep its competitors away. Does this qualify as blight? Should it permit a town to use eminent domain to take that property from the owner and allow another private party to redevelop it? Or consider an office building where the market suggests that a single user tenant would flourish, but the building cannot be made available until several smaller users vacate at the end of their staggered lease terms. If that building remains 51% or more vacant for more than two years, even where the landlord has single users waiting, should it be considered blighted, allowing it to be taken from the owner? These and other questions must be answered before any legislative assistance to the real estate community can be expected to succeed. While the clearance of blighted areas is recognized as a valid public purpose justifying the exercise of eminent domain, stretching the blight criteria to include "mostly vacant" commercial buildings may prove to be more trouble than it is worth.