

DIMENSIONS

Newsletter of the New Jersey Builders Association



IN THIS ISSUE

AN INTERVIEW WITH NJBA PRESIDENT DWIGHT WESLEY PITTENGER, ESQ.	2
STATUS OF MOUNT LAUREL DECLARATORY JUDGMENT CASES.....	3
NEW JERSEY SUPREME COURT ISSUES IMPORTANT RULING FOR DEVELOPERS (CYPRESS POINT)	4
RULING CLARIFIES INTERPLAY OF HIGHLANDS WATER PROTECTION ACT, MOUNT LAUREL DOCTRINE AND FAIR HOUSING ACT	5

BREAKING: MORE COLLEGE GRADS TO BE FHA-APPROVED IN 2016.....	6
COMPUTER SECURITY: FAMILY FEUD	7
THE CRE® 2016-17 TOP TEN ISSUES AFFECTING REAL ESTATE.....	8
GOT DIRT? (SOIL IMPORT/EXPORT)	9
75TH PERCENTILE EVALUATION: AN ECONOMICAL SOLUTION TO CONTAMINATED FILL DISPOSAL	10

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 New Jersey. Additional information is available at www.njba.org.

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 Grant Lucking at grant@njba.org.

DIMENSIONS

AN INTERVIEW WITH NJBA PRESIDENT DWIGHT WESLEY PITTENGER, ESQ.



Dwight Wesley Pittenger, Esq.
NJBA President

Millennials are increasingly interested in moving to cities and urban hubs, do you think some of that is driven by the lack of affordability in the suburbs?

To a certain degree I do believe that has an impact. The live-work-play concept is a major factor but there is a lack of affordable units in the suburbs. Aging baby boomers are also looking for units in that market. Many baby boomers are avoiding the typical retirement community in favor of smaller units in convenient locations. Between millennials and the baby boomer population there is definitely a growing demand for smaller units in the suburban and town environment.

Urbanizing older towns is something planners are looking to do that can address the need for affordable units and attract younger populations interested in the live-work-play lifestyle. Not everyone wants to live in Hudson County or Manhattan, but they still want walkability. In theory, the urbanization of the suburbs and small towns would offer a similar experience and be less expensive than the city.

Why is there a shortage of smaller units in the suburbs?

I think it's mostly driven by zoning. Zoning is typically more reactive than

proactive, so it takes time for trends and sustained need to impact municipalities' planning and zoning rules. For a long time, we have formatted zoning rules to cater to a typical nuclear family unit with 2.4 children. Obviously that still exists but it's important that we also address the need for individuals who live alone or who don't want three or four bedroom homes.

What will it take for towns to embrace smaller units in their planning and zoning?

I don't think many towns will be convinced this is a good concept in the short term. Most communities have the "Not in my back yard" mentality and there is political pressure not to cater to the low end market. That's really where the affordable housing ruling is relevant. If towns have an affordable housing obligation, there will be more incentive to help satisfy the market for such units. The demand is there, the housing isn't. Builders are ready to step in and meet that demand.

Do you see any examples of this trend now?

I can speak to witnessing the trend in my backyard which is Monmouth County. Some towns that are embracing the change are Red Bank, Long Branch, Asbury Park and Belmar. In Red Bank, for instance, older buildings are being converted into smaller units and people are moving into the downtown area. There is easy access to dining, entertainment and mass transit which has enabled the downtown

to flourish. They have embraced the mixed-use concept and given people a non-traditional market in the suburbs. Towns that have done this and are succeeding should serve as a good example and help minimize the fear other towns might have about building smaller units and urbanizing their town centers. Most of the people I know in those towns are loving the new lifestyle.

What are some of the downsides to urbanizing the suburbs?

The clearest downside to me is the lack of available parking and congestion. There are steps towns can take to alleviate the parking issue, like building garages and installing meters.

Do you think builders have caught on to the urbanization trend?

Most traditional builders, as towns, are catching on but they are being cautious and making sure this model will be able to be sustained. I don't think traditional single family home building is disappearing. Mixed-use and urbanization are just a growing part of the mix. Housing changes are not occurring in a vacuum either, other industries are also embracing change with changing demographics. I look at the automobile industry as a great example. For years, big cars with powerful engines dominated the market. Now there is a clear mix of small economical cars and SUVs on the road. Traditional business models are changing and it is something we should be aware of in the building industry.

DIMENSIONS

STATUS OF MOUNT LAUREL DECLARATORY JUDGMENT CASES

By: Thomas F. Carroll, III, Esq.

Following the issuance of the New Jersey Supreme Court's March 2015 opinion declaring the Council on Affordable Housing (COAH) essentially defunct, trial court judges throughout the State have been managing declaratory judgment (DJ) cases designed to bring municipalities into compliance with their *Mount Laurel* obligations. This article summarizes where things now stand.

The "Gap Year" Issue

The "gap years" are the years 1999 through 2015, during which COAH failed to adopt lawful regulations. Municipalities have taken the position that the need for affordable housing that arose during the gap years should now be ignored when it comes to establishing municipal fair share obligations. Housing advocates - the NJBA, individual builders, and the Fair Share Housing Center (FSHC) - have noted that the accumulated need for affordable housing during the gap years did not vanish simply because COAH did not do its job. Thus the housing advocates have asserted that the gap year need should be counted. Without gap year need being included, fair share numbers would be less than 50% of what they will be if gap year need is included.

Ocean County judges ruled that gap year need must be included. The municipalities brought the issue before the Appellate Division, and that court reversed the ruling of the Ocean County judges. On September 8, 2016, the New Jersey Supreme Court agreed to hear an appeal on the gap year question, which was filed by the FSHC and supported by the NJBA. The Supreme Court also stayed the

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Appellate Division's ruling pending appeal. The Supreme Court will now consider the issue on the merits, with oral argument to be held by the Court in late November. A decision is expected in December or shortly thereafter.

The Middlesex County DJ Cases

Different judges in the various counties have managed the DJ cases in different ways, and at a different pace, with some cases being more advanced than others. Most cases in Middlesex County have settled, resulting in considerable rezonings for inclusionary developments that will provide both market rate housing and lower income housing. Through an opinion issued on July 21, 2016, the Hon. Douglas K. Wolfson, J.S.C., in the one Middlesex County case that did not settle (the South Brunswick case), became the first judge in the State to render rulings in "the new era" deciding fair share methodology issues. Deciding fair share methodology issues allows for the establishment of the numerical fair share obligations that must be satisfied by New Jersey's municipalities under the *Mount Laurel* doctrine. Judge Wolfson accepted the opinions of the experts offered by the housing advocates, and he thoroughly rejected the opinions of

the expert put forth by municipalities.

Judge Wolfson's opinion did not decide issues relating to the gap years, since that issue is being resolved in the appellate courts. He conducted a "mini-trial" after the release of his opinion in which he heard testimony on whether gap year need may be considered as part of the "present need" component of fair share obligations (the Appellate Division opinion noted above held that gap year need may not be considered as part of the "prospective need" component of fair share obligations). Subsequent to that mini-trial, the Supreme Court stayed the Appellate Division gap year ruling. On October 6, 2016, Judge Wolfson released his supplemental opinion on fair share issues. His opinion holds that gap year need must be included, and his opinion quantifies that need as to South Brunswick Township.

DJ Cases in the Other Counties

The Ocean County DJ cases have proceeded on a faster pace than cases in most counties. A county-wide trial on fair share issues (except for the gap year issues) began in Ocean County on October 6, 2016. Municipalities filed motions with the appellate courts seeking to stay that trial, arguing that a stay is justified because the Supreme Court will now be hearing an appeal on the gap year question, but those motions have been denied. The Ocean County trial is particularly important because, unlike Middlesex County, it will include the trial court's evaluation of the fair share numbers recommended by Richard Reading, the "numbers master" appointed by the courts in Ocean County and in

Continued on page 11

About the Author:

The author is partner-in-charge of the Land Use Division of Hill Wallack LLP, Land Use Counsel to the NJBA. Hill Wallack LLP, based in Princeton, represented the NJBA when playing a lead role in the COAH regulation litigation, and has also represented the NJBA and individual builders in many of the DJ actions discussed in this article. Hill Wallack LLP keeps records on the filings and status of all New Jersey towns. Please contact the author should you have questions about the status of any particular towns, or any other questions.

DIMENSIONS

NEW JERSEY SUPREME COURT ISSUES IMPORTANT RULING FOR DEVELOPERS (CYPRESS POINT)

By: **Carlton T. Spiller, Esq., Ellen A. Silver, Esq. and Steven B. Gladis, Esq.**

The New Jersey Supreme Court's August 4, 2016 holding in *Cypress Point Condominium Association, Inc. v. Adria Towers, LLC* is the latest decision to fall in line with the "strong recent trend" by state and federal courts to recognize that standard commercial general liability (CGL) insurance policies provide coverage for property damage caused by the faulty work of the insured's subcontractor.

In *Cypress Point*, a condominium association filed suit against the developer and general contractor who had built the condominium project using subcontractors. The suit alleged that water infiltration, such as roof leaks and infiltration at interior window jambs and sills, had caused damage to steel supports, exterior and interior sheathing and sheetrock, and insulation. The association claimed that this water infiltration was caused by faulty construction work, including defectively built or installed roofs, gutters, brick facades, exterior insulation and finishing system siding, windows, doors, and sealants.

The question in *Cypress Point* was whether there was coverage under the relevant CGL policies issued to the developer, which were based on the 1986 standard CGL form prepared by the Insurance Services Office, Inc. (ISO). The policies contain the standard form policy language providing coverage for "those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' . . . caused by an 'occurrence' that takes place in the 'coverage territory' . . . [and]

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. . . occurs during the policy period." The policies define "property damage" as "[p]hysical injury to tangible property including all resulting loss of use of that property." "[O]ccurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." The policies also contain an exclusion that eliminates coverage for "'[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operation hazard'" (the "Your Work Exclusion"). But the policies also specifically provide that the Your Work Exclusion "does not apply if the damaged work or the work out of which the damage arises was performed on [the insured's] behalf by a subcontractor" (the "Subcontractor Exception").

The trial court initially granted summary judgment in favor of the insurers, holding that there was no coverage under the insuring agreement because faulty work does not qualify as an "occurrence"

and consequential damages caused by faulty work are not "property damage" as defined in the policy. The Appellate Division reversed, holding that "unintended and unexpected consequential damages [to the common areas and residential units] caused by the subcontractors' defective work constitute 'property damage' and an 'occurrence' under the [CGL] polic[ies]." The Supreme Court granted certification to consider the question of whether the standard form CGL policies provide coverage to a developer/general contractor when a subcontractor's faulty work causes consequential damage to the project.

The Supreme Court affirmed the Appellate Division, holding that "the consequential damages caused by the subcontractors' faulty workmanship constitute 'property damage,' and the event resulting in that damage—water from rain flowing into the interior of the property due to the subcontractors' faulty workmanship—is an 'occurrence' under the plain language of the CGL policies at issue here."

The Court rejected the insurers' argument that faulty work can never be an "accident" because it is one of the normal, frequent, and predictable consequences of the construction business. The Court also rejected a frequent argument made by insurers that breach of contract claims are not within the CGL policy's initial grant of coverage. The Court explained that "accident" as used in the policies "encompasses unintended and unexpected harm caused by negligent conduct." Thus, the Court

[Continued on page 11](#)

About the Author:

Carlton T. Spiller and Ellen A. Silver are partners in the Litigation Department of Greenbaum, Rowe, Smith & Davis LLP. Mr. Spiller's practice focuses on commercial general liability insurance coverage and litigation involving environmental, construction defect, and professional liability claims. Ms. Silver's experience encompasses a wide variety of insurance coverage matters, including those related to environmental contamination, construction defect claims (general liability and homebuilders' warranty insurance), professional liability claims, asbestos property damage and personal injury claims, D&O liability claims, comprehensive general liability claims, employment claims, automobile dealers liability claims, property insurance, and fidelity bond claims. Steven B. Gladis, an associate in the Litigation Department, focuses his practice on commercial litigation, including construction, employment, insurance-coverage, and environmental matters.

DIMENSIONS

RULING CLARIFIES INTERPLAY OF HIGHLANDS WATER PROTECTION ACT, MOUNT LAUREL DOCTRINE AND FAIR HOUSING ACT

By: Henry L. Kent-Smith, Esq. and Irina B. Elgart, Esq.

In an affordable housing decision that affects all communities in the Highland Region, the New Jersey Superior Court has ruled that the *Mount Laurel* Doctrine is a constitutional requirement that trumps the Highlands Water Protection and Planning Act, a 2004 state law that regulates development in the Highlands region of northwest New Jersey.

Judge Stephan Hansbury also ruled that courts must “consider” the Highlands Act as an allocation factor when determining vacant land capacity as part of the calculation of a municipality’s affordable housing obligation.

The decision affects all communities in the Highland Region, which covers more than 850,000 acres in 88 municipalities in Bergen, Hunterdon, Morris, Passaic, Somerset, Sussex and Warren counties.

Judge Hansbury’s August 2016 opinion in *In the Matter of the Borough of Chester* is the first since *Mount Laurel IV* that casts light on the interplay between: (1) the constitutionally mandated *Mount Laurel* Doctrine, the Fair Housing Act (FHA) and regulations from the Council on Affordable Housing (COAH); vis-à-vis (2) the Highlands Water Protection and Planning Act and Highland’s Council regulations.

The Highlands Act

The purpose underlying the Highlands Act is to balance sound land use with the protection of environmentally sensitive natural resources, particularly drinking water. The Highlands Council conducted a resource assessment which led to the adoption of the Regional Master Plan (RMP) in 2008. The Highlands Council issued local build-out reports in 2009 that computed the residential build-out capacity for each municipality. These



reports were a snapshot in time and did not factor redevelopment or even current site-specific conditions.

The Highlands Region is divided into the Preservation Area and the Planning Area. Municipalities within the Preservation Area are mandated to conform their master plans to the RMP, which severely limits development based on water capacity designations. In the Planning Area, municipal conformance with the RMP is voluntary, thus, it is considered to be a more suitable area for development than the Preservation Area.

Notwithstanding this contrast in the Highlands Act, many build-out reports in the Planning Area projected extremely limited development capacity. Under COAH “growth share” regulations, this limited “build out capacity” incentivized municipalities to conform to the RMP due to the reduction in their affordable housing requirements.

Interplay with Affordable Housing Regulations

The Highlands Act directs COAH to “consider” the RMP in its “allocation of the prospective fair share of the housing need.” Therefore, the RMP should be considered only as an allocation factor when distributing the affordable housing need in the region, and not dispositive of the entire municipal need, as was the case under COAH’s growth share formula.

In a string of 2011 opinions, the court held that COAH retained responsibility for determining the affordable housing obligations of Highlands Region municipalities, notwithstanding the adoption of the RMP, and other advisory documents. *In re Highlands Master Plan*, 421 N.J. Super. 614 (App. Div. 2011); *In re Adoption of Module 3*, 2011 WL 35582131 (App. Div. Aug. 15, 2011); *In re Adoption of Reg’l Affordable Hous. Guidelines*, 418 N.J. Super. 387 (App. Div. 2011).

In *Mt Laurel IV*, the Supreme Court stated that the calculation of municipal Third Round obligations must be in accordance with the Prior Round methodology. The Highlands Council acknowledged in its 2015 updated Housing Modules its deference to the courts to establish towns’ fair share obligations. Theoretically, there should be little conflict between the FHA and the Highlands Act, as COAH, and now the courts, would simply use the RMP as an allocation factor in determining vacant land capacity under the Prior Round methodology.

In re Chester Borough

Chester Borough is entirely in the Highlands Planning Area, with a portion in an Existing Community zone. The Borough has substantial issues with its wastewater treatment plant, which has operated “over capacity” for several years. The Borough petitioned the Highlands Council for plan conformance, in part, as a means to secure grant money to address the wastewater issues.

The Borough filed a partial summary judgment motion seeking to reduce its Third Round obligations to 20 percent

Continued on page 11

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DIMENSIONS

BREAKING: MORE COLLEGE GRADS TO BE FHA-APPROVED IN 2016

By: Michael Borodinsky

More Graduates To Be Approved In 2016

1.2 trillion dollars. That's how much student loan debt the Millennial generation carries. That debt causes many potential first time home buyers to delay their purchase. But should they wait? Apparently, the agency that oversees the FHA doesn't think so. New guidelines on education loans will make it easier for recent graduates -- and many others with student debt -- to get approved in 2016. Effective immediately, student loan payment calculations have eased. FHA lenders will now use lower monthly payment estimates for deferred student loans. With low mortgage rates and easier qualification for college graduates, 2016 is turning out to be a stellar year for younger buyers.

Student Loans Keep Many Graduates From Buying

Making the jump from renter to owner is one of the quickest ways to build wealth. The homeowner controls -- and locks in -- their monthly housing costs. Plus, they benefit when their home appreciates. For renters, this isn't the case. Many new college graduates, though, are handcuffed to the renting lifestyle, simply because of student debt.

The average student loan debt of a 2015 graduate is about \$35,000 for a bachelor's degree, \$51,000 for a Master's and \$71,000 for a Ph.D. Those numbers are trending up, too. In 2012, students carried a median loan amount of \$26,885. Compare that to just \$12,434 two decades ago. Student loan debt often weighs down graduates for years. There are plenty of 40-year-olds that are still paying down student loans. For them, student loan debt has spanned an entire generation.



Thanks to rule changes from Housing and Urban Development (HUD), the agency that oversees the popular FHA home loan program, graduates will have a much easier time qualifying for a home loan.

Here Are The FHA Student Loan Rule Changes

Many 2016 mortgage applicants with student loan debt will discover that their chances of buying a home are greatly improved. In fact, student loans will probably affect their ability to buy a home a lot less than they think. HUD recently relaxed FHA guidelines to get more former students into homes.

Many recent graduates have deferred student loans. They are not required to make payments until a certain amount of time after graduation. This gives them time to start their careers, and start earning a pay check. This is an advantageous arrangement. But when these college grads apply for a mortgage, the lender must factor in future student loan payments. Often, no payment information is available.

In 2015, deferred student loan payments were estimated at two percent of the balance for FHA loans. Thanks to 2016 updates, lenders will estimate deferred student loans at just one percent of the loan balance if no payment information is available. This effectively halves the impact of deferred student loans on

your mortgage application. Keep in mind that this rule applies to student loans for which no payment information is available. If the actual payment appears on the credit report or loan paperwork, the higher of the actual payment or 1% of the balance will be used for qualification purposes. Yet, for applicants who can't document a future student loan payment, this seemingly small change can have profound effects on FHA mortgage approval.

How The Rule Changes Could Play Out For You

Take this example. A recent graduate finds employment straight out of college. She makes \$4,000 per month. Her total monthly bills if she buys a home will be \$1,500 per month including her future house payment, a car payment and a credit card. She also has \$20,000 in deferred student loans. Under former rules, her estimated payment would be \$400 per month. This puts her debt to income ratio at a level that's too high to be approved.

Under new rules, the lender estimates her student loan payment at just \$200, or 1% of her loan balance. Her debt-to-income is now within acceptable levels, and she is approved for a mortgage. Even greater estimated payment reductions apply with larger loan balances.

- \$30,000 in student loans: \$300 per month reduction in estimated payments
- \$50,000 in student loans: \$500 per month reduction in estimated payments
- \$100,000 in student loans: \$1,000 per month reduction in estimated payments

[Continued on page 12](#)

About the Author:

Michael Borodinsky is Vice President, Regional Builder Branch Manager at Caliber Home Loans, where he partners with home builders throughout NJ in providing specialized mortgage services. He also currently serves as 3rd Associate Vice President at NJBA. He is a 33 year mortgage industry professional and is a blogger for The News Funnel.

DIMENSIONS

COMPUTER SECURITY: FAMILY FEUD

By: Cathy Coloff

"Let's play the feud!" We asked 100 IT professionals, "What are the top 10 most important things employees in an organization can do to enhance their network security?" And, the answers are on the board. Without looking, can you guess all 10 correctly? Don't change the channel. Survey says:

1. Use Security Software—Each PC and server should be running an up-to-date security software program, whether one that came with the operating system such as Windows Security Essentials or even better something more advanced found elsewhere. Also, scan your PC at regular intervals to be sure no dormant viruses or malware are lurking and ready to disrupt.

2. Automate Backups—Nothing is more important than your data and applications. Employing an automated daily backup system that stores data in multiple locations (such as locally and/or offsite) is the surest way to avoid problems or data loss that can be caused by system crashes, hardware failures or virus attacks.

3. Practice PoLP—PoLP is the *Principle of Least Privilege* which states that all programs should be run with the minimal necessary access rights in order to accomplish a task. So, do not run as Administrator, unless you really must because that can become the norm and others can take advantage. Even just visiting a bad website while logged on as an Administrator can cause damage.

4. Keep Software Updated—Always keep your licensed operating system software updated by applying the latest service packs and patches. You can also consider software to manage other 3rd party software to ensure it is up to date. An example would be Secunia



Personal Software Inspector, which can identify outdated software.

5. Use Strong Passwords and Do Not Share Them—Use passwords with over 10 characters, a mix of upper and lower case letters, characters and symbols. Additionally, make the password difficult to guess. To make it easier to remember your password, use a phrase (e.g., I Luv Rock & Roll!) and insert letters and numbers into it (e.g., 1!u>R0ck&R0!!). Never share the password with others.

6. Lock It Up—Locks are to keep honest people honest, so help them out. Log out of your profile or shut down/lock your computer or device anytime you are not in direct control of the hardware. Not doing so is a huge security risk because it leaves your account open to abuse...especially an administrator account.

7. Treat Sensitive Data... Sensitive—Do not input unnecessary sensitive, private, confidential data into any unsecure forms. Any proprietary and personal confidential information should be securely filed with very limited access. PCI, HIPPA and other privacy regulations apply to all such data, and non-compliance can be a huge offense.

8. Encrypt—Whenever there is an

option to encrypt, whether it is email, data in storage, or passwords...Encrypt! It is that simple and important!

9. Keep the Machine Clean—Do not allow employees to install any software they want on their hardware. Have a policy in place and enforce it. Also, periodically, weed your list of programs on your computer. Dormant programs no longer in use are just plain risky to keep. Remove and uninstall any software applications or programs you no longer need. It improves performance and enhances security.

10. Be Security Smart and Suspicious

- **Do not click on random links.** Unless you can easily verify a link is legitimate, think before clicking, especially on those in emails or IMs.
- **Be wary of attachments.** Unless you know the sender and were expecting an attachment, do not open it. If you must open it, save it first to your computer and scan it with your AV software.
- **Download with caution.** Lots of "free" software available online appears to be useful, but often it contains spyware which can damage hardware, slow down performance and potentially send critical information to the bad guys.
- **Resist the urge to share.** Do not send chain emails or forward on hoaxes because you could be crying wolf. Otherwise, when something important does need to be shared, no one will listen.

Continued on page 11

About the Author:

Cathy Coloff is a Managing Member with IT Radix. Recognized as one of the 2015 Top 25 Leading Women Entrepreneurs in NJ, Cathy has 25+ years of experience in network systems. With extensive corporate experience at Exxon and Bear Stearns, Cathy works with IT Radix clients to develop their IT best practices without the big corporate price. She can be contacted at 973-298-6908 or itsales@it-radix.com.

THE CRE® 2016-17 TOP TEN ISSUES AFFECTING REAL ESTATE

By: The Counselors of Real Estate

The following article was provided by NJBA Immediate Past President George Vallone who is a member of the Counselors of Real Estate. For more information about the Counselors of Real Estate, contact George Vallone: gvallone@hbrownstone.com, <https://twitter.com/georgevallone1>.

1. The Changing Global Economy

The IMF has revised GDP growth downward for much of the globe in 2016-17, as economic uncertainties continue and intensify. Currency issues, declining exports, and soft energy prices add to volatility (as reflected in the stock markets in early 2016 and Moody's recent downgrade of Saudi Arabia). Political issues and conflict undermine stability as well.

Implications: There is potential for global economic deceleration. Weakened exports could lead to slower/smaller port and infrastructure investment, in particular, and broader softening of investment in real estate and other asset classes. The U.S. remains attractive to global capital and inflows are still strong, although they may be under pressure at their origin (China, Middle East, and Europe). A surge in Chinese buying of both residential and commercial real estate last year took their five-year investment total to more than \$110bn, according to a study from the Asia Society and Rosen Consulting Group.

2. Debt Capital Market Retrenchment

Debt markets for commercial real estate are slowing sharply. Regulators are telling bank lenders to curtail CRE lending

(that's 50% of the debt market), and the CMBS markets are slowing down, with no legislative fixes to retention rules that are due to go into effect in the summer of 2016. Many insurance companies that traditionally invest in real estate are approaching their real estate allocation limits.

Implications: The search for permanent CRE debt capital will become more intense and competition for capital will become an issue in 2016 and 2017. The lending environment is likely to become more restrictive. This could present opportunities for some other, less regulated, lenders to enter the market.

3. Demographic Shifts

Millennials (generally considered to be people ages 18-35) have overtaken the Baby Boomers (people of ages 51-69) in sheer numbers, but both groups remain substantial real estate consumers. While the Boomers are retiring at a rate of approximately 10,000 per day, America's population of persons aged 90-and-older has almost tripled since 1980, and is expected to increase to more than 7.6 million over the next 40 years, according to the U.S. Census Bureau. Older households and younger households are competing for housing in many of the same places. In terms of income, younger (Millennial) households are falling behind with many sons and daughters living at home with parents.

Implications: Multi-family development is still strong, with evolving amenities. There are opportunities in housing options for both groups. In the retail sector, more "experiential" shopping/dining/entertainment destinations will emerge, but buying power is lower due

to income stagnation. Although Baby Boomers continue to prefer to age in place, there will be opportunities in services including medical, assisted living and memory care facilities. Look for a rise in renting over home ownership.

4. Densification/Urbanization

Transportation options, walkability, extensive work/live/play options continue to draw people of all ages into the urban core and to close-in "urbanized" areas. The move to higher density areas continues, as job growth and dynamic urban centers attract new residents and businesses.

Implications: There is a growing trend toward the development of high density mixed-use centers such as The Domain in Austin and the West Loop in Chicago that offer luxury living spaces, retail, work and entertainment spaces, parks, and gathering spaces. The emergence of "innovation centers" and "education centers," which represent dynamic economies and cultural environments continues. There is pressure on suburbs to become more "urban."

5. The Political Environment

The political environment has become acrimonious at all levels – global, national, state, local – and affects investment decisions (including business and household location decisions) with issues ranging from the perceived ability of governments to function to taxation to social issues. Social media makes it very easy to track the political and economic climate of any locale – and debate any political issue publicly.

Implications: The political and tax

[Continued on page 12](#)

About the Author:

The Counselors of Real Estate®, established in 1953, is an international group of high profile professionals including members of prominent real estate, financial, legal and accounting firms as well as leaders of government and academia who provide expert, objective advice on complex real property situations and land-related matters. Membership is selective, extended by invitation only. The organization's CRE® (Counselor of Real Estate) credential is granted to all members in recognition of superior problem solving ability in various areas of real estate counseling. Only 1,100 people in the world hold the CRE credential.

DIMENSIONS

GOT DIRT? (SOIL IMPORT/EXPORT)

By: Richard Lake, LSRP

With the economy returning and construction projects ramping up, it seems we receive calls on a weekly basis requesting environmental sampling of soil in need of import or export at construction projects. Import or export of soil in New Jersey is generally not regulated except through some local municipal ordinances or when the soil is imported/exported from a property undergoing remediation. Nevertheless, evaluating the environmental quality of soil imported/exported should be considered to protect the liability of both the sending and receiving parties. This typically involves due diligence to evaluate whether the soil has the potential to be contaminated and/or collection of soil samples for laboratory analysis.

For most development projects, a Phase I Environmental Site Assessment (ESA) and/or Preliminary Assessment (PA) is the first step in evaluating the potential for contamination at a property. If potential environmental concerns are identified during the Phase I ESA or PA, soil or groundwater sampling is often performed. This data should be considered when evaluating the environmental quality of soil that may be imported/exported.

In some cases, a Phase I ESA or PA may not identify environmental concerns associated with a property; however, that does not eliminate the potential that soil may contain contaminants above strict New Jersey Department of Environmental Protection (NJDEP) standards. A Phase I ESA or PA typically focuses on evaluating whether a release of petroleum products or hazardous substances has occurred. But there are other sources that may result in elevated concentrations of contaminants in soil. For example, arsenic is naturally occurring and is often found in New Jersey soil at levels

that exceed the NJDEP standards. Other contaminants such as polycyclic aromatic hydrocarbons (PAHs) originate from diffuse anthropogenic sources (i.e., from widespread manmade sources such as combustion of fossil fuels) and may exist at levels exceeding the standards, particularly since NJDEP lowered the standards for these contaminants in 2008. While contaminants from these sources may not be regulated by NJDEP, they could impact the ability to import the soil to a site and significantly affect soil export costs. Considering these issues and the potential liability, it is generally good practice to sample the soil that is planned for import/export regardless of the findings of a Phase I ESA or PA.

When soil is to be imported/exported for use during remediation of a contaminated property in the State's Site Remediation Program (SRP) (for instance, to cap contaminated soil), evaluation and sampling of the soil pursuant to NJDEP guidance is required. The NJDEP published the Alternative and Clean Fill Guidance for SRP Sites (December 29, 2011), which included conservative sampling requirements, including laboratory analysis of samples collected from virgin sources such as quarries. In April 2015, NJDEP published a revised version (Fill Material Guidance for SRP Sites) that slightly relaxed the sampling requirements. The guidance outlines a sampling frequency based on soil volume with a full suite of analytical parameters typically needed unless due diligence research suggests otherwise. The cost to collect and analyze soil samples pursuant to the guidance can be significant. Analytical results must also meet strict criteria.

For projects where import/export of soil is not dictated by the NJDEP guidance or local ordinances, the level of sampling to be performed is typically established

following an environmental due diligence review, and is based on 1) the likelihood that the soil is contaminated, 2) the volume of soil to be exported, and 3) the requirements of the receiving property owner/developer.

The need for soil import/export should be evaluated during project planning, prior to initiating construction. This will allow time to assess potential sources of imported soil, or to sample soil planned for export. Discovery of unanticipated contamination during construction can lead to project delays and cost overruns. Exceptional project planning does not eliminate the possibility of generating soil in need of export from a construction project. Soil suitability, weather, and other factors often contribute to the generation of excess soil.

It is recommended that project specifications detail the level of sampling (and what standards will apply) for imported soil so contractors can properly bid projects. The developer and contractor should also be made aware that an environmental professional or a Licensed Site Remediation Professional (LSRP) for a remediation project may need to review the analytical data prior to soil import. A developer/contractor could be faced with project delays and increased costs associated with importing soil if finding an acceptable clean fill source proves troublesome. Likewise, a developer or contractor can expect premium costs to manage and export to an approved facility excess soils that contain contaminants above NJDEP's standards. NJDEP guidance permits the reuse of marginally contaminated soil (a.k.a. alternative fill) at properties undergoing remediation provided that certain conditions are met. Soil that contains elevated concentrations of naturally occurring elements such as

[Continued on page 13](#)

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DIMENSIONS

75TH PERCENTILE EVALUATION: AN ECONOMICAL SOLUTION TO CONTAMINATED FILL DISPOSAL

By: Justin M. Protasiewicz, P.E.

SESI Consulting Engineers has been working with NJ contractors, developers, and land owners to assist them with the disposal of contaminated fill. Do you have environmentally impacted soil that you need to dispose of? Do you want to be paid to import fill to your site? Before making a disposal or import decision, you should know the most up-to-date NJDEP Guidance. The NJDEP has developed the "Fill Material Guidance for SRP Sites," updated April 2015 and referenced herein as "the Guidance." The Guidance outlines approved alternative fill types, testing procedures, etc. for materials intended for use at sites that are in the Site Remediation Program (SRP). In addition, the Guidance provides a procedure for assessing environmentally-impacted soil from offsite sources for use as an alternative fill. This procedure is known as the 75th Percentile Evaluation.

The 75th Percentile Evaluation is a tool that the NJDEP has developed that has huge potential as an economical disposal solution for the environmental community. Unfortunately, the Guidance is fairly new and the development community may not know much about it, are not taking advantage of it due to the additional analysis required, and/or don't realize the economic potential for the tool.



The concept is fairly simple:

1. An area of concern (AOC), whether isolated or sitewide, is identified at the receiving SRP site;
2. The statistical 75th percentile concentration for all samples for a given contaminant is calculated from existing testing data and based on a formula provided in the Guidance; and,
3. Once the 75th percentile concentration has been determined for a site, potential import sources can be evaluated. The import fill sources may contain only contaminants that are similar to what exist on the receiving site ("like-on-like" requirement), with maximum concentrations for each contaminant below the 75th percentile concentration. In addition, testing of the import fill sources must typically

performed in accordance with the Guidance.

The 75th Percentile Evaluation can be used by developers to offset construction costs on SRP projects that require fill by charging a fee for accepting impacted soils meeting the "like-on-like" disposal requirement. Contemporaneously, the cost of buying the equivalent volume of clean import fill can be eliminated from the project budget. In addition, trucking costs to a landfill can also be deducted if the SRP receiving site is close to the donor

site. The Guidance also economically benefits the donor site since the fee for disposal on an SRP site is typically negotiated to be much less than that for disposal in regulated landfills.

The proliferation of the use of this evaluation is highly dependent upon developers' and consultants' understanding of the process and the potential cost savings. It also requires the environmental community to work together to identify potential contaminant based disposal sites and sources. To take maximum advantage of this alternative solution for importing fill, it is important to use a company that is well-versed in the process and has a network of industry contacts and known construction sites that can participate.

About the Author:

Justin M. Protasiewicz, P.E. is a Licensed Professional Engineer and Project Manager with SESI Consulting Engineers. He provides a broad range of engineering and environmental consulting services for commercial, industrial, retail, and residential projects for sites in New York, New Jersey, Pennsylvania, and Connecticut. Justin is also a contributing member of the American Society of Civil Engineers, a commissioner for the Morristown Environmental Commission, and a member of the Morris County Economic Development Corporation Brownfields Committee.

RULING CLARIFIES INTERPLAY

Continued from page 5

of the RMP build-out growth projections. Twenty percent referred to COAH's set aside requirement for affordable for-sale units. The build-out projection for the Borough was 9 units, and the motion sought to reduce the Borough's obligation to 2 units.

The Court rejected the Borough's argument that the RMP build-out report alone should determine its affordable housing need. Adopting such reasoning, the Court found, would effectively revise the Prior Round methodology, in contravention of the *Mount Laurel IV* mandate. The Court established that the RMP could be considered only as an allocation factor in evaluating the Borough's affordable housing compliance plan.

This marks the first time a court has held that the Highlands RMP must accommodate affordable housing obligations and prohibited a municipality from relying exclusively on RMP build-out reports to limit its affordable housing obligation.

Consequently, the RMP must be modified to accommodate the Court's determination of regional affordable housing need. One "unintended consequence" of such a reevaluation may finally lead to a workable Highlands Transfer of Development Rights program which thus far has not addressed regional affordable housing needs.

COMPUTER SECURITY

Continued from page 7

- **Forget the flash drive.** Transferring data via USB flash drives is the EZ Pass to computer virus infection. Use only with 100% knowledge of safety.

As you can see, there are many things employees can do to enhance network security.

Thanks for playing!

CYPRESS POINT

Continued from page 4

held that "consequential harm caused by negligent work is an 'accident.'" "Therefore, because the result of the subcontractors' faulty workmanship here—consequential water damage to the completed and non-defective portions of *Cypress Point*—was an 'accident,' it is an 'occurrence' under the policies and is covered so long as the other parameters set by the policies are met."

The Court went on to explain that, when viewed in isolation, the Your Work Exclusion would seem to eliminate coverage—after all, to the developer or general contractor, the entire condominium is "your work." However, the Court further explained that the Subcontractor Exception "unquestionably applies," holding that "because the water damage to the completed portions of *Cypress Point* is alleged to have arisen out of faulty workmanship performed by subcontractors, it is a covered loss."

While the Supreme Court's decision left outstanding issues that will have to be resolved through future litigation (such as whether there is coverage for the cost of repairing or replacing the defective work) *Cypress Point* is an important victory for developers and general contractors. Under the 1986 ISO standard form CGL policy, when a subcontractor's faulty work causes consequential damage to other, non-defective portions of a project, the developer or general contractor's insurance must respond with coverage.

The authors of this Alert – Carlton T. Spiller, Ellen A. Silver and Steven B. Gladis – filed a brief in the *Cypress Point* matter on behalf of amici curiae the New Jersey Builders Association, the National Association of Home Builders, and Leading Builders of America, arguing in favor of the conclusion adopted by the Supreme Court.

STATUS OF MOUNT LAUREL

Continued from page 3

numerous additional counties.

The DJ cases in the other counties have, by and large, lagged behind Middlesex and Ocean counties. Trials in certain Union County cases were scheduled to start during the last couple of months, but those cases settled. No Union County trials are scheduled as of this writing. Trials in other counties are not likely to occur before sometime next year.

Conclusion

The pace of adjudication of the contested *Mount Laurel* DJ cases throughout the State has been quite disappointing. In its March 2015 opinion returning exclusionary zoning disputes to the trial courts, the Supreme Court envisioned that all issues would be addressed by the end of 2015. Despite that disappointing pace, a fair number of settlements favorable to developers and lower income households have occurred throughout the State, although principally in Middlesex County. Moreover, opportunities remain for builders to seek intervention in the pending DJ cases, with rezonings for higher density product typically being sought. Further, many towns have not taken the steps required to become immunized from builder's remedy suits, and such suits can be filed against such towns. Builders seeking rezonings are well-advised to explore the possibilities provided by the *Mount Laurel* doctrine.

COLLEGE GRADS

Continued from page 6

The applicant's buying power is increased by the amount that the estimated payment decreases. In other words, a home buyer with \$50,000 in student loans can now be approved for a home payment that is \$500 higher. Keep in mind that if the actual payment is available, the lender will use that amount, if it is higher than the 1% estimate. Furthermore, if 1% of the loan balance is greater than the actual payment on loan documents or your credit report, the lender must use the one-percent figure. New FHA rules around deferred student loans, however, will open homeownership opportunities to an entire population that was locked out of owning a home just months ago.

FHA Guidelines Could Turn Renters Into Owners In 2016

First-time buyers represent a historically low percentage of the market in 2016. According to Realtor.org, new buyers made up 32 percent of all home buyers. That's the second-lowest reading since the real estate trade organization started compiling data in 1981. First-time home buyer levels haven't been this low since 1987.

Lower numbers are caused, at least in part, by high student loan debt levels. But first-time buyer participation could turn around sharply due to new FHA rules. Ever-rising rents and all tax benefits of homeownership will spur renters to more seriously consider buying a home. And student loans may no longer stop them from going through with it.

Indeed, 2016 is turning out to be an ideal year for younger home buyers. Mortgage rates have unexpectedly hit 3 year lows. Rates were supposed to increase in 2016, but instead they dropped. This opens up a rare opportunity for home buyers: recent graduates can afford more home for less money thanks to low rates. Today's lending environment is becoming increasingly accommodative

to the younger home buyer's ownership goals.

What Are Today's Rates?

If you have high student loan debt, consider an FHA loan, which has recently loosened its guidelines around estimated loan payments. And, FHA loans come with some of the lowest rates of any loan type. Get a rate quote while rates are low and guidelines are accommodative. You could be surprised at the home you qualify to buy right now.

2016-17 TOP TEN ISSUES

Continued from page 8

environment of every locale is now visible and information is immediate, creating heightened awareness that can influence where people choose to live, where businesses locate or expand and where tourists visit and spend. Locales that demonstrate political stability and investment in infrastructure, transit, schools, etc., may attract residents, visitors and businesses; those communities that project a negative environment will likely lose economic vitality over time.

6. Housing Affordability and Credit Constraints

New issues are beginning to emerge in the housing market, as affordability and credit constraints are challenging both the rental and home ownership markets. Stringent credit requirements prevent many households from entering the home ownership market, increasing demand for rental property. Limited available for-sale inventory and income stagnation are affecting affordability. Multifamily development continues but rents are outstripping incomes in many communities. With declining affordability, questions arise about where newly formed households will live, where the workforce will reside and whether affordable services will be

available for aging Baby Boomers.

Implications: There will be continued strong demand for rental housing, but with a likely slowdown in rent growth. Micro apartments are helping to provide affordable alternatives for Millennials. Single family owner markets have room to improve, and builders are beginning to target "starter homes." Competition for land in some areas is a supply constraint.

7. The Disappearing Middle Class

The wealth and income gap continues, with a number of measures showing stagnant or declining wages and wealth. A recent Pew Research study shows that the median income for middle-class households fell by nearly five percent between 2000 and 2014. Their median wealth (assets minus debt) declined by 28 percent after the housing market crisis and the subsequent recession. Costs have risen dramatically for many large-dollar items that affect middle class families, including college tuition and out-of-pocket costs under employer healthcare plans. Confidence in a comfortable retirement is wobbly, with concerns over rising costs and declining benefits in corporate retirement plans. To cover increasing costs and eroding asset wealth, an increasing percentage of households have moved from one-income to two-incomes. In 1960, 72 percent of two-parent families with children under 18 had a single earner (typically the father). That figure fell to 37 percent by 2010, while the number of two-earner families rose to 60 percent. At the same time, the Millennial generation is falling behind in assets and income (and many young people are coping with student loan debt).

Implications: Middle-market retailers (i.e. Sears, Macy's) have weakened and closed some retail outlets. The

Continued on page 13

2016-17 TOP TEN ISSUES

Continued from page 12

purchasing power divide drives new opportunities to serve diverse markets (i.e., Wal-Mart and Dollar General at the low end of the spectrum and luxury retailers such as Neiman Marcus and Tiffany at the other end). Stagnant or declining purchasing power affects where people can live as their housing choices diminish. There are opportunities in high-density multi-family and affordable housing. Luxury development continues to do well (malls, office, hotels, retail). But there is less opportunity in the middle. There will be a shift from home ownership to renting over time. A lack of home and business ownership--and such investment in communities--can easily lead to or contribute to growing social unrest.

8. Energy

Whenever a key commodity encounters instability, it can threaten global economic security. Energy markets are currently unstable. This year's crash in oil prices has threatened the global economy--capital markets have responded--Saudi Arabian debt has been downgraded by Moody's and, in some markets (such as Houston and North Dakota) lenders are restricting commercial real estate debt.

Implications: There has been a drastic change in U.S. oil production--rig counts in the U.S. are at their lowest level in 50 years. This affects regional employment and economies. Investors are reassessing plans. Alternative energy may become more attractive over time. High energy demand in China could change dynamics, but energy remains a highly volatile market.

9. The Sharing/Virtual Economy

As the effects of the recession only slowly fade, we are seeing the emergence of a "shadow economy" or "sharing economy." New enterprises spring from economic uncertainties, such as Airbnb, Uber and bicycle sharing

companies (e.g., Divvy). These have become alternatives to traditional lodging and transportation offerings -- often operating outside of traditional regulations. They offer alternatives for employment as well. Crowdfunding has become an addition to traditional sources of capital for new enterprises and investment, including real estate.

Implications: Efforts to regulate some of these operators have seen mixed results, and the enterprises will likely continue to change the economic landscape while challenging the viability of some of their more traditional counterparts. New competitors and shifting demand will likely push weaker players out of the market (consider the falling prices of taxi medallions). Shared office spaces are rapidly becoming more widespread; "virtual" offices offer office amenities (receptionists, mailboxes, short term desk space) to small businesses. As is often the case in periods of dynamic change, many will become more widely accepted elements in the general economy.

10. The Rise of "Experiential" Retail

Traditional retail is reacting to change by adapting, with major retailers shuttering stores and downsizing their footprints, moving more to online options. As retailers retrench and rethink their retail models, large online retailers thrive. Amazon has replaced Wal-Mart as the biggest retailer in terms of dollars. This creates not only challenges but also opportunities.

Implications: "Destination" retail development is emerging. Malls are being reimagined as "experiential"--providing service options, "showroom" spaces (e.g., Tesla) while many actual purchases are being made online. Malls are redefining the concept of 'anchor' stores, with high-end food courts replacing department stores. "Mixed-use experiences"---such as a hotel/

restaurant/sports (bowling) combination in addition to traditional stores---are growing. Watch for new retail ideas to attract consumers, including offering more local and regional shops and fewer large chains, in an effort to create more unique shopping experiences.

As we begin to see signs that we have reached the peak of one of the hottest retail investment markets in history, many owners are re-evaluating their portfolios to decide which properties they want to keep versus which to sell. Core properties located within major MSAs and/or high demographic areas have always been desirable, however, over the course of the real estate cycle, investors have moved to secondary or tertiary markets in search of significantly better yields, choosing credit tenancy over location.

On the Watch List:

The Counselors of Real Estate organization noted that close runners-up in development of The CRE Top Ten Issues Affecting Real Estate 2016-17 list included 21st Century Manufacturing & Industrial, Infrastructure, and "Unknown Unknowns" (such as terrorism and trade agreements which are factors that could affect commercial and residential markets.

GOT DIRT?

Continued from page 9

arsenic can also remain on site, and remediation of naturally occurring elements is normally not required. The ability to reuse soil that is considered alternative fill or that contains naturally occurring elements is typically evaluated by the LSRP.

Due diligence and project planning are key to managing costs associated with the import/export of soil. A qualified environmental professional should be consulted to assist with these efforts since each site is unique.