

DIMENSIONS

Newsletter of the New Jersey Builders Association



IN THIS ISSUE

AN INTERVIEW WITH NJBA PRESIDENT DWIGHT WESLEY PITTENGER, ESQ. 2

SUPREME COURT RELEASES OPINION ON "GAP YEAR" FAIR SHARE ISSUES: WHAT HAPPENS NOW?..... 3

HOW SELF-DRIVING CARS, UBER, AND THE URBANIZATION OF AMERICA ARE CHANGING THE WAY STRUCTURED PARKING FACILITIES ARE DESIGNED, BUILT AND FINANCED 4

CONSIDERING YOUR CONDITIONS WHEN YOU CONTRACT 5

OWNER'S TERMINATION FOR CONVENIENCE WILL NOT PRECLUDE ENTITLEMENT TO LIQUIDATED DAMAGES 6

THE RISKS TO ARCHITECTS AND ENGINEERS IN A CONSTRUCTION DEFECT CLAIM 7

NEW JERSEY SUPREME COURT REVERSES BAN ON ELECTRONIC BILLBOARDS 8

OFFICE 365... GET THE SENSATION 9

CHALLENGES AND OPPORTUNITIES FACING THE FUTURE OF OUR CITIES: PART I 10

PROPERTY TAX APPEALS - WHAT'S NEW IN THE NJ TAX COURT?..... 11

HOW TO PROMOTE A START-UP COMMUNITY VIA A PRE-SELL MARKETING PLAN . 12

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

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

DIMENSIONS

AN INTERVIEW WITH NJBA PRESIDENT DWIGHT WESLEY PITTENGER, ESQ.

Dwight, this will be your last Dimensions article as President of NJBA. The Association has been very busy over the past year; what efforts are you most pleased with?



*Dwight Wesley Pittenger, Esq.
NJBA President*

During my term as President, I wanted to build unity between NJBA, our local associations and the National Association of Home Builders (NAHB). Often times, the focus on policy and regulatory efforts at the state level can disconnect NJBA from the needs of our Builder and Associate Members at the local level. Over the last year, NJBA CEO Carol Ann Short, Esq., NJBA President Elect John Kirkenir and I, met with our local Presidents on a regular basis to learn what concerned their members and how NJBA could address those concerns. Those meetings have created a better connected association that has allowed us to reduce the time from when a problem occurs locally to a legislative or regulatory response at the state level. I am also pleased to note that Dean Mon was elected as NAHB 3rd Vice Chair which has already brought greater recognition and unity to our three-tiered association. Dean has been very active at Metro, NJBA and NAHB for many years, so I am confident he will continue to be a tremendous advocate at the national level. His term on the national ladder will definitely be a source of pride for our state and local associations in NJ.

NJBA was able to secure several legislative and regulatory victories in 2016, which do you think had the biggest impact on our members?

I was very pleased NJBA was able to secure a fifth Permit Extension Act (PEA) for our members in the nine counties most impacted by Superstorm Sandy. The Legislature made it clear after the fourth PEA, that it was politically unfeasible to approach them for a fifth statewide extension. Realizing that we lacked legislative support initially, we devised a creative and politically palatable solution by proposing to extend the PEA in only the Sandy affected counties where recovery was an ongoing issue. Through terrific work by NJBA and our members, we garnered support for the initiative quickly enough to beat the expiration date of the previous PEA. I think that the additional permitting time was invaluable to many of our members who were still trying to complete projects that had been delayed by both the recession and subsequently Superstorm Sandy.

On the regulatory front, I was very pleased that we avoided a Legislative Override of the Department of Environmental Protection's (DEP) adopted 2015 Flood Hazard Rules. The NJBA Environmental Committee worked diligently to review and submit comments on the DEP's rule proposals and prepare testimony and statements for our legislative advocacy efforts. The eventual deal reached between Senator Smith and DEP Commissioner Martin to issue an Administrative Order helped us avoid the prospect that the favorable rules could be overridden by legislative decree.

The Environmental Committee was also instrumental in working on a statewide retention basin study in conjunction with the New Jersey Department of Agriculture and DEP. It took the efforts of many individual members over the course of two years to complete the study and it will serve as an excellent resource.

NJBA, MXD and BPAC held an industry event in November that raised more money for BPAC than any event in Association history, could you speak to the importance of the event in relation to the upcoming election?

The event honoring Joseph F. Riggs of K. Hovnanian was a great success not only for BPAC but also for our industry. Thankfully, we had the honor of recognizing Joe, who is an NJBA Past President and has been a pillar in the NJ building industry for as long as I can recall. We also had a team of terrific individuals working behind the scenes to raise money for the event. NJBA and MXD recognized that with an upcoming election for Governor and every seat in the Legislature, we needed to gather funds for BPAC early in the campaign season to greatly enhance our ability to support candidates who share our vision. I'd like to personally thank everyone who contributed or attended the event because their support will truly be a benefit to the building industry in NJ. We don't build or work in a regulatory or legislative vacuum in NJ. Sometimes the whole picture is not clear, but once we start looking at the development side of the business, it's very clear that you can't stand on the sidelines and hope someone else is going to do the work for you.

Earlier this month, the NJ Supreme Court upheld the "Gap Year" ruling that municipalities would need to meet their fair share numbers from 1999-2015. While we digest the impact of this decision, what is your immediate reaction?

It was a major victory for NJBA, the building industry, New Jerseyans and the companies that employ our

Continued on page 14

DIMENSIONS

SUPREME COURT RELEASES OPINION ON “GAP YEAR” FAIR SHARE ISSUES: WHAT HAPPENS NOW?

By: Thomas F. Carroll, III, Esq.

On January 18, 2017, the New Jersey Supreme Court released its opinion in the “gap year” appeal. That opinion resolves the question of whether fair share need numbers must be calculated for the gap years. The gap years, the years 1999-2015, are the years in which the Council on Affordable Housing (COAH) failed to adopt lawful regulations and fair share numbers. The Supreme Court’s opinion goes a long way toward eliminating uncertainty as to municipalities’ fair share obligations under the Mount Laurel doctrine.

The Supreme Court’s Rulings

Consistent with the position taken by the NJBA in the appeal, the opinion holds that fair share need numbers must be calculated for the gap years. Thus, municipalities will face higher fair share obligations, and they must adopt fair share plans accordingly, rezoning more properties for affordable housing.

Municipalities had argued that the gap year need should simply be ignored. The Court rejected that position, agreeing with NJBA that the need for affordable housing accumulated year-by-year during the gap years. The Court then addressed the question of how the gap year need should be calculated. The opinion directs that trial courts calculate gap year need as an expanded version of “present need,” as opposed to including gap year need within the category of “prospective need.” Gap year need numbers when calculated as prospective need are slightly higher than gap year need numbers when calculated as expanded present need, but the latter are still substantial. Further, gap year need will be added to the other components of

Hill
Wallack LLP
Attorneys at Law



M X D
New Jersey
Mixed-Use Developers
Patron Sponsor

fair share obligations that municipalities must meet, including “prior round” need (need numbers calculated by COAH in the past), and prospective need for the period 2015-2025.

Experts for the Fair Share Housing Center and the NJBA have already done reports calculating gap year need as an expanded version of present need. It is anticipated that revised reports addressing gap year need in that fashion will now be filed, with the trial courts to hear testimony on the opinions and fair share numbers provided in those reports.

The Opinion’s Effect On Pending Cases

Trial courts throughout the State are now guided by the Supreme Court’s opinion. There is an ongoing fair share methodology trial involving Mercer County Mount Laurel cases, and that is likely to be the first case in which the Supreme Court’s opinion is applied.

That trial, being conducted by Judge Mary Jacobson in the Mercer County Mount Laurel cases, began on January 10, 2017, and trial dates are currently scheduled through early March. Because the gap year issue was before the Supreme Court when the trial commenced, Judge Jacobson has thus far limited the testimony in the trial to fair share numbers for the period 2015-2025. Now that the Supreme Court has decided that gap year fair share numbers must be added, Judge Jacobson will be directing the parties shortly as to how the gap year need issues will be addressed at trial.

Settlement Issues

Many Mount Laurel declaratory judgment (DJ) cases throughout the State have already settled, with municipalities having received “settlement discounts” toward their fair share obligations. Some of those settlements have been concluded, with municipalities having received final judgments declaring their compliance with their Mount Laurel obligations. It is doubtful that the gap year opinion will have any effect on already-concluded settlements, but that remains to be seen.

Other settlements are only proposed at this stage. To be accepted by the trial courts, fair share plans proposed through settlements must be publicly noticed and then undergo a “fairness hearing” in court, with the trial court judges ruling upon whether the settlements should be accepted. Some proposed settlements are being challenged by builders who contend that the settlements are deficient, and that municipalities proposing the settlements

[Continued on page 13](#)

About the Author:

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

DIMENSIONS

HOW SELF-DRIVING CARS, UBER, AND THE URBANIZATION OF AMERICA ARE CHANGING THE WAY STRUCTURED PARKING FACILITIES ARE DESIGNED, BUILT AND FINANCED

By: Robert S. Goldsmith and Steven G. Mlenak

For perhaps the first time since the invention of the automobile, developers, businesses and governing bodies are now taking into consideration a diminishing demand for parking when designing and financing structured parking facilities.

Historically – with increases to the population, the volume of people commuting to work, and the number of households purchasing second and third vehicles – the demand for parking has seemingly grown unabated year after year. Due to the impending rollout of autonomous, self-driving vehicles, the rise in popularity of shared-car services, and changing societal trends, developers and governing bodies throughout the country are now considering the “shelf life” of structured parking facilities like never before. Those looking to finance the construction of these facilities would be well advised to take into account what many experts believe will be a seismic shift in the way people get around in the decades to come, and when debt service payments will still be due. Whether it be through conservative planning, the design of facilities which allow for adaptive reuse, or the utilization of shorter term financing options, developers of structured parking facilities may successfully avoid finding themselves in a position where they are still making debt service payments on an empty, unused, and ultimately non-adaptable facility.

Car-share companies such as Zipcar, car2go, Uber and Lyft claim that for every shared vehicle in use today, 15 personally-owned vehicles are taken off the road. Additionally, studies have shown that up to 20% of Zipcar members

Greenbaum Rowe
Smith & Davis LLP
COUNSELORS AT LAW



MXD
New Jersey
Mixed-Use Developers
Patron Sponsor

avoid the purchase of a personal vehicle. Generally, cost-sharing services such as Zipcar are on the rise due to growing enthusiasm in the corporate sector for the cost savings associated with not maintaining a fleet of vehicles, along with a younger generation less keen on vehicle ownership. In Paris alone, it has been estimated that more than 20,000 private cars have already been taken off the road due to such services. When you consider that personally-owned cars are parked as much as 95% of the time, it makes sense that such services will continue to prosper as more and more individuals and businesses look to shed unnecessary car payments, repair and maintenance costs, and insurance premiums.

Another significant factor to consider is the expected growth and implementation of driverless, autonomous vehicles. Companies such as Google, Apple, Ford, Volvo, General Motors, and Tesla have been developing self-driving technology for years. By all accounts, we

are moving closer to the introduction of such vehicles to the mass market. The Boston Consulting Group, a leading global management consulting firm, predicts that fully automated cars could make up nearly 10 percent of annual global vehicle sales by 2035. The U.S. government is preparing for a driverless world as well, as \$4 billion has been included in the Department of Transportation’s 2017 budget for the purpose of creating and implementing driverless vehicle pilot programs. At the state level, eight states and the District of Columbia have adopted autonomous vehicle legislation, and a similar bill in New Jersey was recently passed by the Assembly Transportation and Independent Authorities Committee and awaits a vote by the full General Assembly.

At first impression, it could appear that the advantage of such vehicles would be personal, and without an impact on overall vehicle ownership, however many experts believe that such vehicles would cause a dramatic reduction in the number of cars needed by families. In theory, a driverless vehicle could drop dad off at work in the morning, drive back to pick up mom and drive her to work, deliver the kids to and from school, and pick both parents up at the end of the day. When not in use, the car could park further away and avoid more convenient and costly options. Finally, driverless technology could improve traffic flow by eliminating erratic braking, employing re-routing to avoid congestion, and traveling closer together to increase road capacity. With cars in

[Continued on page 13](#)

About the Author:

Robert S. Goldsmith, Esq. is Chair of the Redevelopment & Land Use Department at Greenbaum, Rowe, Smith and Davis LLP. For the past forty years, his practice has focused on redevelopment, downtown and urban revitalization, transit-oriented development, public-private partnerships and project financing. Steven G. Mlenak, Esq. is an Associate in the firm’s Redevelopment & Land Use and Real Estate Departments. Robert and Steven can be reached at 732-549-5600.

CONSIDERING YOUR CONDITIONS WHEN YOU CONTRACT

By: Aaron S. Brotman, Esq.

The start of a new construction project is a time of great optimism, and difficult conversations are often avoided in the hope that all will go well. To get to this point, the developer will have gone through a complex and often drawn out process. Once the developer has completed the resolution compliance and received the appropriate sign-offs, he may believe he is done with those approvals. The truth is that conditions of a planning board or zoning board approval often will have a dramatic effect on both the shape of the final project and the actual construction process itself. Rather than simply accepting the contract as presented from the contractor or using a model form construction contract, the developer should craft the terms of the contract to accommodate any approval conditions that remain in force and to anticipate and address any potential problems resulting from the conditions before they arise. By accounting for conditions in the contract, a developer can make the construction process easier.

Conditions imposed by a board can vary greatly and may include requirements far more complicated than ensuring that a developer obtain other agency approvals, submit revisions, or provide off-site improvements. A variety of conditions may be permissible so long as the condition (1) does not offend the zoning ordinance, (2) does not require illegal conduct by the developer, (3) is in the public interest, (4) is reasonably calculated to achieve some legitimate objective of the zoning ordinance, and



(5) is not unnecessarily burdensome. As a result, a board may impose conditions which impact the construction process as well as the final project. Among these are requiring that certain portions of a site remain undeveloped and undisturbed, that a work site ceases operations by a certain hour, prohibiting work on weekends (particularly in a residential environment), limiting noise levels during construction, that maintenance bonds be posted, or that certain environmental features be protected from start to finish.

Raising any relevant conditions when negotiating a construction contract allows the developer can do two important things: (1) alert the contractor to potential issues, which will be accounted for in the contract itself; and (2) better educate the developer on the nature of its contractor. When faced with the prospect of dealing with conditions, does the contractor

resist the need to accommodate the conditions or use the discussions to seek unreasonable concessions from the developer, or does the contractor provide useful feedback and suggest means to mitigate any concerns? This may be the time to find a different contractor or to learn how to manage the one you have while the project is still in its infancy – before problems truly arise, which lead to delays or cost overruns. Further, if the construction hours are limited, including this in contract, including this in the contract allows a developer to enforce the restriction without fear of a change order.

Considering the conditions in the negotiation process also works to the benefit of contractors. These may be potential issues the developer has not considered, so by taking the time to discuss what challenges the project may face, an early discussion gives both the contractor and the developer the opportunity to more honestly assess what coming to a final, built project may entail. Such a discussion can also create a more cohesive and resilient working relationship because it reduces the risk of mid-project demands that a contractor adhere to conditions in an approval about which it did not know.

Ultimately, including any applicable approval conditions in the construction contract from the start will work to produce a more cohesive, amicable, and efficient construction process and final project.

¹ *Darst v. Blairstown Twp. Zoning Bd. of Adj.*, 410 N.J. Super. 314 (App.Div. 2009),

² *Care One at Teaneck, LLC v. Zoning Bd. of Adj. for the Borough of Teaneck*, 2013 N.J. Super. Unpub. 2075 (Chancery Div. 2013).

³ *Majestic Contr., LLC v. Nunziato*, 2011 N.J. Super. Unpub. LEXIS 2850 (App. Div. 2011).

⁴ *365 Spotswood/Englishtown Rd., LLC v. Zoning Bd. of Adj.*, 2010 N.J. Super. Unpub. LEXIS 1967 (App. Div. 2010).

About the Author:

Aaron S. Brotman, Esq. is an Associate in the Sills Cummis & Gross Real Estate Department and focuses on land use, development and construction law. Prior to attending law school, Mr. Brotman was a project manager in the construction industry. He can be reached at (609) 227-4600 abrotman@sillscummis.com.

DIMENSIONS

OWNER'S TERMINATION FOR CONVENIENCE WILL NOT PRECLUDE ENTITLEMENT TO LIQUIDATED DAMAGES

By: Audrey K. Kwak, Esq.

Conventional wisdom holds that an owner will not be entitled to liquidated damages after terminating a contractor for convenience—i.e., without cause—as liquidated damages are remedies arising from the default of the contractor. But a recent case from the Connecticut Supreme Court debunks this notion and instead affirms the primacy of contract language, notwithstanding the fact that it seems to confer upon the public owner a substantial windfall.

In *Old Colony Construction, LLC v. Town of Southington* (2015), the court considered a contractor's claim that the project owner, the Town of Southington, was foreclosed from collecting liquidated damages because the town had terminated the contractor for convenience on a sewer pump station replacement project.

The contract provided that time was of the essence and provided for liquidated damages in the amount of \$400 for each day that substantial completion exceeded the contract substantial completion date. After significant delays on the project (attributable both to the contractor and to the town), the town terminated the contract on the basis of convenience, more than two and a half years after the contract substantial completion date had passed.

After termination, the contractor and the town each filed claims against the other. The trial court concluded that the contractor was entitled to more than

**ECKERT
SEAMANS**
ATTORNEYS AT LAW



**MASTER
SPONSOR**
Defending Our Industry

NEW JERSEY BUILDERS ASSOCIATION

\$164,000 for completed work that it had not been paid for. However, the court also determined that the town was entitled to liquidated damages of \$315,000 for 789 days of delay. The liquidated damages award offset the contractor's damages entirely and resulted in a net judgment favoring the owner of over \$150,000.

The contractor appealed, arguing that because a termination for convenience avoids liability for the contractor's expectation damages and avoids the risks associated with proving proper termination for cause, the owner thereby forfeits traditional "default based remedies" available for termination for cause. The appellate court disagreed, based on the express language of the contract. The court noted that the contract's termination for convenience clause specifically allowed for termination "without cause and without prejudice to any other right or remedy," and this broad reservation of rights and remedies was to be given full effect absent evidence of a more limited intent. Furthermore, even

if such a limitation did exist following a termination for convenience, the town's claim for liquidated damages in this case would not be impaired because its right to such damages arose as soon as the substantial completion date passed and continued to accrue until the termination of the contract.

The Connecticut Supreme Court agreed with both lower courts, holding that the town's pursuit of liquidated damages did not deprive the contractor of any rights that it would have had if it had been terminated for cause. The Court also observed that the contractor was not exposed to the costs of project completion, for which it would have been liable if terminated for cause. The Supreme Court thus agreed with the trial court that the town's election to terminate the contract for convenience did not preclude it from recovering liquidated damages.

This case emphasizes the importance of carefully reviewing and negotiating contractual language in order to ensure the language correctly expresses the parties' intent. Owners should ensure that a termination for convenience clause expressly reserves its contractual rights and remedies, including the recovery of liquidated damages, if applicable. Conversely, contractors should be aware that a reservation of rights in a termination for convenience clause is likely to be enforced, and should negotiate limiting language accordingly.

About the Author:

Audrey K. Kwak, a Member (partner), with the law firm of Eckert Seamans, is an experienced litigator in the area of commercial business disputes, with a particular focus on handling high-stakes construction and commercial contract disputes. Eckert Seamans is a national law firm with over 375 attorneys located in 14 offices throughout the eastern United States, including Princeton and Newark, NJ; Philadelphia, Harrisburg, and Pittsburgh, PA; Wilmington, DE; and White Plains, NY. Audrey can be reached at 412.566.6049 or akwak@eckertseamans.com.

DIMENSIONS

THE RISKS TO ARCHITECTS AND ENGINEERS IN A CONSTRUCTION

DEFECT CLAIM

By: Mitchell H. Frumkin, PE, RS, CGP

Summary: In the last few years the risks involved in the design or oversight of construction projects to prevent construction defects are driving design professionals away from providing these services. The goal of many attorneys has evolved into a process to force the designers' and inspectors' insurance companies to settle cases for large sums even if no liability exists since the cost of legal defense is more than the claim. This type of situation is driving many professionals out of the industry. This article will talk about this catch 22 situation where builders cannot find expert professionals to help them with quality control due to the risks involved in providing these services.

It all started for me about 15 years ago. I am the founder of an engineering consulting firm that works in the community association marketplace.

So, what is it that makes a community association more of a problem than other types of ownership when it comes to construction defects? For our example we will use a multifamily attached unit condominium in which the unit owners own the interior of their unit and the building and site amenities are owned by all unit owners jointly and are known as the common elements. When the unit owner purchases their home they perform an inspection of the unit interior to identify any problems and negotiate with the builder. The common elements are not inspected until the new unit owners take control of the community which could occur many months after they have moved in.

After the builder builds the community and the new homeowners move in they go through a turnover of the community to the newly formed association that



represents the homeowners. As a part of this process, which is known as Transition, the association will typically retain an engineer to evaluate the construction of the common elements to determine if they have been built in general conformance with the plans and to identify any deficiencies that may exist.

To help identify potential deficiencies before they become a problem, in many instances the builder will retain a third party inspection firm to perform periodic observations during construction. The design architect may also be contracted to provide additional periodic observations of the work in progress. Generally the observations take place on a periodic basis and not full time. In most situations the engineer or architect will provide a punch list to the builder but do not return to confirm that any identified deficiencies have been corrected.

As a result of the growth in the number of community associations, a new industry has evolved where construction defect claims are advanced against the builder alleging improper construction. While, of course proper construction is the goal, the legal process inhibits the ability of builders to retain third party inspectors due to the risks involved.

The typical process that leads to this problem is as follows:

1. The builder decides to build a community association and retains an engineer and an architect to develop the design plans for the community.
2. The builder retains a law firm to develop the legal documents that define the type of association and what comprises the common elements.
3. The builder builds the community and retains a third party engineer and the design architect to perform periodic inspections during construction to identify potential construction defects.
4. The new homeowners move in, take control of the community, and retain an engineer to perform a Transition Study.
5. The Transition Study identifies deficiencies if they exist.
6. If deficiencies exist legal action may be taken against the builder if the association and the builder cannot resolve the claims. Litigation is also sometimes filed to preserve a right to file even if the claims are not fully identified at the time of the filing.

Once a claim is filed, our legal system takes over. The first concept which is employed is the "entire controversies doctrine." This concept means that if you don't bring someone into the claim in the beginning, you may not be able to bring them in later. This practice results in all parties, irrespective of their involvement in the construction of the project or their involvement in the defective portions of

[Continued on page 14](#)

About the Author:

Mitchell H. Frumkin, PE, RS, CGP is the President of Kipcon Inc. and can be reached at (732) 220-0200. Mitch Frumkin recently Chaired a committee comprised of Nation Association of Home Builders, and Community Association Institute members that jointly developed a best practices paper on transitions. Please contact Mitch for a copy of this report.

DIMENSIONS

NEW JERSEY SUPREME COURT REVERSES BAN ON ELECTRONIC BILLBOARDS

By: Katharine A. Coffey and Christopher John Stracco

On September 15, the Supreme Court of New Jersey in *E&J Equities v. Board of Adjustment of Franklin Township*, 2016 N.J. LEXIS 890 (Sept. 15, 2016), reversed a decision of the Franklin Township Zoning Board of Adjustment and invalidated a township ordinance prohibiting the placement of electronic billboards along Interstate 287 in the township. The genesis of the case was in 2010 when the township adopted an ordinance regulating signs, including billboards, permitted in zoning districts proximate to an interstate highway. Digital billboards were expressly prohibited anywhere in the township. The township alleged that digital billboards were barred based on aesthetic and public safety concerns and, in particular, noted “there was no conclusive source or documentation that digital billboards were safe” nor were there “reasonable standards” for the regulation of digital billboards.

From 2008 to 2009, Franklin Township held public hearings concerning revisions and updates to its sign ordinance, including billboards. During that time, plaintiff filed an application with the Franklin Township Zoning Board of Adjustment for a conditional use variance to construct and install a digital billboard on property in a light industrial zone adjacent to Interstate 287. While the application was pending in March 2010, the Township adopted an ordinance prohibiting digital billboards. At that time, a number of studies showed that digital billboards have no statistically significant relationship with the occurrence of traffic accidents. A neighboring municipality had permitted the installation of a digital billboard along a portion of Interstate

 DAY PITNEY LLP



287, under New Jersey Department of Transportation regulations (N.J.A.C. 16:41C-11.1) establishing minimum distance and other requirements. Under those regulations, based on the amount of frontage of Interstate 287 in the township, one digital billboard would be permitted. The NJDOT had issued a permit for the digital billboard subject to plaintiff’s obtaining local zoning approval. Ultimately, the township zoning board voted 4 to 3 to approve the application, which equated to a denial because of the supermajority approval required for conditional use variances under N.J.S.A. 40:55D-70(d)(3).

The plaintiff appealed the zoning board’s decision to the Law Division in lieu of prerogative writs, and the Law Division concluded that the “Ordinance banned an entire medium of speech and burdened commercial speech.” Applying an intermediate scrutiny standard, the Law Division determined the township had failed to establish that a total ban on digital or electronic billboards served a legitimate government interest, and that the ordinance was not narrowly drawn to advance that interest. In reversing the zoning board’s decision, the Law Division found that “one digital billboard, by itself, was not likely to have any more of an impact on [T]ownship aesthetics than a static billboard.” The court also noted that the township had

failed to demonstrate that a complete ban on digital billboards advanced its stated interest in traffic safety given that the plaintiff’s traffic safety studies found no correlation between the installation of digital billboards and any increase in traffic accidents. In finding that the township’s ban on digital billboards was more expansive than necessary to advance the identified governmental interests, the Law Division declared the ordinance invalid.

The township appealed the Law Division’s decision to the Appellate Division, which reversed the Law Division and reinstated the zoning board’s decision and the ordinance, finding that it “is universally recognized that [the] government has a legitimate, even substantial, interest in preserving the aesthetics of its community and in promoting traffic safety,” and that the township’s stated reasons provided “a rational objective basis” for the Township’s decision to refrain from digital billboards as a permitted use.

On certification, the Supreme Court reversed the Appellate Division and declared the ordinance unconstitutional. The court applied the “time, place, manner, intermediate scrutiny standard” for commercial speech. In so doing, it noted that “when a governmental entity restricts speech, it must do more than simply invoke government interests that have been recognized over time as substantial. In other words, there must be a modicum of support for the invoked government interest.” With regard to aesthetics, the court found that the record provided no basis to discern how the three permitted static billboards were more aesthetically palatable than a

[Continued on page 13](#)

About the Author:

Christopher John Stracco, a New Jersey partner at Day Pitney and Chair of its Real Estate Litigation practice group, represents clients in the areas of real estate, property and general commercial litigation, including zoning, land use, and real property-related litigation. Katharine A. Coffey, also a partner at Day Pitney, assists clients with commercial and multi-family development and redevelopment, including land use and zoning, rezoning, affordable housing, real estate transactions, liquor license transfers and related litigation. Please feel free to contact the authors (973) 966 8220/cstracco@daypitney.com or (973) 966 8323/kcoffey@daypitney.com, respectively, to learn more about this case.

DIMENSIONS

OFFICE 365... GET THE SENSATION

By: Cathy Coloff

Most business users have grown used to Microsoft's flagship productivity software products such as Outlook, Word and Excel; but have you checked out the other features included with Office 365?

Office 365 has all the familiar software you use and love, but Microsoft has continued to enhance and add to their capabilities within the desktop software itself as well as the Office 365 online suite. They have mixed in the cool factor with a dash of practicality to make you more productive. Here's a taste of just some of the enhancements Microsoft has introduced in the past few months:

Office 2016 apps on iOS, Android, and Windows 10 PC tablets. Run Word, Excel, PowerPoint and OneNote on any device and enjoy consistent look and feel across platforms. Download the apps on your device today with your Office 365 subscription and taste the sweet life of easy access and collaboration.

Real-time Skype for Business chat in the Office 365 web experience. Imagine you're editing a Word document on your machine and want to collaborate with a colleague. Now, both of you can simultaneously edit the document and chat real-time in Word, Excel, PowerPoint and OneNote Online. Use Chat to communicate immediately; for example, ask a quick question, perhaps discuss



how to best divide editing responsibilities, topics to add/remove and more. Keep in mind the Chat history is not saved (you could copy and paste the Chat history if desired). Want to save your comments? No problem. Use the Comments feature (found under the Review tab on the ribbon) and your comments are saved in the document for future reference or review. The comments can be replied to, marked as done or deleted. Working together just got even easier...Chat, comment, collaborate!

Do things quickly with Tell Me. Don't remember where to go to change the font color, add highlighting or change the margins? Office 2016 added a new text box to the ribbon where you can type a few words of what you're trying to do and it will quickly show you the features related to your question. You no longer need to poke through the ribbon options to find the feature or action you want. How minty cool is that?

Share large files easily within Office 365 using OneDrive or SharePoint. Outlook automatically converts file attachments to a link that recipients can click on to download from OneDrive or SharePoint folders. You can specify whether the file can be modified, or opt to attach the file as a local file copy instead. It's controlled through your OneDrive or SharePoint sync settings.

Archive and de-clutter email. Ready to de-clutter your Inbox without worries of losing items? You can quickly move an item stored in your Inbox or any other folder to an archive folder. Once moved, the archived items remain accessible and searchable across all devices. Even better, if needed, they can easily be restored to their original location. The first time you use the Archive option, it will prompt you to set a folder as your Archive and then you're all set. Note: This Archive feature will not reduce the size of your mailbox. You must use other archiving features to remove items from your mailbox to conserve space. Happy archiving!

These are just a few of the features that Microsoft recently added to the Office 365 platform. So, go ahead and take a bite of Office 365 and be sensational!

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.

DIMENSIONS

CHALLENGES AND OPPORTUNITIES FACING THE FUTURE OF OUR CITIES: PART I

By: **George T. Vallone MBA, CRE**

I met my business partner Dan Gans in 1972 when we were both freshman at Gettysburg College. One year after graduating we decided to start a development business together. After studying the entire New York Metropolitan area for three years as we completed our post-graduate studies, we came to the conclusion that Hoboken would be the best place to start.

The selection criteria that we used in deciding where to start our redevelopment business mirrors the criteria that developers around the world consider in their site selection process. It's no secret that the primary driver of value in real estate is directly linked to location. Lifestyle and housing preference decisions follow a selection process which drives market demand. Consequently, understanding those market preferences lead directly to the highest value locations.

We elected to begin our career in the city of Hoboken, New Jersey. In our specific case we picked Hoboken because of its location on the Hudson River directly across from Manhattan Island in New York City, and because it met all of our other selection criteria. It had a large inventory of 100 to 150 year-old, very well built brownstones and brick row houses. These buildings were in disrepair and were available at very low prices due to the evaporation of middle class workers whose port related and manufacturing employers in these industries closed down and moved elsewhere. The middle class simply moved out leaving many homes for sale with few buyers. These buildings were well-suited for high-end renovation and sale as condominiums. Additionally, Hoboken and Jersey City were transit rich locations. They both had mass transit access to one of the largest employment centers in the country (New

York City) via subway, bus, and ferries, and automobile access into Midtown and downtown Manhattan through the Lincoln and Holland Tunnels. Both cities also had significant employment generators within their borders as they were home to several academic institutions, hospitals, and hundreds of small commercial, retail and dining and drinking establishments.

We purchased a four-story, brick row house as our first development project on Third Street in Hoboken, New Jersey, in 1979. We picked it because the price was a very reasonable \$20,000, it was two blocks from Washington Avenue (Hoboken's Main Street) and it was a five minute walk to the PATH transportation center. In one year, we completely renovated it and converted it into four condominiums. We sold the upper three units and kept the ground floor unit for the two of us to live in and for our first office. We continued with larger and larger projects including the construction of a 100 unit high-rise condominium in 1985 simultaneous with the restoration of an adjacent 1905 bank building which was listed on the National Historic Register, earning us a 25 percent tax credit which helped to shelter the condominiums profits.

To keep with large scale projects, we became involved with brownfield redevelopment on the Hoboken waterfront and downtown Jersey City. Brownfield redevelopment involves cleaning up contaminated industrial sites and repurposing them into mixed-use developments such as; multifamily, retail, parking and parks.

In the late 70s, 80s and 90s our condominium buyers were the "Baby Boomers," referred to back then as "Yuppies" - Young Upwardly-mobile

Professional People and their children, referred to as "Gen X." As the Boomers moved into their late 20s and early 30s they began forming families and many left our market in search of the suburban lifestyle; a single-family house with a yard, two car garages, and a swing set. A generation later, that same demand for the urban lifestyle is being driven by the Gen X and the Millennial generations. Further fueling demand for housing in redeveloping urban areas is the fact that over the last 10 years the middle aged Baby Boomers, who are en-mass becoming empty-nesters, are retiring and returning to the urban lifestyle of their Yuppie youth. Empty nesters are now combining with Gen X and the Millennials to fuel the demand for luxury rental apartments and condominiums on the New Jersey side of the Hudson River. The exact same housing trend is being seen energizing many older neighborhoods and industrial areas along the Brooklyn and Queens waterfronts on the East River side of Manhattan. Nationally, the Baby Boomers, Gen X, and Millennials are a 215,000,000 strong market (67 percent of the 319 million U.S. population). The percentage of this market that prefers a place to live where job centers, culture, active and passive recreation, dining, drinking and shopping are all interwoven in pedestrian friendly neighborhoods that are accessible to regional mass transit is clearly up-trending. This mega-trend toward urban living is happening all over the United States and in many of the world's post-industrial waterfront cities.

While the demand for urban life is growing, urban brownfield redevelopment certainly has its many challenges and problems.

One of the major challenges of urban redevelopment result generally from

[Continued on page 15](#)

About the Author:

George T. Vallone MBA, CRE, is co-founder of Hoboken Brownstone Company and Immediate Past President of NJBA. He can be reached at (201)-792-3814 and on twitter @georgevallone1.

DIMENSIONS

PROPERTY TAX APPEALS - WHAT'S NEW IN THE NJ TAX COURT?

By: Anthony F. DellaPelle, Esq. & Richard P. DeAngelis, Esq.

Thousands of real estate tax appeals are filed annually with the New Jersey Tax Court. Only a small percentage of cases are actually heard, so when a decision is issued, whether on a motion or case tried to conclusion, attorneys and appraisers who appear before the court are wise to understand how those decisions may impact future cases. It is also helpful for owners of commercial property to understand these trends as they consider filing a property tax appeal.

Any evidence relevant to value as of the assessing date is discoverable and admissible

In *Broadway-Somerset, LLC v. Twp. of Franklin*, the court ordered the property owner to produce a contract of sale for the subject property. The owner had objected to the disclosure arguing that the contract was not relevant to market value because the sale had not closed and was subject to many contingencies. The owner argued that the contract was not likely to lead to admissible evidence and contained confidential information. The township countered that the contract was relevant to its real estate appraiser in preparing his opinion of value.

The court ruled in favor of the township and compelled disclosure of the contract subject to a protective order. The court ruled that central issue in a tax appeal is to determine the true market value of the property and thus the contract is relevant, especially given the fact that it was entered into by the parties close to the relevant valuation date. The court held further that the contingencies of the agreement neither diminished the relevancy thereof nor renders the contract inadmissible as evidence. This case shows a recognition by the court of the relevance of such information

pertaining to the subject property, even though the sale had not closed.

Highest and best use – the foundation of an appraiser's opinion of value

In *Forsgate Ventures IX, LLC v. South Hackensack Township*, the court again reminded appraisers of the importance of the highest and best use analysis (i.e., the use that is legally permissible, physically possible, financially feasible and maximally productive). In this case, both appraisers agreed that the highest and best use was the current use, as improved with a Restaurant Depot, a cash and carry operation that sells equipment and supplies exclusively to restaurants and other establishments. The appraisers differed on how the actual use of the property should be characterized. The owner's expert characterized the property as an industrial warehouse while township's expert characterized it as a large discount retail store. The court agreed with defendant's characterization. The court ruled that use of industrial/warehouse leases to determine the market rent was fatal to the determination of value by the owner's appraiser. While the appraiser valued the property based upon a legally permissible use, he did not value it for its maximally productive use, i.e., discount retail, which commands a higher rent. The assessment was affirmed because the owner's appraiser did not undertake a thorough highest and best use analysis.

The crux of the matter – fair market value

Of course, the main issue in every tax appeal is fair market value and there were several cases impacting how the court approaches issues impacting upon

value.

In *Palisadium Management Corp. v. Borough of Cliffside Park*, the court rejected the cost approach method of valuation by borough's appraiser finding that the unique location of the property, with views of the Manhattan skyline, and its multiple uses as a banquet facility and health club, do not render it a "special purpose" property for which the cost approach is acceptable. The court adopted the hybrid valuation approach used by the owner's appraiser – the sales approach for the banquet facility and the income approach for a health club. However, the court rejected various adjustments made by the appraiser, most notably with regard to upward adjustments for the skyline views for which he offered no objective data in support. The court found that the opinion was subjective and unacceptable. Unable to render a determination of market value for the property, the court affirmed the assessment.

In *VBV Realty LLC v. Scotch Plains Township*, the court was critical of the lack of market studies, surveys or other evidence to support adjustments by the defendant's appraiser to account for various differences between the subject property and the comparable leases. The court found that adjustments must have a foundation obtained from market-derived sources or objective data and may not be based on subjective observations and/or personal experience. The court addressed also the issue of verification of comparable sales and leases. The court found that the plaintiff's appraiser had failed to verify, confirm or independently corroborate the sales and lease information upon which he relied. As such, the court accorded

[Continued on page 15](#)

About the Author:

McKirdy & Riskin, PA, specializes in real estate value litigation, including property tax appeals and eminent domain matters. The firm has successfully handled tax appeals for property owners New Jersey for every type of property. Anthony F. DellaPelle, Esq. can be contacted at adellapelle@mckirdyriskin.com and Richard P. DeAngelis, Esq. at rdeangelis@mckirdyriskin.com, or call 973-539-8900.

DIMENSIONS

HOW TO PROMOTE A START-UP COMMUNITY VIA A PRE-SELL MARKETING PLAN

By: Holly Kingsley

Over the years, Pace has worked with some of the finest builders and developers in the Garden State and the country. Consequently, we've learned a thing or two about how to successfully market residential real estate. In this issue, we'd like to share a few thoughts on the importance of having a Pre-Sell Marketing Plan for the success of a residential project. By "pre-sell," we're referring to that phase or period of time before your community is officially open for sales, prior to any model home (or homes) being open. Of course, this process is not cast in stone. It needs to be organic and flexible to accommodate the nuances of particular communities and builders, but the basics are essentially the same.

Timing wise, your efforts to pre-promote a community and build a VIP Waiting List need to begin about six to ten weeks prior to its opening. Some would say eight to ten weeks prior, but we think that's too early. Here's a list of critical things to do and steps to take:

Develop a pre-sell strategy. What does this mean? Just this: if your plan is to actually sell homes during this time period before model homes are complete, rather than to simply build a VIP list, there needs to be a strategy that gives customers a compelling reason to buy before they can see a model.

Create appealing site signage. It sounds obvious, but the first step to building a list is to develop signage for the property. Signage should display the name of the community, a short description of the product and the project, an indication of pricing, and a phone number and/or URL to a website or initial landing page. Anyone who passes by the site should know what is coming!

Create and place snipe signs. These small signs should be placed in a three-mile circle of the development.

Website or temporary landing page. This is critical, not only to provide details about the project, but to capture VIP registrations and build your prospect list. A temporary landing page is a great (and critical) precursor to a full-blown website – and usually fairly easy and inexpensive to set up. You must have an online presence from the earliest possible stage. People will see your signs, your emails, and your ads... and then go online to find you. Be there!

Email marketing. Create a series of emails to your entire customer database, informing them about the upcoming community, for their own information and to share with their friends, relatives, and contacts.

Other marketing. Create and place "coming soon" ads in appropriate media (traditional and online), hyping the soon-to-open development and creating early buzz for the project.

Social media. Use your existing social platforms, or create new ones to do posts about the upcoming development. We usually recommend Facebook and Twitter for starters, with other sites like Pinterest, Instagram and Houzz to be used later, as more images (renderings, model home photos, etc.) are available. Paid advertising, too, is growing in reach and response. For instance, directed ads in Facebook's Newsfeed can be targeted to those who have searched or used keywords that align with your business or your particular community.

Digital advertising. There are so many digital advertising opportunities

today that cannot and should not be overlooked, from Search Engine Marketing (SEM) to relevant real estate websites (BDX, Zillow Group, etc.). Mobile advertising is key! It has been estimated that 75% percent of Internet users will be on mobile. Critical internet strategy options include:

- **Geo-Fencing:** Target customers around their physical location, a competitor's location, or places where they're likely to be
- **Geo-Targeting:** Deliver ads to consumers and potential homebuyers within a specific geography—down to the zip code level
- **Site Retargeting:** Advertise to people who have already visited your company or community website or landing page by placing ads on the webpages they visit after leaving your site
- **Search Retargeting:** Deliver ads to people when they use search terms that pertain to your community within the web pages they're browsing.

Content marketing: Publish content about your project and the surrounding area on blogs – your own, of course, but other relevant sites, as well, as a guest author. Share these posts on your social media platforms. Use interesting topics, beautiful photography, engaging thoughts... connect people with people through your blog posts.

And, lastly, follow-up, follow-up and follow-up again! Prospects have lots of choices, resources and referrals today. The more you continue to be top-of-mind, the more your project will stand out from the competition.

About the Author:

Founded in 1949 and acquired in 1986 by WPP, the world's largest communications services group, Pace is a full-service branding and marketing agency with a venerable track record of innovation in developing successful campaigns for residential and commercial real estate clients. Holly Kingsley joined Pace in 1997 and today serves as Chief Operations Officer, responsible for overseeing key agency operations and logistics, supervising strategic planning, and providing senior-level management for many of the agency's key clients.

DIMENSIONS

SELF-DRIVING CARS

Continued from page 4

more continual use and a reduction of vehicles per family, much less parking space would be needed.

Technology aside, our society is slowly shifting its values away from vehicle ownership and suburban or rural lifestyles. In 1983, more than 91% of people between the ages of 20-24 held a driver's license. By 2014, that number had dropped to approximately 77% and shows little sign of recovering. At the same time, cities are growing faster than the country as a whole. The Pew Research Center found that 48% of Americans would prefer walkable urban areas instead of the suburbs. Notably, more people have used public transportation in the past few years than in the past six decades.

For all of these reasons, there have been calls on developers to strategically design a "new generation" of parking structures. Engineers tasked with designing garages must now consider the flexibility of facilities ten, twenty and thirty years following construction. Architects and designers are more frequently being challenged to design urban parking garages with the "good bones" necessary for re-purposing in the future. The most significant design change – one that would yield maximum flexibility but also be the most costly – would be doing away with sloped garages. Exterior spiral ramps or elevator lifts, for example, would surely enable developers to re-purpose facilities with the greatest flexibility. However, the cost of eliminating tried-and-true sloped ramps, which serve as the means of traversing parking levels and also add additional surface area for parking, will likely prove uneconomical for many projects.

While the experts agree that parking demand is going to decline, it is difficult to predict how slowly or rapidly that decline will occur. We simply cannot determine at this time the parking demands of society thirty years into the future. With conservative planning and

prudent engineering, however, parking facility developers may be able to avoid making debt service payments decades from now on an underutilized parking facility.

NEW JERSEY SUPREME COURT REVERSES BAN

Continued from page 8

single digital billboard. The court found a considerable amount of available literature would permit the township to adopt appropriate regulations for digital billboards, and it noted that the NJDOT had, in fact, promulgated regulations on the very issue. The court likewise dismissed the public safety debate because the "record is also bereft of any examination of the safety impact of the installation of three static billboards." It found that "the numbers standing alone do not lead inexorably to the conclusion that the installation of a single digital billboard in the Township will exacerbate the accident rate. ... In short, bare numbers do not carry the public safety debate." The court concluded that "in the fact of a record founded only on unsupported suppositions, fears, and concerns, we need not address whether the course taken by the governing body is reasonable under all of the circumstances."

In ultimately reversing the Appellate Division and holding that the ordinance was unconstitutional, the court stated that "a governing body seeking to restrict expression cannot simply invoke those interests with scant factual support informing its decision-making and expect to withstand a constitutional challenge. In the end, the record provides no explanation of the qualitative differences between three static billboards and a single digital billboard. The record also belies the assertion that no standards existed to address aesthetic and public safety concerns."

Most zoning and development applications for development do not involve free-speech issues. However, municipalities should take note that mere window dressing in support of protecting aesthetics and public safety

does not pass muster as protecting "substantial" government interests absent at least a modicum of support for the invoked interest. Here, there was a virtual disconnect between the ordinance and common sense, because the township presented no empirical data suggesting that digital billboards cause more accidents than static billboards, or that they are less aesthetically pleasing than static billboards, particularly when located in the township's light manufacturing zone and adjacent to a major interstate highway.

SUPREME COURT RELEASES OPINION ON "GAP YEAR"

Continued from page 3

have wrongfully failed to propose a rezoning of the objecting builders' sites. The Supreme Court's gap year opinion should boost the prospects of builders in that category.

Even when builders do not have a current interest in providing affordable housing in given municipalities, proposed settlements should still be reviewed in towns in which builders have an interest in properties. Certain settlements are proposing terms that are unfavorable to property owners generally, such as "growth share" type ordinances that impose affordable housing obligations on all properties without providing any density bonuses or other compensatory benefits. Such terms may be unlawful. Public notices of proposed settlements must be carefully reviewed, and vigilance is required to guard against the application of such ordinances to properties of interest.

Conclusion

The Supreme Court's gap year opinion provides good news to builders and other affordable housing advocates. It removes a significant element of uncertainty that has plagued the process for well over a year. The trial courts must still manage the Mount Laurel cases to conclusion, but the gap year opinion will no doubt bring about more settlements and speedier resolution of the cases involving towns that choose not to settle.

THE RISKS TO ARCHITECTS AND ENGINEERS

Continued from page 7

the construction, being brought into the lawsuit. This includes all subcontractors, suppliers, engineers, and architects. When engineers or architects are brought into the claim, an “affidavit of merit” is needed from another engineer or architect saying that the “standard of care” was not met. This affidavit typically does not provide enough detail to identify the basis for the claim since it only claims that the “standard of care” has been violated.

So, what happens next to the architect or engineer? The protection that design professionals have against claims such as these are their Errors and Omissions insurance. When a claim is made against the design professional it is reported to their insurance company. This immediately triggers the collection of the policy’s insurance deductible to be used for the architect or engineer’s legal defense.

The next step is the need to retain an expert to refute the claim against the engineer or architect even if the claim has not yet even been clarified. In many cases the court system will require pretrial mediation in an attempt to settle the claim without going to trial. As all of this is going on, more and more legal and expert fees are being accumulated by all parties to the claim.

When the claims are against an entity that is only involved in a minor part of the construction, it is no longer about whether your services met the standard of care and more about the cost of defense and the cost to go to trial. The attorneys know this, the mediators know this, and the system allows this. Significant funds are required to objectively evaluate a claim.

I will describe two examples to show how the system works. A number of years ago I was an expert in a construction defect claim that was going through the mediation process. Legal counsel told me that he was going to demand \$50,000

from the contractor who built the tennis courts. My response was that there is nothing wrong with the tennis court. The response was that the contractor had two choices, pay \$50,000 to get out now or \$100,000 to prove that he was innocent.

The next example involves an engineer providing third party inspections during construction. The engineer performed five days of inspections over a two and a half year construction period. The builder was sued for multiple construction defects. The engineer was brought into the claim and was able to show by his minimal number of inspections that the defects could not have been a result of five inspections over two and a half years. The result after the insurance company invested over \$100,000 in defense costs was a decision to settle the claim for \$325,000 since it would cost less to settle than the anticipated defense costs.

So, why don’t engineers and architects want to provide inspection services for this type of project?

The cost of their Errors and Omissions insurance (if still offered) can become cost prohibitive and adversely affect their ability to operate. If engineers and architects cannot provide these services to builders, construction defects are likely to rise. Builders may also lose premium advantages given on their liability policies for having third party inspections during construction. The only solution is for builders to work with their engineers and architects to provide full indemnification against third party claims and pay all defense costs. Unfortunately, most builders will not provide this.

To sum this up, in the past many engineering and architectural firms would provide risk management inspection services during construction, now because of the risks involved they will not. A while back I met with a large public builder that my firm was providing third party inspections for and asked if they would provide indemnification

protection. I was told no. I immediately told them that I would no longer provide these services. On the way out, the in house attorney for the builder told me that my decision was a good strategic move and that my firm would make more money as a defense expert when they build it wrong and are sued. Is this really the best way to serve the industry?

AN INTERVIEW WITH NJBA PRESIDENT

Continued from page 2

residents. I have served as Chair of the Affordable Housing Committee at NJBA for about two years now and it has been a long arduous process to get to this point. I’d like to thank the many outstanding brilliant minds on the Committee who have done a tremendous job and continue to represent our interests. There is still some uncertainty concerning what local vicinages may do with their cases but having clarity that the “Gap Year” obligations must be met is a major step towards addressing our lack of affordable housing in NJ.

We need to recognize that the largest expense for most individuals is their housing cost. The effects of globalization, economic factors in NJ and our land use patterns have left a large portion of the population without realistic housing options. In the 1980s and 90s, we thought that the suburban template was here to stay but that is radically changing. NJ has not done enough to address that change. Increasingly people are looking at new housing options and densities that will reduce their housing costs. If we don’t provide affordable housing options in NJ, employers in our state will be the next to suffer as residents relocate to lower cost markets. Making land use patterns in NJ more efficient will enable NJ to adapt to the new global economy. The ruling on the “Gap Year” obligations is a step in helping us to correct the housing affordability issue in NJ.

CHALLENGES AND OPPORTUNITIES FACING THE FUTURE OF OUR CITIES

Continued from page 10

problems caused by a policy clash between legislators passing un-prioritized legislation which promotes well intended but conflicting objectives. An example of such conflicting objectives would be incentivizing urban redevelopment versus creating jobs for unionized construction workers. Both of these policies have a high priority which forces legislators to try and accomplish both and use legislation to connect them. In New Jersey, local financing subsidies like real estate tax abatements and PILOTS (Payments in Lieu of Taxes), which have the intention of fostering redevelopment of former industrial areas, typically come with a prevailing wage (Union) requirement thus diluting the beneficial impact of the incentive by about 30 percent to those who use it and sometimes discourage potential new entrants to the market. Similarly, New Jersey's Brownfield Reimbursement Program, whose objective is to incentivize the remediation and redevelopment of historically environmentally impacted industrial property also comes with the prevailing wage requirement. By failing to prioritize policies and using legislation to attempt to accomplish conflicting objectives, you end up achieving less of both of the objectives.

Another significant challenge urban redevelopment faces is the availability of affordable workforce housing in up and coming neighborhoods. As re-development in our inner cities accelerates and existing property values escalate, the incentive for the private sector to preserve affordable housing diminishes.

Affordable housing policies often clash with redevelopment policy when the cost of building new affordable housing is placed on the development community without an offsetting compensating incentive like density bonuses, property tax relief, or expedited approvals and permitting. Another challenge that is

bias often referred to as the "Nimby" (Not In My Back Yard) mentality. This bias is well documented in suburban and rural communities, it is now beginning to show up in urban areas where residents of "high-end neighborhoods" do not want to preserve the existing affordable housing stock or admit new affordable housing into their midst because that will introduce a "bad element" of the population into their otherwise upscale neighborhoods.

Producing new affordable housing traditionally has only been accomplished through government incentives, like low-cost financing, vouchers (like the HUD Section 8 voucher program), and 4 percent and 9 percent Low Income Housing Tax Credits which are in short supply. Additionally, some become an annuitized and increasing burden on the private tax-paying sector over time.

Check the next edition of *Dimensions* to read Part II of this article which will further examine how land use politics, infrastructure and more, affect development.

"Reprinted from *Real Estate Issues* with the permission of George Vallone - the author, and The Counselors of Real Estate of the National Association of REALTORS®, Vol. 41, No. 1, 2016."

PROPERTY TAX APPEALS

Continued from page 11

no weight to the appraiser's opinion and affirmed the assessment.

In *Barnes & Noble #2664 v. Township of Evesham*, the court struck the testimony of the township's appraiser regarding his sales approach because he relied on sales of buildings subject to existing leases and did not analyze the leases or the impact of those leases on the sales price. The court also affirmed its preference of the income approach to value of income producing property.

Why should property owners care about Tax Court decisions?

The tax appeal landscape is always changing. Certainly market conditions contribute to these changes as do the opinions by the Tax Court. Property owners considering filing a tax appeal should ensure that the professionals they hire are keeping abreast of these changes so that they may determine whether an appeal is even warranted and, if so, are able to present the strongest case possible.