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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 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.
Dear NJBA Members,

I am pleased to have this opportunity to address the membership in my first Dimensions article as President of NJBA. I look forward to building on the tremendous work of Immediate Past President Dwight Wesley Pittenger, Esq., in bringing greater unity to our three-tiered membership. During my term as President I will be focusing on three E’s: Engagement, Efficiency and Education.

Engagement

To promote member engagement, I have directed the NJBA staff to organize the return of Trenton Days, where NJBA members visit the NJ State House to view legislative hearings, network with elected representatives and promote the building industry in NJ. Our policy makers in Trenton greatly affect our industry and it is of the upmost importance that their policy decisions reflect the fact that the home building industry is a major driver of our state’s economy.

Over the year, we will also promote member to member engagement through recruitment and mentoring programs. NJBA has a diverse membership comprised of individuals from every facet of the building industry. The wealth of knowledge within NJBA is a too often overlooked resource. I hope to increase the cooperation, coordination and working partnerships between our members. We will further facilitate this goal by holding joint events with our four local associations and through the Young Professionals Committee, which has already partnered with the young professionals’ groups at all four locals.

NJBA will also be engaged politically as we enter the election season where all 120 seats in the NJ Legislature and Governorship are up for grabs. BPAC will play an important role as we look to support candidates for office who share our goal of providing quality and affordable housing options for New Jersey residents.

Efficiency

NJBA will be reworking numerous policies and procedures to increase its ability to focus on key advocacy issues. Members, staff and Board Members will act in targeted pursuit of specific goals to increase efficiency and reduce the current drain on human resources. For instance, committees at NJBA will no longer be required to meet on a monthly/quarterly basis but only on an as needed basis. Additionally, the Board will consider moving from four to three meetings per year. These changes will empower the staff and volunteers at NJBA to perform their roles with greater precision and fervor. I expect that by reducing the frequency with which NJBA calls on its member volunteers, greater participation will become commonplace as meetings become more productive.

Education

NJBA will continue to offer educational programs covering a variety of topics and interests while providing access to affordable continuing educational training for professionals. Our educational programs have enabled our Master Sponsors the ability to share their expertise with nearly 1,000 attendees over the past two years, excluding attendees at the Atlantic Builders Convention. We will also look to increase member education opportunities by using webinars and other online tools to bring “best practices” management techniques and educational programs to a broader segment of our membership.

Legislative Update

NJBA is currently focused on advancing its MLUL Preliminary Approval legislation, evaluating fire sprinkler related legislation and monitoring legislation concerning Payments In Lieu of Taxes (PILOTs) and tax abatements.

The MLUL Preliminary Approval legislation, the product of the MLUL Reform Task Force, would amend the Municipal Land Use Law (MLUL) by simplifying and streamlining the application and review process for preliminary site plan and subdivision approval consistent with the original intent of the MLUL. The bill was released unanimously by the Senate Community and Urban Affairs Committee on February 27, 2017 with David Fisher of K. Hovnanian Homes on hand to testify in support of the bill. The bill was posted for consideration before the full Senate on March 13th but was not voted on due to concerns raised by Senator Smith and others in the democratic caucus. NJBA is reaching out to various Senators to assuage any concerns and it is hoped that the bill will be posted again in the near future.

In response to the continued push by the Legislature and fire sprinkler advocates, NJBA has formed a Fire Sprinkler Task Force made up of a broad array of NJBA members including builders, Code Committee members, architects and engineers. The Task Force continues to monitor all the legislation surrounding building codes and fire safety requirements and we recently met with the Assembly Speaker Vincent Prieto to discuss his legislation concerning fire safety in multifamily buildings.

NJBA is also closely following discussions in the Legislature involving

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AFFORDABLE HOUSING CAN HELP WITH DOWNTOWN REVITALIZATION

By: Stephen Santola Esq. and Debra Tantleff

Everyone in municipal circles is talking about affordable housing. More than 325 New Jersey municipalities have entered the judicial affordable housing process established by the Supreme Court in In Re Adoption of NJAC 5:97 (Mt. Laurel IV). The goal of these actions is to reach a judicial determination of each town’s affordable housing obligation. Cases are proceeding at varying speeds depending on the county, the judge and a given municipality’s willingness to negotiate and settle its future requirements. Once an affordable requirement is established, each town must present to the court a realistic plan detailing how it will fulfill that requirement. In short, at some point in the not too distant future, each town in New Jersey is going to have a required number of affordable units it must deliver between today and 2025.

The question now is, how can municipalities direct the development of affordable housing in a way that benefits the town, its tax base and existing local residents? While the challenges presented by this new housing obligation seem daunting, consider today’s environment, which continues to be defined by migration to urban-like settings and a growing number of people seeking walkable downtowns with vibrant public spaces and access to public transportation. The lifestyle demands presented by both Millennials and Baby Boomers create a powerful opportunity for municipalities: They can use their affordable-housing obligation to foster downtown redevelopment by implementing thoughtful planning and economic policies that allow for the creation of dynamic mixed-use and mixed-income downtown neighborhoods.

Tools To Keep Projects Profitable

Downtown redevelopment comes with its own set of costs, often unique to an area. Assembling a number of small lots, remediating environmentally challenged sites, and building structured parking are in-town challenges not often faced in more traditional “greenfield” developments. The costs to meet these challenges, even without an inclusionary affordable housing component, can be enough to sink a new project. But a number of tools are available to towns and developers to assist in making the numbers work.

Many towns are updating antiquated zoning ordinances proactively by planning for redevelopment and/or overlay zones that provide for density bonuses to allow for inclusionary affordable housing. In this scenario, income from the additional market-rate units helps to subsidize the cost of the affordable units. Permitting higher-density residential development in a downtown affords a potential win-win for the municipality: It helps establish the customer base necessary to support vibrant downtown retail while meeting the municipality’s obligation to provide affordable housing. The opportunity created by these zoning provisions will vary and comes with its own sliding scale of financial viability. In some instances, the additional density can result in an increase to overall building height, which can itself create a different and potentially costly zoning hurdle, or it can push the project into a different construction type (i.e. from wood to steel or concrete), resulting in a more expensive building system with construction costs too high to justify the profitability of the project.

Another powerful tool that municipalities should consider are tax incentives. Affordable housing is typically financed through creative capital stacks that include state and federal tax credits. A combination of proposed changes to the federal corporate tax rate, which if enacted will result in a decline in investment in Low-Income Housing Tax Credits, coupled with the increased competition among qualified developers to secure what tax credits are available, will force the need for other financial subsidies if any of this housing is to be developed. Municipalities can ease the financial hurdles of building affordable housing by offering either short-term or long-term financial agreements known as payments in lieu of taxes, or PILOTs, that establish defined real-estate tax payments structured over a set period of time. These agreements can provide the benefit of a reduced operating expense as well as the certainty of long-term costs, both of which help reduce financing barriers. While the use of PILOTs is sometimes controversial since they can divert funds away from the local school system, municipalities can earmark a portion of these payments back to the school district or to fund specific school-related projects.

Finally, in looking at the public-private nature of redevelopment, municipalities can consider the use of land grants to offset acquisition costs. The cost of property assemblage required to facilitate meaningful downtown redevelopment is a dominant factor in determining the financial viability of a project. Countless downtown redevelopment opportunities can be created through repurposing municipally-owned property. The ability for municipalities to convey land allocated for affordable housing at a reduced or nominal land basis can be one of the biggest components

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Stephen Santola Esq. is the Executive Vice President and General Counsel at Woodmont Properties and Debra Tantleff is the Founding Principal at TANTUM Real Estate.
“Home stretch” is a relative term in this context – it has been over two years since the Supreme Court released the opinion now being called “Mount Laurel IV,” and the Mercer County trial to adjudicate fair share numbers began on January 10, 2017. However, there is every reason to believe that the trial will be completed by mid-June, after which the judge presiding over the Mercer County trial – the Hon. Mary C. Jacobson, A.J.S.C. – will be issuing an opinion on fair share numbers that will be useful throughout the State.

The Background

A fair share numbers trial has previously been conducted in the South Brunswick case in Middlesex County. However, it was unclear for quite some time which county would be the first county to conduct a countywide trial on fair share numbers, utilizing the “numbers master” discussed below. It was ultimately resolved that Mercer County would be that “first” countywide fair share trial. The trial is essentially a consolidated proceeding that was to establish a fair share methodology resolving the Mount Laurel declaratory judgment (DJ) cases that had been filed by the Mercer County municipalities. The parties to the case are the Fair Share Housing Center, the NJBA, individual builders, and the Mercer County municipalities.

Two Trials in One

The Mercer County case has actually consisted of two trials. In the first trial, the parties put on extensive testimony and documentary evidence concerning fair share numbers for the period 2015-2025. That has come to be known as the “prospective need trial.” When that trial started it was not clear that there would be a second trial. However, the New Jersey Supreme Court thereafter issued its opinion directing the trial courts to also calculate fair share numbers for the “gap years” (1999-2015). The Supreme Court opinion refers to gap year need as “expanded present need.”

The prospective need trial has now been concluded, and the expanded present need trial began on May 15, 2017. The prospective need trial required 28 days of testimony spread out over a period of four months. However, the expanded present need trial has been moving at a faster pace than the parties expected, leading to the hope that it will conclude by mid-June, since far less than 28 trial days are now expected for the second trial.

The Reports of the “Numbers Master”

Judge Jacobson, and most other judges throughout the State, have appointed Richard Reading as a special master whose only role is to advise the judges as to his recommendations on fair share numbers. Mr. Reading has sat through the entire Mercer County trial proceedings. At the conclusion of the parties’ testimony in the prospective need trial, Mr. Reading issued his recommended fair share numbers. Mr. Reading has also reviewed the experts’ reports of the parties as to expanded present need (gap year need) and, based on those reports, he has issued a preliminary report recommending expanded present need fair share numbers for the gap years. Upon the conclusion of the expanded present need trial, Mr. Reading may revise his preliminary numbers, should he deem fit.

Judge Jacobson’s Decision and its Statewide Impact

After the second trial is concluded, Judge Jacobson will weigh all the evidence, consider the recommendations of Mr. Reading, and issue an opinion judicially adopting a fair share methodology for both prospective need and expanded present need. Although the focus of her decision will be on Mercer County towns, and her decision will technically be binding only within the Mercer County trial courts, Judge Jacobson’s decision will still be of statewide significance. The methodology she adopts could be applied to derive fair numbers throughout the State, and it is envisioned that judges in other counties will give considerable credence to Judge Jacobson’s decision, especially since few, if any, judges will be excited about the prospect of presiding over their own lengthy fair share trials. Time will tell.
The Construction Lien Law ("CLL") created the Notice of Unpaid Balance and Right to File Lien (commonly known as the "NUB") for the purpose of reducing owner-contractor animosity during the construction process, but resolving a lien dispute remains adversarial and subject to the formal requirements of the CLL. On a residential project, the lienor contractor or subcontractor must first file and serve the NUB as laid out in N.J.S.A. 2A:44A-20 before the lien itself can be filed. The NUB is, at its core, a device to reserve the contractor's foreclosure priority prior to filing an actual lien – if the contractor follows the rules. The accelerated arbitration process that follows the NUB, however, can catch the owner unaware and vulnerable if the owner is not thoroughly prepared.

It is important to understand what the NUB is not. It is not a replacement for the lien itself, which must be filed within 120 days from the last date of work performed, 30 days longer than on a commercial project. Further, one must understand the process surrounding the NUB. The filing and service of the NUB must occur within 60 days and be followed by a demand for arbitration; the arbitrator must then issue a decision within 30 days from demand on the value of the lien, and the prospective lienor then has 10 days to file the lien or see it barred. All this must be done within 120 days, so a vigilant owner evaluating the lien should be on the lookout for (1) a NUB filed 61 days or later than the last day worked, (2) a late demand for arbitration, or (3) a lien filed more than 120 days from the last date of work performed.

As between the owner and contractor, the NUB is designed to resolve the dispute in an efficient, cost-effective manner. Because most residential disputes are between small contractors and individual homeowners, the NUB process saves time and money by allowing an arbitrator, rather than a court, to determine the true value of the lien, including any defenses or counterclaims raised by the owner. These savings may not, however, hold true for larger projects where the issues are more complex and the documents more numerous.

But is the project at issue one where the prospective lienor must file a NUB? A single-family home certainly qualifies as a residential project, but is it still a "residential" project if it is an apartment building or development on a more "commercial" scale?

Unfortunately, as the District of New Jersey Bankruptcy Court lamented, New Jersey courts have provided no definitive guidance in answering this question. The more common assessment focuses on the nature of the use of the project, rather than its size. Trial courts have required NUBs for HVAC work on individual units of a condominium complex, a townhouse development, a single-family home development, and a combination single-family home/condominium project. Conversely, a residential condominium project of 336 units did not require a NUB because the court considered it markedly different from a typical residential project.

The key to defending a residential lien is preparing for the rapid, mandatory arbitration process that follows. On a small project, the arbitration can save the owner and contractor time, money, and effort. On a large project, however, the accelerated process may place significant stress on an owner, which must react to a NUB and have its documents prepared for the arbitrator in a matter of days. An unprepared owner may scramble to present its case on short notice to the arbitrator and end up bound by a lien amount in excess of what it truly owes.

An owner can best present its position effectively before an arbitrator by

1. The NUB and the following arbitration process are permitted but not required on a commercial project.

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The views and opinions expressed in this article are those of the author and do not necessarily reflect those of Sills Cummis & Gross PC.
HOW LONG AM I LIABLE FOR?

By: Ed Dunham, Esq.

You are a construction contractor with a number of successful projects under your belt, when you find out that you are being sued over a project you completed years ago. Your reaction is "Can I still be liable for a project I finished that long ago?" The answer is going to depend on an analysis of the circumstances of your case, the Statute of Limitations, the Discovery Rule and the Statute of Repose for the project's locale.

All states have Statutes of Limitations. The Statutes of Limitations provide a deadline for filing a lawsuit. Typically the Statute of Limitations is longer for breach of contract claims than it is for tort claims. A "tort" claim is generally a claim that someone wrongfully caused someone else damage under circumstances that were not governed by a contract. A personal injury claim is a prime example. Depending on the state, other types of claims may be subject to other specific Statutes of Limitations. In other words, the deadline for a plaintiff to file claims against you is going to be different depending on the locale and the claims being asserted.

Determining that a plaintiff filed a lawsuit against you after the Statute of Limitations deadline has passed, however, is not the end of the analysis. Statute of Limitations deadlines can be extended by what is known as the Discovery Rule. In most cases, the time period set by the Statute of Limitations on your construction projects begins when you achieve Substantial Completion of your contract. Under the Discovery Rule, the Statute of Limitations does not begin to run until the plaintiff knows, or should have known, that he has a claim.

A determination that a plaintiff has filed its claim within the Statute of Limitations, as extended by the Discovery Rule, still does not complete the analysis, however. Most states have a Statute of Repose in addition to a Statute of Limitations. A Statute of Repose generally places a cap on any extension to the Statute of Limitations beyond which the plaintiff is barred from bringing a claim, regardless of whether it knew or should have known of its claim. Like the Statute of Limitations, it typically (but not always) runs from Substantial Completion.

An example would be as follows: Let's say you substantially completed project "Y" 11 years ago. Let's further say that the Statute of Limitations for a contract claim in the locale where project "Y" is located is 6 years and the Statute of Repose is 10 years. You are sued for breach of contract. The claim is brought more than 6 years after you achieved Substantial Completion, so it was filed beyond the deadline set by the Statute of Limitations, but the plaintiff argues that the Statute of Limitations has been extended by 7 years because it could not reasonably discover the problem until 7 years after Substantial Completion. While the reasonable discovery of the claim 7 years after substantial completion might very well extend the Statute of Limitations, it does not extend it past the 10-year cap imposed by the Statute of Repose. Accordingly, after discovering its claim, the plaintiff should have filed its lawsuit against you within the 10-year cap. Because it did not, the case against you should be dismissed.

Something else that needs to be taken into account are repairs. While a plaintiff may be out of time to bring a claim on the project itself, it may be within time to bring a claim on the repair itself, if the claim is only that the repair was not properly done.

To give you an idea of the difference the locale of your project may have on the various statutes, the chart below compares the Statutes of Limitations and Statutes of Repose for New Jersey, Pennsylvania, New York and West Virginia for contract claims (the most popular claims against contractors).

<table>
<thead>
<tr>
<th>State</th>
<th>Statute of Limitations</th>
<th>Statute of Repose</th>
</tr>
</thead>
<tbody>
<tr>
<td>NJ</td>
<td>6 years - N.J.S.A. 2A:14-1</td>
<td>10 years - N.J.S.A. 2A:14-1.1*</td>
</tr>
<tr>
<td>PA</td>
<td>4 years - 42 Pa. C.S.A. 5525(2) and (3)</td>
<td>12 years (14 years for certain personal injury or wrongful death claims) - 42 Pa. C.S.A. 5536</td>
</tr>
<tr>
<td>NY</td>
<td>6 years - NY C.P.L.R. § 213</td>
<td>No statute of repose**</td>
</tr>
<tr>
<td>WV</td>
<td>10 years - W.V. Code 55-2-6</td>
<td>10 years - W.V. Code 55-2-6a***</td>
</tr>
</tbody>
</table>

* New Jersey's Statute of Repose has an extra condition. In addition to arising out of a construction project, the claim must allege an unsafe condition.

** New York is one of the few states in the country that does not have a Statute of Repose.

*** The West Virginia Statute of Repose is atypical and more along the lines of a Statute of Limitations for construction claims. It may be extended by a court pursuant to the Discovery Rule.

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Edgar Alden Dunham, IV is a lawyer with the Princeton, New Jersey office of Eckert Seamans. He practices in the area of commercial litigation, with an emphasis in construction law. Ed 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.
The New Jersey Builders Association recently had a conversation with Economist Joel Naroff, Ph.D., President and Founder of Naroff Economic Advisors, and Investors Bank Senior Vice President Tim Touhey, who is a team leader with Investors’ Commercial Real Estate Lending Group. The discussion focused on positive changes in the economy and the housing market since the presidential election. The improving conditions have motivated more builders in New Jersey to reenergize construction projects and build new product.

Dr. Naroff and Mr. Touhey both believe that more millennials are now entering the for-sale housing market for the first time and boomers are returning after selling their primary homes. Both types of buyers are looking at townhome communities in more densely-populated areas. Also, they are choosing communities that are close to employment opportunities, have reliable transportation options and offer many quality-of-life amenities.

**Question:** What is your view of homebuilding and housing markets from now through the end of the year?

**Dr. Naroff** – We can clearly say that the housing market in New Jersey is moving in a positive direction and is likely to be in a much stronger place by the end of the year.

**Question:** What is the current sentiment among builders, and how does this group see the prospects for growth going forward?

**Tim Touhey** – Well, if you look at confidence level of builders nationwide in the last 12 months, it may be at the highest level I’ve seen in years. New Jersey builders’ confidence has gone up significantly over the same time period. They are more optimistic, and I’ve seen this positive viewpoint reinforced by the financing requests coming to our bank. For example, we’ve received more loan applications from builders in the last few months than I’ve seen in the past four years.

**Question:** What factors have held back the uptick in new residential construction?

**Dr. Naroff** – The overhang of mortgage delinquencies has restrained prices, and foreclosures hurt new construction more than existing homes. Now, mortgage delinquencies and foreclosures in New Jersey are finally being addressed. The number of these properties is coming down at a faster pace today than in previous years.

The steady decline in the number of delinquent properties holds out some hope that the factors restraining new construction will continue to fade away. We have seen in other states that when the delinquency rate drops to a low level, we start seeing a pick-up in both prices and new construction.

**Question:** What signs are you seeing from the financing side that show builders are ready to invest in new construction and shoulder all the costs that are linked to project development?

**Tim Touhey** – At the bank, we are seeing more loan applications for single-family projects than we have had in 36 months. For example, we originated a loan for a project that has done extraordinarily well. We provided $14 million in construction financing to a publicly-traded developer and builder for a project located in Montgomery Township. The project, which has 112 townhouses, is finished and completely sold out.

Then you move further east in New Jersey, and we financed another project by a large, publicly-owned builder. This property is an age-restricted community, and the builder received $14 million in financing to construct a development with 126 residential units. In the last 12 months, they have sold 61 townhomes.

We have received loan applications from most of the large builder development companies. I see increased activity in the marketplace. My view is there is pent-up demand for new product.

**Question:** What are the trending economic fundamentals that may positively influence new construction and more home-buying?

**Dr. Naroff** – I think the fundamentals of the market are changing, and that is helpful. The state’s economy, we’re talking in relative terms, is doing better, but it’s got a ways to go before we can say it’s doing great. We are seeing growing incomes. Also, we’re seeing some price increases, although they are more moderate than in many other states.

Also, we have not seen any major decline in affordability for first-time homebuyers, as mortgage rates have remained reasonably low. Earlier this year, we anticipated that there would be tax cuts, and long-term interest rates rose in expectation of stronger economic growth. Those rates have gone back down in recognition of the fact that significant economic growth is more likely in 2018.

So for the rest of this year, whether it’s because of action by the Federal Reserve or markets, interest rates may go up, but they’re unlikely to go up very rapidly.

**Question:** Looking at emerging opportunities for builders in New Jersey, what’s trending in the area of affordable housing?

Continued on page 18
We all know enough to follow good hygiene and general wellness practices to avoid spreading germs… washing our hands, coughing into our elbow, and keeping our hands away from our eyes and mouth. Most of us working parents remember the first time dropping off our child at day care and cringing when the first thing our child did was put a toy in their mouth. For this reason, many of us encouraged our children to use their pacifiers a little while longer to avoid germy objects making their way into their mouths. Of course, there’s always the risk of the pacifier falling on the floor. Does the 3-second rule apply here?

Precautionary measures when it comes to personal health are second nature. We know how people spread viruses and we take measures to prevent them. Unfortunately, the same is not true when it comes to computer viruses. We know they exist and that they are harmful, but do we really know how they spread? Some ways may surprise you…

**Email Attachments** – Unfortunately, sometimes we receive viruses via email seemingly from people that we know and trust. Even when emails are extremely generic sounding and come with suspicious attachments, people often open them anyway since they came from a friend or from a trusted site. At IT Radix the golden rule is that if you don’t know what an attachment is, don’t open it (especially attachments with an .exe or .dll extension)! It’s easy for a hacker to pretend to be someone you know.

**Malicious Websites** – Like it or not, you may become infected with viruses by doing nothing more than simply visiting a website. To stop these malicious websites, adjust the settings on your antivirus software and firewall so that no outside connections can be made and no programs can be installed without your permission.

**Networks** – Through no fault of your own, you may find yourself with a virus just by being connected to a larger network where someone else on this network downloaded a virus by accident. There isn’t much you can do to safeguard yourself from these kinds of viruses; however, have your network administrator ensure that everyone’s antivirus software is up to date so that the virus can be removed as quickly as possible.

**Phishing Schemes** – Identity theft is on the rise, and phishing schemes are the number one reason. A phishing scheme is when you receive an email from a legitimate looking website claiming to be your bank or credit card company. You freely provide your personal information without batting an eye. Oftentimes, when you visit these sites, viruses are automatically installed on your computer. The smartest thing you can do is to simply call your bank or credit card company directly if you receive an email to confirm it’s legit!

**Infected Software** – There are a plethora of free games and programs on the Internet, but they sometimes come with a price! If you happen to stumble upon a malicious website, you will unknowingly infect your computer if you download a free game or piece of software. Buyer beware…only download freeware or shareware from a trusted source.

**Fake Antivirus Software** – There are a number of free antivirus programs on the Internet, and a surprising number of them are fake. Only download antivirus programs from trusted sites or from websites that you know are completely legit. Unsure? Ask us!

**Peripherals/Mobile Devices** – When buying peripherals that connect with your computer, you may inadvertently infect your computer with a virus. There really is no way to stop such an infection from happening, but by keeping your antivirus software up to date you can ensure that you have the tools ready to go if you are infected.

When it comes to viruses, preventative care is critical! You are your No.1 defense when it comes to preventing the spread of computer viruses!

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**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.
In a recent decision entitled Bright and Varick Urban Renewal Company, LLC v. Jersey City Planning Board, et al., the Appellate Division affirmed the grant of automatic approval to plaintiff-redeveloper to construct an 87-unit residential development when the Planning Board failed to act on its application within the statutory time limits set forth in N.J.S.A. 40:55D-46(c). This is a significant victory not only for the plaintiff-redeveloper here, but for, similarly situated applicants who face untoward delay tactics from municipal boards kowtowing to neighborhood opposition groups. These delay tactics – employed simply to frustrate or forestall an applicant – are the very evil which the automatic approval provision was specifically designed to overcome.

Background

The statute is clear – a planning board must act within 95 days of submission of a complete site plan application. N.J.S.A. 40:55D-46.c. If the planning board is unable to render its decision within that time period, it is entitled to secure additional time “as may be consented to by the developer.” *Id.* “Otherwise, the planning board shall be deemed to have granted preliminary approval of the site plan.” *Id.*

Despite this strong language, history has shown that our courts have been reluctant to enforce the automatic approval provision. For example, in Manalapan Holding Co. v. Planning Bd. of Hamilton, 92 N.J. 466 (1983), a developer seeking major subdivision approval was granted an automatic approval by the Appellate Division when the township planning board failed to act on its application within the 95-day statutory period. There, the township planning board had argued it had extended the 95-day statutory period because it routinely deferred action on development applications until after it received notice the application had obtained county planning board approval. Although the Supreme Court found the township planning board had no authority under the Municipal Land Use Law (“MLUL”) to unilaterally extend the 95-day review period, it reversed the grant of automatic approval finding that “the record indicates that the municipal officials misperceived the effect of the MLUL upon their former practice of securing county approval prior to acting upon a preliminary subdivision application. The township’s reliance upon its understanding of the law was clearly genuine.” However, the Supreme Court cautioned that in the future it would only recognize a narrow exception in cases where a planning board’s violation of the statutory time limits was inadvertent or unintentional.

The automatic approval provision did not gain much strength until the Supreme Court’s 2008 decision in Amerada Hess Corp. v. Burlington County Planning Bd., 195 N.J. 616 (2008). There, Hess sought to expand and modify an existing gasoline service station that then fronted on two roads. The proposed expansion would utilize additional property that had frontage on the Burlington County By-Pass. After being repeatedly asked by the county planning board to hold off filing a formal application while it finished conducting a study of the Route 541 corridor, Hess eventually tired of the more than year long wait and filed its development application with both the township and county planning boards. The township planning board rendered a final decision after two public hearings but the county planning board simply refused to take action until it completed its study.

Since the county planning board took a wait and see attitude, Hess filed a motion for summary judgment seeking to invoke the automatic approval provision of the County Planning Act, N.J.S.A. 40:27-6.7, which requires the county planning board to act within 30 days or within 60 days if both the municipal approving authority and the applicant consent.

The trial court granted Hess summary judgment finding that the county planning board never obtained the consent of the township planning board for an extension and that Hess did not approve an extension as required by N.J.S.A. 40:27-6.7. The Appellate Division and subsequently the Supreme Court affirmed. Ruling in favor of Hess, the Supreme Court noted it shall be presumed that “boards are fully familiar with the time constraints in the approval statutes, including the method for obtaining extensions and the limits thereon.” The Supreme Court further warned that “in the absence of mistake, inadvertence, or other unintentional delay, there should be no such reluctance” to grant an automatic approval.

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Donna M. Jennings is a shareholder at Wilentz, Goldman & Spitzer, PA. in Woodbridge where she is a member of the Land Use/Environmental Team. Ms. Jennings represents developers and redevelopers in all phases of land use approvals, and related environmental and regulatory matters, as well as litigation and appeals involving the approval and permitting process. She represented the plaintiff Bright and Varick Urban Renewal Company, LLC in this case. She may be reached at 732-855-6039 or djennings@wilentz.com.

1. Ms. Jennings also represented Amerada Hess - the successful plaintiff in this case.

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Mapping with unmanned aerial vehicles (UAVs) is changing the way land surveyors produce surveys. It looks like the future of surveying will take place in the sky instead of on land, the main reason being that field data captured via UAV or drone provides very detailed property observations that can be converted to highly accurate line work and topography. The high-definition image from above creates a permanent visual record which aids in mapping and subsequent site designs. Additionally, the perspective of still images and streaming video can provide for numerous marketing, presentation, and media materials.

During the past 50 years, surveying and engineering measurement technology has made many advancements such as the electronic distance meter, total station, GPS, robotic total station, and laser scanner. Drones are the next major advancement in surveying technology. Topographic surveys are an essential part of all land development projects and in our current environment where technology changes daily, it is important to have faster turnaround times and more detailed modeling of site topography on projects.

Traditional topographic surveying requires the collection of field-measured points in a pre-determined grid requiring long man-hours and carrying heavy equipment from one location to another. Depending on the amount of data points, a large land parcel could take over a week for collection of all the data and then another 3-4 days in the office analyzing that data before mapping ensues. Weeks or longer pass before the final survey product can be delivered to the client. Drone mapping takes a fraction of the field time. The site survey which results through drone collection methods is developed with the same amount of accuracy as you would on foot and in some cases greater accuracy. The advantages to using a drone for surveying as opposed to traditional ground survey methods is that UAV mapping offers quicker, more complete mapping so that problem areas can be identified and addressed. Large jobs that once took weeks can be completed in a few days’ time, and a week’s worth of traditional data collection is now achieved in just one day, however time to analyze the data will most likely remain the same.

Less time spent on the ground means staff safety is improved by minimizing risk to surveying teams when measuring sites in unstable terrain, busy transportation routes and steep slopes. A traditional ground survey team may need multiple days to map a large dangerous site, but a drone can complete the same task in much less time. With the push of a button, a drone can autonomously survey a site, obtain a complete aerial mapping of the site, land back at its launch location, and upload its data in just a few minutes. In addition, UAV’s allow projects to be completed at a lower cost because of the reduction of field staff and eliminating needs for traffic control in hard to access roadways. Plus the data is more complete, eliminating the need to revisit sites for missed data collection. That cost savings can then be passed on to the clients.

With every technological advancement come hurdles and in the case of UAVs these include challenges such as regulations associated with safety, privacy and homeland security. There are many other pseudo-professional and recreational drone uses which have caused alarm among the public. Certainly, drones cannot be used for every job. In addition to certain sites not being suitable for flights, there remains specific data to be obtained on the ground: items like underground utilities and boundary points. Field crews will also set ground control to tie the aerial imagery into a coordinate system, the same method utilized by aerial surveying from planes has been done in the past. Additionally, certain requirements set for ALTA surveys may not yet be up to date with UAV methods and require specific on-the-ground data.

There are regulatory hurdles as well.
RAMPING UP TO ADA COMPLIANCE

By: Charles Thomas, Jr. P.E., P.P and Michael Roth, P.E.

As a developer or contractor have you ever found yourself removing a new curb or sidewalk due to a noncompliant ADA ramp? Or as an engineer have you gotten the nightmare call from a contractor that a sidewalk slope exceeds the required slope and demands a redesign?

With the importance of on-site accessible routes, design and construction coordination is critical. Although the Americans with Disabilities Act (ADA) was passed by Congress in 1990, the ADA Standards for Accessible Design was later published in 2010 which made compliance with these regulations imperative. Noncompliance for access has had significant financial impacts to property owners, as in some cases the municipality withholds their certificate of occupancy and watchdog groups have been on the prowl to cash in by filing “drive-by-lawsuits” with the owners for non-compliant ADA structures.

How do you avoid these non-conforming issues? It starts with a detailed design by an engineer who understands the ADA regulations. There are a lot of gray areas within the ADA regulations. Some of the design criteria in the 2010 Standards for Accessible Design are not fully clarified and are left up to interpretation of the designer. Also, there are varying sources of regulations on ADA that are applied in specific cases based on location (on and off site) and the building design.

Your engineer must be able to provide detailed construction drawings that indicate not just compliance with ADA requirements, but give the contractor some tolerances during construction. Not every ADA parking stall can be constructed to exactly 2% slope in all directions. Why not design for 1.5% and allow for some tolerance during paving and keep under the 2% maximum slope?

Once a project enters its construction phase, three issues can really impact ADA compliance.

First, the project is built off the approved site plan. The engineer is not asked to provide construction drawings (CD’s), which would provide greater detail information and spot grades. Specifically on the CD’s, the ADA accessible routes would be highlighted for the contractors and inspectors.

Having a construction document phase and more importantly having the engineer preparing detailed grading plans to ensure ADA compliance is important in this day and age of violations for accessibility noncompliance. The violations can range from municipalities holding the certificate of occupancy from the applicant and even civil monetary penalties from lawsuits which can be as much as $75,000 for the first offense.

Second, the contractor uses his own surveyor instead of the engineers. Using the contractor’s surveyor during stakeout can lead to finger pointing if something goes wrong. Also the engineer’s own surveyor is more likely to point out inconsistencies and potential errors on a drawing before it gets staked out.

Third, the design engineer is typically not involved with construction until something goes wrong. Unfortunately the engineer is called only when the problem has already been constructed. With ADA designs, the engineer should be called out to the site at the time of forms being set or prior to paving. A simple check with a smart level can save a lot of time, frustration and arguing on costs to replace non-conforming items.

Many developers are taking compliance review to the next level by contracting third party consultants that specialize in accessibility compliance of federal, state, local laws and building codes to perform plan reviews and technical assistance.

To overcome ADA non-compliant issues, it takes many people to be aware of the design/construction requirements: from the engineer, to the surveyor, and finally to the contractor understanding of required curb ramps, and sidewalk running slopes and cross slope designs.

Remember, the real reason to ensure ADA compliance is not just to avoid penalties from lawsuits which can be as much as $75,000 for the first offense.

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HOME BUILDING: WHAT COULD POSSIBLY GO WRONG?

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

The building code of Hammurabi, King of the Babylonian Empire, is the earliest known building code written in 2200 B.C. The code assessed penalties if a building was not properly constructed. An especially onerous code provision specified that “If a builder builds a house and does not make its construction firm and the house collapses and causes the death of the owner, that builder shall be put to death.” Further, “If it causes the death of the son of the owner, then the son of the builder shall be put to death.” Today home builders don’t risk death, but they certainly risk expensive claims and all-too-common construction defect litigation. The lawyers, the cost, and the damage to business and reputation may make some builders feel that the death penalty in ancient times may have been more palatable. Why then, after thousands of years of home building, are there still major problems? Let’s explore what could go wrong?

Similar to ancient times, homes are still mostly built by hand. They are also still built on land with highly variable conditions including grades, soils and groundwater. This is in strict contrast, to building cars, which are largely assembled by robotics on carefully monitored assembly lines. Builders are challenged to achieve high quality construction with low risk of problems. Builders must not only be skilled craftsman, but also excellent project managers with intimate knowledge of applicable construction codes and standards. Unfortunately, despite builders’ best efforts unforeseen problems often occur. In fact, according to the International Code Council, 51% of building department inspections fail the first time.

Home construction is very complex and multi-faceted. The whole process starts with a geotechnical engineer exploring subsurface conditions, and a civil engineer and surveyor to plan and layout site improvements. Then an architect designs the home, and finally a structural engineer configures the foundation and framing. Once the design is completed, according to the NAHB, a builder constructs the average home by coordinating the work of 22 subcontractors. These subcontractors, and various suppliers represent over 250 people that work on the job site in the 3- to 6-month course of building a home. Surprisingly, well over 100,000 parts and materials are used to build an average home. A single error or omission by any of the design team or workers, or a defective part or material can and often does cause problems.

 Builders and home buyers alike often wonder why building department inspectors don’t catch all the problems? A primary reason is that inspectors are generally focused on life safety issues such as electric shock, fire prevention, and natural gas hazards. Most often they don’t tend to concentrate on the common high-liability risks such as engineering design, underlying soils, structural fill compaction, adequacy of foundation and framing, and water penetration. It is important to note that “a house can pass all code requirements and still have latent defects that are subject to liability under implied warranties (1).”

Implied warranties for new homes are recognized by courts in all 50 states. For the builder’s protection, it is important to replace the implied warranty, interpreted by the courts, with a written limited express warranty. “An express warranty is the builder’s or remodeler’s (warrantor’s) written or oral promise that is expressly made to the home buyer or homeowner that the work will meet certain standards and, if it does not, that warrantor will stand behind the work by making repairs or by replacing defective components (1).”

The warranty standards are referred to as performance standards. There is a key difference between building standards and performance standards. Building standards, typically building codes, specify how to build a home. Performance standards specify how the performance of a home will be judged during applicable workmanship, systems, and structural warranty terms.

Finally, an express warranty should mandate legal binding arbitration, recognized in all 50 states, by which any disputes between builders and home buyers may be resolved. Arbitration, in accordance with the Federal Arbitration Act, “provides a mechanism for resolving disputes without the expense and delay that generally occur in a lawsuit (1).” Arbitration proceedings conducted in the home are almost always preferred over litigation conducted in a courtroom.

Since homes are still hand-made

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Land use policies in America’s oldest cities evolved over the last hundred and fifty years. Originally they were designed to be more and more restrictive in order to solve (control) the many major problems that became endemic in many of the northern cities as their populations began to explode beginning after the Civil War. The original well intended purpose of land use laws was to reduce density to solve the horrific conditions in cities caused by overcrowding and the consequent problems of fires from unsafe construction practices, sanitation, crime, and the industrial pollution caused by the necessity of factories being located next to where people lived. For the most part, over the last fifty years, these health and safety conditions no longer exist. The solutions to these historic problems however have not caused a commensurate change in land use policy. Those now-outdated restrictions should be reduced and growth and densities encouraged in appropriate locations. With modern sewer, water, and mass transit systems in urban areas and the increasing de-industrialization of our cities as we move from a manufacturing to an information based economy; cities should be allowed to grow without these outdated restrictions. In fact, the most successful cities have their employment buildings in close proximity to where people live. Walkability to mass transit and jobs is the new amenity.

Exacerbating the problem of efficient land use in New Jersey is that zoning is done at the municipal rather than the municipal level. “Home rule,” as the locals like to call it, has resulted in 537 municipalities each deciding how much and where they will allow growth to occur with absolutely no concern about the effect of this growth, or lack thereof, on neighboring municipalities or the regional economy. This bottom-up planning model creates an imbalance between the social benefit of growth and the private costs that growth sometimes imposes. The solution is top-down planning where long-term growth can be anticipated, future infrastructure requirements can be budgeted and planned for, and the creation of low density low-cost affordable housing and public open spaces can be balanced and offset by high density high cost housing. Resistance to top-down planning is also often exacerbated by urban landowners attempting to preserve local zoning power to artificially inflate the value of their assets by restricting the supply of additional product on the market.

Rebuilding infrastructure is another challenge facing our older urban areas. Although much of the infrastructure exists that was capable of handling much larger populations from the peak industrial levels of our past, the infrastructure is aged. We still discover wood and brick sewers when we open up the streets for water, sewer, and power connections and we still have combined storm water and sanitary flows running through the same pipes in most of our older cities. During recent severe storm events, most municipal sewage treatment facilities were overwhelmed by the surge of storm water which had nowhere to go so it backed up onto the streets causing widespread flooding. Major portions of Hoboken and downtown Jersey City were under 4 to 5 feet of water that caused hundreds of millions of dollars in property damage.

These combined systems are in need of redesign, separation, and rebuilding. Financing the rebuilding of our infrastructure can be a very simple matter if the cities are willing to accept taller buildings and increased densities. By making additional density in taller buildings available in redevelopment areas for a price, infrastructure funding can be created quite literally from thin air. One of the density bonus plans we worked on in Jersey City, N.J. would’ve allowed 40+ story buildings instead of the 20 story buildings currently permitted and would have added 2,000 additional units to a neighborhood which, at an average market price for land per residential unit of $50,000, would’ve generated $100 million which could’ve been used for public purposes like infrastructure financing, affordable housing, open space, and mass transit improvements. Solutions like these exist but require political leadership.

Notwithstanding these challenges, there are far greater opportunities in redeveloping post-industrial cities like Hoboken and Jersey City. Most of the local political and bureaucratic officials we deal with have a pro-development attitude. Developers who know how to work together with the community stakeholder groups and the city are in great demand. They know that working together during the planning process ensures faster approvals and projects that result in more profitability for the developer and more benefits for the host community. There are a significant number of large tracts of river front and river view property, originally all exclusively occupied by industry that became vacant and available for redevelopment. Active rail-road right-of-ways that traversed and connected the cities from their waterfront factories and warehouses to their markets inland now are used by passenger rail. 16 years ago, New Jersey Transit invested $1.5 billion into the Hudson Bergen Light Rail Train (HBLRT) using the newer and less expensive light rail technologies. The HBLRT’s 23 station stops running along 34 miles of the New Jersey Hudson...
HOW TO DEVELOP A SITE WITH AN EXISTING ENVIRONMENTAL CAP

By: Mike Solt, PG

Your next project has all the potential for success, but the site has undergone environmental remediation in the past and has an engineering control sometimes referred to as a cap. Now what?

An engineering control protects human health and the environment by providing a barrier between contaminated media, such as soil or groundwater, and the surface. Disturbing the cap without the right knowledge could jeopardize public health and safety, as well as place your project at risk of penalties. Despite such concerns, it is possible to work on sites with environmental caps, maintain the integrity of the environmental controls, and remain in compliance with New Jersey environmental laws and regulations. To best ensure that the function and integrity of a cap remains protective, the key is to work with a Licensed Site Remediation Professional (LSRP) certified by the New Jersey Department of Environmental Protection (NJDEP). LSRPs ensure protection for human health and the environment, and compliance with local, state and federal regulations. They also properly document cap disturbances and restoration.

LSRPs were created by the State of New Jersey to guide developers, builders and others through New Jersey’s environmental regulations so that contaminated sites would be remediated faster while protecting both the public and the environment. Additionally, LSRPs, with their extensive training and knowledge of environmental controls, are valuable resources for developing sites where remediation has been completed.

The LSRP program, established in 2009, has licensed more than 600 experts in New Jersey’s environmental laws and regulations. With a few exceptions, every environmental remediation site must use an LSRP to guide the process. Today, about 14,000 remediation projects are using LSRPs.

For a project with an existing cap, remediation may be required to restore the cap, which makes an LSRP critical to the development team.

Whether the site is suspected to have historic fill or some other type of contamination, the existence of a cap should be specified in a deed notice for the site. The type of cap depends upon the nature of the contaminant, intended use of the property, subsurface conditions, remedial goals, and who could be adversely affected by environmental contaminants. Buildings, parking lots, sidewalks and landscaped areas all may be part of the environmental cap.

Before construction begins, it is important to understand the nature of the contaminants below the cap. An LSRP will evaluate the impact of the proposed development on the existing cap and notify the NJDEP about the proposed disturbance and the plan to restore the area with an equally protective barrier. The LSRP also can monitor and document the disturbance and restoration of the cap.

A Health and Safety Plan should be in place before a cap is disturbed. This allows workers to understand the risks involved when dealing with contaminated material and informs workers of measures that can be taken to protect themselves from the potential risks.

The LSRP also will help file a cap disturbance report with NJDEP office of Remedial Action Permitting Bureau of Operation, Maintenance, and Monitoring detailing site specific information, a description of the cap disturbance and its restoration. Alterations to the cap are documented in as-built diagrams that must be recorded with the deed.

Imported fill material must meet specific requirements and the LSRP will have to review documentation to verify the suitability of material before it is brought to the site. Likewise, excess material requiring export will likely need testing and may require disposal at a specialized facility.

Developers and owners should also be aware that use of a cap carries post-remediation obligations. The cap is permitted with the NJDEP and a certification must be filed every two years. There are annual fees that must be paid to the NJDEP. The LSRP retained by the developer will guide them through the financial aspects of the process.

Financial Assurance must be established to ensure that periodic costs, one-time costs, and the cost of operation and maintenance is covered throughout the duration of the remediation project. NJDEP uses a 30-year planning horizon to calculate the Financial Assurance costs.

Operation and maintenance costs include inspections and annual repairs and reporting, periodic repairs that may occur at a lower frequency, and can also include long-term groundwater monitoring, and any anticipated one-time expenditures. Items such as replacing an area of a cap, repaving an area of an asphalt cap, replanting on a vegetated cap, or pest-control costs to deter burrowing animals are considered periodic costs. Extensive re-paving is an example of a one-time cost.

From beginning to end, any plan to...
THE KEY TO A SUCCESSFUL MOBILE SITE IS SUBTRACTION

By: Michael Bellina

There is no doubt that our cell phones are an integral part of our lives. If you don’t believe me, try going a day without it. Because of this, as business owners, we have made sure that our sites are mobile friendly. At least, you think you have.

Responsive sites are not necessarily the answer

These days many websites are responsive website designs. What that basically means is the site conforms naturally to the size of the screen it is viewed on. It doesn’t matter if it is a 27 inch monitor or an old iPhone the size of the page will magically conform to the size. If you use a common website development platform like Wordpress, many of the themes are “mobile friendly”. I argue they are not.

In a typical responsive site, the right column moves below the left column. This makes sense as much of the main content is on the left hand side of the page when viewing on a desktop. However, what if you included important information like a signup form or search function? Those important conversion interactions would now be at the bottom of all that content. If you couple that with the fact that only half of your viewers on a mobile site actually reach the footer of the page, that is a bunch of lost opportunity. The site looks nice on a mobile phone but it is not very useful. Something consider as well is how much of your traffic is really coming from a mobile device. If it more that forty percent then it is probably not a good idea to rely on a responsive design for your mobile experience.

Over 50% of searches take place on mobile devices

According to a recent study, mobile searches have reached their tipping point. If you are a business that relies on your website to drive traffic, consider that one out of every two visitors is coming to your site on a mobile device. Take a good look at your site on your phone, how far down does the visitor have to scroll to get to the information you want them to see? That beautiful panorama on your desktop site is not only really small on your phone, but between the header and that image, you have taken up nearly half of the screen which means that the visitor needs to start scroll immediately. Many do not.

Is this really needed on the page?

Responsive websites do not do a good job on their own at subtracting what is not necessary at a particular time. This is why planning out what the viewer sees immediately is very important. Like that desktop panorama which makes a great impression when the visitor lands on the site is not so impressive as a thumbnail image. If this wonderful image has a call to action button as well, the button and text will really be small. If your demographic is older it might be hard for them to read, so the likelihood that it is going to make an impression is small (pun intended).

When planning out your mobile site something to consider is that you want to make content bigger. I am not just talking about text but buttons, navigation and even important images have to be easy to see and easy to click on. If you have an image that is a diagram or has a bunch of text on it, when it shrinks down to the mobile size, all that text shrinks as well. Also consider people with thick fingers, small buttons may be hard for them to click on if they are not spaced properly. Nothing leads to abandonment quicker than frustration.

Size does matter and so does speed

Responsive sites shrink existing content down. It’s convenient but not very practical. Going back to the panoramic on your desktop site, for that image to be clear on a 27 inch monitor, it has to be a fairly large image. On a mobile device over a poor data connection that could take two or three seconds to load. In other words, that call to action may never be seen because either the viewer has scrolled down or even worse, left. Site speed is very important.

When you plan your mobile site, you have to consider mobile bandwidth as well. You can’t assume that every person will have a perfect connection to view your site. This is why it is important to plan the mobile site and test how fast it will load. A typical responsive website loads in about 4 seconds. Do this test for me, stare at your phone for four seconds straight. It’s a long time. A mobile site has to load nearly immediately. Again you have to ask yourself, what is really needed to get your message across, from there, subtract some more, and then you should be good.

Separate rankings for mobile

As if user experience and site speed isn’t enough to worry about, a few months back Google decided to have a different ranking algorithm for mobile. Google never really lets you peek behind the curtain but I am willing to bet that usability and site speed are ranking factors along with content. My

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PILOTs and tax abatements. Several proposals have been introduced that require a percentage of PILOTs to go to a municipality’s school district.

A bill introduced by Senate President Sweeney that would impose prevailing wage requirements on properties receiving tax abatements/exemptions, has been released by the Senate Labor Committee despite strong opposition by NJBA. The Association is working with a coalition of groups including NAIOP, NJAA, the NJ State League of Municipalities, the Chamber of Commerce, and NJBIA to make sure this ill-advised and damaging legislation, S-1162, does not proceed through the legislative process.

Regulatory Update

NJBA remains actively involved as an advocate on the regulatory front, both on a statewide and regional basis.

The Environmental Committee is currently preparing comments on the New Jersey Department of Environmental Protection’s (DEP) Freshwater Wetlands rule proposal, which is the latest rulemaking effort of the Division of Land Use Regulation. DEP has also issued the “State Water Supply Plan,” which is the long-awaited, first major revision since 1996. Upon being notified by our members that DEP is modifying its application and interpretation of its Fill Guidance that is negatively impacting brownfield redevelopment, NJBA and its trade group partners quickly urged for and discussed with senior DEP staff concerns expressed by the regulated community. NJBA subsequently drafted a position paper outlining issues from both the regulated community and DEP’s perspective, as well as proposed meaningful solutions.

The Metropolitan Builders and Contractors Association and NJBA are evaluating the best option to utilize the NAHB grant funding to counter the problematic Highlands regulatory scheme, particularly as the Highlands Council is poised to issue the draft “Monitoring Program” report for the Region.

Legal Affairs Update

NJBA’s Affordable Housing Task Force continues to vigilantly track and strategize in the ongoing affordable housing litigation and settlement discussions. NJBA has participated in the Mercer County trial, which is the focal point of the affordable housing litigation. The first phase of the trial on the 2015-2025 prospective obligation with testimony by the methodology experts concluded on May 8th, while the second phase involving the 1999-2015 obligations has recently commenced. The Mercer County judge will likely issue a comprehensive opinion on the obligation numbers during the summer, which we anticipate will then be heavily relied upon by other county trial courts. Please see NJBA Land Use Counsel Tom Carroll’s article in this edition of Dimensions for an in-depth examination of the affordable housing litigation.

Once again, thank you for the opportunity to serve as this great Association’s President and I look forward to working on your behalf and updating you as the year progresses.

HOW TO DEVELOP A SITE WITH AN EXISTING ENVIRONMENTAL CAP

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disturb an environmental cap requires a lot of prior knowledge. LSRPs are uniquely trained to bring regulators and developers together to achieve a gold-standard of environmentally responsible development practices. By bridging the information gap between regulators and developers, LSRPs can streamline the development process and avoid unexpected costs and delays.

AFFORDABLE HOUSING CAN HELP

Continued from page 3

in ensuring that a project can move forward.

The affordable housing numbers can be significant, and the concerns of implementation are valid. There is no one-size-fits-all solution for the challenges presented as municipalities seek to meet their affordable home requirement. It will be critical for municipalities and developers to continue to work cooperatively in order to ensure smart mixed-income redevelopment that provides the necessary economic stimulus to sustain our communities. But satisfying these affordable-housing obligations presents an opportunity for a municipality to meet many other community goals, including building a thriving downtown.

HOW LONG AM I LIABLE FOR?

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Finally, the parties to a construction contract generally can agree in the contract to shorten the applicable Statute of Limitation. They can also generally agree, pursuant to a forebearance agreement, to toll a Statute of Limitations, which has the effect of extending the deadlines in which a party can sue.

Knowing the Statutes of Limitation and Statutes of Repose for the areas in which you are working can help you in managing risk and to have an intelligent discussion with your defense attorney if you are sued.
DIMENSIONS

MERCER COUNTY FAIR SHARE NUMBERS TRIAL
ENTERING THE “HOME STRETCH”

Continued from page 4

Judges throughout the State have been waiting to see the fair share numbers that are adjudicated in the Mercer County cases, and it is expected that the pace of adjudicating DJ cases throughout the State will accelerate upon the release of Judge Jacobson’s decision on fair share numbers.

Settlements

Many towns throughout the State have either settled their DJ cases already, or are in the process of doing so. As of this writing, it appears that only two Mercer County towns have not settled. That could change in the days and weeks to come. Statewide, over 100 towns are in some stage of settlement (either finalized or pending). Many towns have also been waiting to see the fair share numbers that arise from the Mercer County cases, and the pace of settlements should also pick up following the release of Judge Jacobson’s decision.

Can Builders Still get Involved?

Except in towns where settlements have been finalized, with final judgments of compliance having been entered, the answer is yes. In most counties, the trial court judges are still granting builders’ motions to intervene in DJ cases. Even where that is not the case, builders seeking rezoning relief can still become involved in the process, through participation as “interested parties” and otherwise.

It must also be recalled that hundreds of towns remain subject to builder’s remedy suits. Towns in that category include: (1) towns that have never filed DJ actions, and are not protected by a court judgment of compliance and repose; (2) towns that filed DJ cases, but then voluntarily dismissed them; (3) some towns that were the subject of builder’s remedy suits before the Supreme Court issued its March 15, 2015 Mount Laurel IV opinion; and (4) towns that decline to become compliant with their Mount Laurel obligations within the confines of their DJ cases, if trial court judges in such cases declare that builder’s remedy suits may be brought.

Conclusion

Builders interested in utilizing the Mount Laurel doctrine to seek rezoning relief may still do so in most towns. Interested builders should consult with counsel regarding the status of the municipality of interest, and the manner in which such relief can be sought, depending on the status of the municipality in question. 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 with any other questions.

THE KEY TO A SUCCESSFUL MOBILE SITE IS SUBTRACTION

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guess, and it’s a pretty good one, is that Google will not rank non user friendly sites at the top of the list on a mobile device.

The takeaway is that it is as important to plan a mobile site as much as you plan your desktop site. The mobile site should have its own design and it should be a minimalist approach to your desktop site. That doesn’t mean you can’t have beautiful images, it just means you have to make sure a small, low res version is served to your mobile site. Many responsive designs just shrink and reposition. A true mobile site is planned and tested separately. It should have the same impact as your desktop but in a different way. As Ben Franklin supposedly once said, “If you fail to plan, you are planning to fail.”

RAMPING UP TO ADA COMPLIANCE

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potential lawsuits and reconstruction issues, but to design and construct facilities to be readily accessible and usable by individuals with disabilities. The accessible routes are designed for individuals with disabilities so they know the accessible routes are consistent with each other and understand the site parameters they will face.

ADA accessibility has advanced tremendously over the years and it is a necessity to construct these means of access for the disabled to allow all to share equal mobility.

THE KEY TO A SUCCESSFUL MOBILE SITE IS SUBTRACTION

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Tim Touhey – I think the homebuilder and developer are feeling a sense of optimism in that many municipalities are agreeing to have more affordable housing units.

There is finally a sense among builders and developers that, after nine or ten years of waiting, the New Jersey Supreme Court has decided on the so-called “Third Round Rules” under the Mount Laurel Doctrine. The justices have weighed in that there is a shortfall of affordable housing in most New Jersey communities.

To avoid the situation of receiving affordable housing numbers from the court, municipalities and builders have to come together, on their own, to settle on the amount of affordable housing a community plans to have over a 10-year period.

Of the 526 municipalities in New Jersey, 160 communities have settled on the number of affordable housing units that will be needed over the next decade. Before each of these local governments made the decision, there was uncertainty in the market, for a long time, about the potential growth in the affordable housing sector.

Now, a builder can initiate economic activity around affordable housing in many municipalities across our state.

In essence, we see affordable housing as a valid growth opportunity for builders today and well into the future.

Question: From an economic point of view, what is the likelihood that this renewed focus on affordable housing can spur new construction?

Dr. Naroff – To the extent municipalities have to settle on a “number,” and they provide this housing, my sense is more affordable homes will be constructed.

Tim Touhey – My sense is that municipalities are concerned they are going to get a mandate for a bigger number of affordable homes, so they are willing to compromise.

Question: Looking ahead, what are the economic trends that can influence builders?

Dr. Naroff – As I noted, the fundamentals of the market are becoming more positive, and that is helpful. I think builders are optimistic, and they are looking to do more business because the fundamentals are there. But, I also think there is a recognition that they’ve got to be cautious going forward. By that, I mean they don’t want to get ahead of themselves as they have in the past. They seem to have learned the hard lesson that irrational exuberance and overbuilding can be very painful. So look for construction to pick up, but moderately.

Using Drone Technology for Land Surveying

Drones penetrate federal airspace and according to the Federal Aviation Administration’s (FAA) interpretation UAV use is generally illegal unless it falls under the recreational use exemption. The FAA is developing new regulations to license drones, but finalization will take some time. Regulatory restrictions for safety, although necessary, are the biggest threat to the development of drone technology. Many local communities have passed their own ordinances and specific facilities such as prisons and schools all have restrictions on use of UAVs. However, individuals can become licensed UAV pilots through the FAA ensuring safe and knowledgeable operation.

MidAtlantic utilizes a DJI drone which allows for the uploading of GPS or Google Earth data to compute flight path coordinates and automatic flight routes. The planning software also enables the pilot to enter specific routes, speeds, altitudes and hover times over each point. Under ideal conditions, mapping accuracies sufficient for engineering predesign work in the preparation of preliminary servicing plans can be achieved. While much of the operation is automated and pre-programmed, numerous steps and vigilant oversight by an FAA licensed pilot enhance the built in safety features of the equipment.

In conclusion, though there are tools that have traditionally been used for land surveying, UAVs are quickly becoming a critical new tool for surveying firms. At this point drones will not be replacing field crews, as ground personnel are still needed for many facets of surveying. The general rule with using drones is that if it cannot be seen or sensed from the air, then the drone is not the answer for that job. However, the use of drones will allow land surveyors to obtain data just as accurate as before but in a safer, more manageable, and time-efficient manner and allows companies to safely take on and complete more jobs for more clients in less time.

Home Building: What Could Possibly Go Wrong?

by hundreds of workers using many thousands of parts and materials, on lots with a wide variety of conditions, unforeseen problems can and will occur. These days builders need not fear risk of punishment by death, but rather liability for expensive claims and all-to-common construction defect litigation. Builders can help manage their risk by providing a comprehensive new home warranty for the benefit of both the builder and the home buyer.
Bright and Varick Urban Renewal Company’s ("BV") application.

On August 16, 2013, plaintiff-redeveloper BV filed an application seeking preliminary and final major site plan approval to construct a five story 87 unit multi-family residential development consistent with the Redevelopment Plan and the Amended Redevelopment Agreement. As part of the application, BV sent a letter to the Zoning Officer seeking to confirm that the application would proceed before the Planning Board. By letter dated August 23, 2013, the Zoning Officer responded affirmatively that the application would require Planning Board approval.

Shortly thereafter, the City Planner advised BV that the application was nearing completion but that several items needed to be submitted before the application could be considered complete. In less than a week, BV submitted all of the missing checklist items but for one which required submission of additional copies for agent review upon request. By letter dated October 4, 2013, the City Planner advised BV that the application was “substantially complete” and instructed BV to submit plans for agent review.

During this completeness review process, a group of vocal neighborhood residents organized under the name the Van Vorst Park Association, Inc. ("VVPA") began to voice displeasure with the proposed development and demanded that the Redevelopment Plan be amended to, among other things, reduce the development’s proposed density.

In response, City representatives repeatedly told VVPA and others that the City could no longer amend the Redevelopment Plan since BV was protected under the Time of Application Rule (N.J.S.A. 40:55D-10.1), stating numerous times that if it did anything to hold up the development, it would lose the lawsuit. The City representatives also repeatedly went on the record – whether at Town Hall meetings or through blog posts and emails – affirmatively stating that the proposed “density” was fully conforming with the Redevelopment Plan and that BV’s application was an as-of-right development proposal – meaning no variances are required and that the Planning Board would have jurisdiction over site plan review. Several City representatives readily admitted that they had “brainstormed, researched and hunted for loopholes” to reduce the project’s density but to no avail.

Yet despite telling the public there was no legal way to prevent the development from advancing, the City caved to public pressure and did exactly what it told the public it could not do – try and halt the development. Thus, three months after BV’s fully conforming application had been filed and almost two months after the application had been deemed complete, the City did an about face claiming that the permitted density in the Redevelopment Plan was “ambiguous” despite the fact that this allegation had been previously raised by a former Mayor and soundly rejected by City representatives. Thereafter, the City removed BV’s application from the Planning Board’s agenda and ultimately the issue was referred to the Zoning Board of Adjustment which never scheduled a public hearing.

BV strenuously objected to the cancellation of its Planning Board hearing and repeatedly warned various City officials that the time to act on its fully conforming site plan application would expire shortly. No hearing was scheduled and so the 95 day period in which the Planning Board had to review BV’s site plan application expired without the Planning Board taking any action. BV then requested the issuance of a certificate indicating that the Planning Board had failed to timely act on its application. In response, the Director of Housing Economic Development and Commerce advised BV that its application was denied due to the ambiguity surrounding the project’s density and that BV may file an appeal of his decision with the Zoning Board within 20 days.

The Trial Court’s Decision

On February 4, 2014, BV filed a seven-count Verified Complaint requesting, among other things, an automatic approval and a declaratory judgment confirming that there was no ambiguity with respect to the density standard in the Redevelopment Plan.

The trial court rendered a written decision on August 29, 2014, finding that because the Planning Board failed to act within the 95 day period and that since there was no evidence that its failure to act was “the result of mistake, mishap, inadvertence, or delay” BV was entitled to an automatic approval. Importantly, the trial court also ruled that BV’s application was complete as of October 4, 2013 when the City Planner accepted its application as “substantially complete.”

After the City Defendants’ motion for reconsideration was denied, the City defendants bowed out and so the VVPA was permitted to intervene for the sole purpose of appeal.

The Appellate Division’s Decision

On appeal the WPA advanced several arguments – all of which were rejected by the Appellate Division. First, the WPA argued that the trial court erred in granting automatic approval because BV’s application was never deemed complete. However, N.J.S.A. 40:55D-10.3 states “an application for development shall be complete for purposes of commencing applicable time period for action by a municipal...
agency, when so certified by the municipal agency.” By letter dated October 4, 2013, the City Planner had certified that BVUR’s application was “substantially complete.” Despite VVPA’s assertion, the Appellate Division concluded:

The Board decided to table and then deny a completed application because it wanted to address the density issue; a decision we conclude neither altered the completed status of the Application nor tolled the ninety-five day timeframe. There was no ‘mistake’ by the Board relative to notice of the meeting or misfiling of the Application. There was no “reasonable misapprehension” by the Board whether the application was complete.

VVPA also argued that the automatic approval was contrary to the public interest because the density issue had never been aired at a public hearing. This argument was also summarily rejected as the Appellate Division noted that “there were numerous noticed public hearings during the redevelopment process at which no member of the public, including VVPA, appeared and objected regarding the issue of density or on any other basis. By contrast, BV complied with the requirements imposed by the controlling ordinance in the application and was not advised by the board to the contrary.”

Importantly, the Appellate Division concluded by noting that “in balancing the equities between the public interest and the interest of the developer, the outcome weighs in favor of BV.” The Appellate Division arrived at that conclusion based on the VVPA’s inaction during the numerous noticed public hearings addressing the Site’s redevelopment in conjunction with BV’s reliance on the controlling ordinance when it filed its site plan application. As the Appellate Division noted, the time periods set forth in the statute are in place to provide applicants with a “measure of predictability.”

Unfortunately, although BV’s request for an automatic approval was affirmed by the Appellate Division – almost four years have passed since it submitted its fully conforming site plan application and so there is nothing “automatic” about the process. In fact, as of the writing of this article the VVPA has filed a Notice of Motion for Reconsideration (which the City Defendants joined) and so BV must now wait for the Appellate Division to rule on this motion. Even assuming the Appellate Division denies the motion, the WPA still has the right to file a Petition for Certification with the Supreme Court of New Jersey. If VVPA’s Petition is granted, BV is most likely looking at another year or more before the Supreme Court will render a decision. This is a long time to wait for an “automatic” approval but when faced with a municipality bent on stalling a project indefinitely or killing a project – it provides the only avenue for keeping the project viable.
River waterfront provide easy access for 54,000 people per day commuting up and down the Hudson River waterfront to local employment centers and for connecting to the ferry and PATH subway systems into Manhattan. As a result of that infrastructure investment, private developers have constructed approximately $30 billion of private investment surrounding these station stops.

Another opportunity exists because of inactive and abandoned railroad right-of-ways being converted to linear parks that also function as pedestrian walkways and bike paths; i.e. “Rails to Trails.” Rails to Trails projects like Manhattan’s 1.5 mile long “High Line” have proven the popularity of these walkways and demonstrated the value-add benefits to adjacent property owners who now have high foot-traffic retail space on their upper floors which align with and have frontage along this linear park. On a larger scale, the “East Coast Greenway” is planned and sections are getting built that will ultimately take hikers and bikers on a 3,000 mile path along abandoned and repurposed railroad right of ways stretching all the way from Calais, Maine, on the Canadian border to Key West, Florida.

In the very near future, we will begin to see a reduction in the traffic congestion in urban areas. This has long been an excuse to prevent more development. Already, disruptive transportation technologies like Uber, Lyft, Zip Cars, and City Bikes are dramatically reducing the need to own an automobile in urban areas. In the near future, driver-less cars will take over our urban roadways. You will be able to order a car which will pick you up at your doorstep, take you to your destination, then come back and pick you up when you’re finished and return you to your point of origin. No one will need to own a car anymore. This is why the big three automakers are paying very close attention to the Teslas and the Google self-propelled automobiles that are on the verge of widespread adoption. You can see a telltale sign of that attention as GM recently invested $500m in Uber’s competitor Lyft. Parking lot and car-garage owners and automobile insurance companies will feel this disruption first. Parking lot and car-garage owners, who’s facilities are typically located near employment centers or near transit portals to employment centers will be able to convert them to housing and greatly increase their value but the automobile insurance companies will not fare as well.

Our experience over 37 years of urban redevelopment has convinced us that although the challenges are great, the opportunities are even greater. The development community has always been vigilant in tracking demographic changes and their implications on the site selection process. Forward thinking developers realize the way to create successful developments is by focusing on the triple bottom line; societal, environmental and economic. In our role as Counselors, it is incumbent on us to continue to educate all of the disparate stakeholders within the legislative, policymaking, regulatory, and development communities on the importance of harmony. By working together with our legislators to address the challenges of prioritizing redevelopment policy can we focus the power of public land use controls and incentives to create private sector financing for affordable housing, to rebuild our aging infrastructure, and to provide the necessary amenities for a quality urban lifestyle. Only through this type of political awareness and redirection will we create the best cities of the future.

1. See www.nytransit.com
2. See www.greenway.org