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DIMENSIONS

Newsletter of the New Jersey Builders Association

IN THIS ISSUE

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 the realization of the American Dream. NJBA serves as a resource for its members through continuing education and advocacy. The NJBA and its members strive for a better, greener, more affordable housing market. Additional information is available at www.njba.org.

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 Padraig Ryan at pryan@njba.org.

A Message From NJBA President Corey Wescoe

Dear NJBA Members,

I am honored to have this opportunity to address the membership in my first Dimensions message as President of NJBA and look forward to leading our organization as we fight for fair and balanced, pro-growth housing policies in New Jersey.

As Vice President of Acquisitions for PulteGroup, Northeast Corridor Division and an officer and member of NJBA, it has been a privilege to get to know and work with so many upstanding men and women who share our passion and commitment for the homebuilding industry.

Over the next year, I will continue the work of Past President Tom Troy whose mission was to provide all New Jersey residents a safe, decent and affordable place to live. Given the state's stringent regulatory environment, this is no easy task; NJBA has historically worked in Trenton to combat burdensome and onerous regulations that would exacerbate New Jersey's affordability crisis. I look forward to working with law makers to strengthen our industry and promote housing for all.

My priority as NJBA President as we further spur economic growth is to address the unprecedented delays in building code plan review and inspections that are increasing costs and adding to the state's reputation as unfriendly to business. We are working with state legislators to create a building code approval that will hasten building code reviews and inspections by creating an expansive program that allows more options for inspection and plan review.

Proposed legislation, A4788 (Karabinchak), would establish an alternate expedited inspection process under the State Uniform Construction Code Act where the applicant for a construction permit may opt to pay a premium fee to have inspections performed on an expedited basis. The bill has broad support in the legislature, and NJBA is working with law makers to refine certain aspects of the proposal. By addressing these costly delays, NJBA members will be able to conduct business more efficiently, and homeowners and home buyers will no longer be saddled with the unrest of uncertainty.

Additionally, we are working on reforms to repurpose properties including many large suburban professional office parks and regional shopping malls that have become underutilized, vacant, obsolete and difficult to market in today's world, and as a result, they have become known as "stranded assets." Legislation supported by NJBA, S1583 (Cruz-Perez) & A1700 (Dancer), which specifies that vacant shopping malls and office parks are eligible as designation areas in need of redevelopment is approaching the end of the legislative process, and we are encouraging officials to get it on the Governor's desk by the end of the month.

On the regulatory front, we also want to ensure a reasonable regulatory environment and members have been heavily engaged in several crucial issues over the past several months, including a stakeholders' process developing reforms to the Site Remediation Reform Act, known as SRRA 2.0, rulemaking concerning revisions to the Stormwater Management Rules, and a rule proposal expanding Category One Waters designations.

Since last July, NJBA has been engaged in SRRA 2.0 stakeholders' meetings, which focused on potential changes to the program on issues such as green and sustainable remediation, Direct Oversight, Financial Assurance, Remediation Funding Source, surety bonds, LSRP of record requirements, enhancing public notification and access to files, and notification of discharges, among others. This stakeholders process resulted in the introduction of legislation, S3682 (Smith) & A5293 (Pinkin), which makes various changes to SRRA. Critically, numerous harmful proposals that were considered during the stakeholders' process were not included in the most recent drafts of the legislation, which recently passed the Assembly and Senate Environment Committees. NJBA will be engaged to ensure that brownfield redevelopment is not encumbered by changes to the site remediation or brownfield laws.

NJBA is also engaged in rulemaking concerning further revisions to the Stormwater Management Rules. These revisions are being considered to compliment and expand on the recent Green Infrastructure Stormwater Rule proposal that is expected to be formally adopted by DEP at the end of 2019. Stakeholders are currently evaluating potentially problematic proposals including adopting a new rainfall rate and eliminating the redevelopment exemption among other topics.

Earlier this month, NJBA submitted comments in response to DEP's proposal to expand Category One Waters designation to an additional 749 river miles in NJ. NJBA and other industry groups were extremely concerned with the lack of stakeholders and scientific justification for the proposed extensions, which

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If You Don't Recognize Your Tenant, It May Be Time To Revisit The Assignment Provision In Your Lease

By Donna A. McBarron, Esq.

A recent Appellate Division decision serves as a strong reminder to landlords to make sure that the tenant they sign on with remains the tenant on the lease, unless the landlord otherwise consents to the change. In Berk and Berk at Cherry Tree, LLC v. Nelson, Brown, Hamilton & Krekstein, LLC et al., Docket No. A-1878-17T3 (N.J. App. Div. 2019), a landlord learned this lesson the hard way.

In the Berk case, the landlord signed a five-year and five-month lease with a law firm commencing on June 1, 2011. The tenant was a limited liability company (LLC), and the landlord did not obtain any personal guarantees. Through a series of departures from the law firm, what was originally "ABCD, LLC" morphed into "AXYZ, LLC." In other words, of the four named attorneys comprising the original LLC entity which signed the lease, only one named attorney remained. In 2015, AXYZ, LLC ceased operations and stopped paying rent.

Without an operating LLC to sue for the unpaid rent, and having failed to obtain personal guarantees from any of the lawyers, the landlord tried to assert a number of claims against some of the original members of ABCD, LLC, but to no avail. The Berk case goes on to evaluate - and reject - each of the legal theories advanced by the landlord, but the landlord ultimately lost the case (and the promised rental stream).

What could this landlord have done differently to protect itself? The first obvious answer would have been to obtain personal guarantees. The less obvious answer was that this landlord failed to include a strong assignment provision in its lease or, if one existed, it failed to utilize that provision to its fullest.

In New Jersey, a lease can be freely assigned (or subleased) unless there is specific language in the lease prohibiting such assignment or sublease. Typically, leases will provide that an assignment or sublease cannot occur without landlord's consent. Sophisticated tenants will look to carve out exceptions to that rule and limit the landlord's discretion in rejecting a request. But landlords should still aim to retain as much control as possible over who their tenant is.

Aside from requiring tenants to seek consent from the landlord on an assignment, "assignment" must also be broadly defined. It should not just cover the situation where P Corp. is assigning the lease to Q Corp. What if P Corp. is still called P Corp., but all of the owners have changed? A carefully drafted assignment provision should include assignments that occur by operation of law, merger, consolidation, reorganization or transfer of business of operations. It should include direct and indirect assignments, as well as voluntary or involuntary assignments. It should include any change in ownership, or at least changes in ownership of 25% or more. The more broadly assignment is defined, the less chance a landlord will end up with a tenant it does not recognize because its consent was not required on that type of assignment.

The Berk case did not discuss whether the lease in question had an assignment provision or whether the landlord's consent was sought or obtained. If a strong assignment provision had been included and utilized, the result of the Berk case could have been very different. If consent had been required and requested, the landlord could have done its due diligence on X, Y and Z who were to replace B, C and D. If the landlord was not satisfied that the new entity had the same or better creditworthiness than the original LLC, the landlord could have said no. Better yet, this would have been a perfect opportunity to revisit the lack of personal guarantees, and the consent could have been conditioned on the receipt of personal guarantees or some other additional security or consideration.

There are lessons to be learned from Berk. Those fond of lawyer jokes may conclude that landlords should simply avoid leasing to lawyers. Perhaps the better lesson to glean from Berk is that landlords should have their leases reviewed by a competent, commercial leasing attorney who will ensure, among other things, that the tenant so thoroughly vetted by the landlord isn't replaced with an X, Y or Z.

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IRS Makes QOZs Compelling But You Have To Mine The Regulations

By David S. Neufeld, Esq.

With the enactment of the 2017 tax law, the country was introduced to Qualified Opportunity Zones, a sweeping program that can yield massive tax benefits to investors and provide economic revitalization to areas that have long been on the losing end of the economy. While Congress provided broad brush principals, the Treasury Department has been filling in the gaps with extensive regulations.

Fundamental QOZ Framework

An individual or entity with capital gains realized after 2017 and before 2027 from any source (e.g. the sale of stock, not just from real estate) can defer paying tax on that capital gain to the extent the gain amount is invested in a Qualified Opportunity Fund (QOF) within 180 days of realization.

That gain can be deferred until as late as the end of 2026 as long as the funds remain invested in the QOF. Depending on the length of that investment period, 10% (for a five year investment) or 15% (for a seven year investment) of the deferred gain can, in fact, be abated completely. Under current law, to achieve the 15% abatement the investment must be made by December 31, 2019, and to achieve the 10% abatement the investment must be made by December 31, 2021. In addition, any tax on the gain from the new investment in the QOF can be entirely abated if the new investment in the QOF is held at least ten years.

To be a QOF, 90% of the fund's assets must be invested in tangible property (real or personal) ("Qualified Opportunity Zone Business Property") or business("Qualified Opportunity Zone Business"), located within certain specified zones, called Qualified Opportunity Zones ("QOZ"). These QOZs are economically disadvantaged census tracts designated by the governors of each state and, with some limitations, in contiguous census tracts. There are 169 zones in New Jersey.

Surprises in the Proposed Regulations

Here are a few of the most interesting and surprising results of regulations proposed by Treasury:

Qualified Opportunity Zone Business Property

While in many cases when a QOF buys an existing structure in the QOZ it must expend an amount on improvements at least equal to the amount it spent to acquire the property.Vacant buildings within the QOZ may present an exception. As long as it has been vacant and has not been depreciated by the seller for at least five years a QOF can acquire it and is not required to invest an additional amount that equals or exceeds its basis in the vacant building.

In a couple of instances Treasury, with a tip of the hat to reality, acknowledges that government inaction (zoning boards, for instance) can delay projects, and loosens the time required to permit projects to achieve the tax benefits.

QOZ Business Property can be either owned or leased. There are several rules concerning leased property, including one rule that provides that if QOZ Business Property is leased from a related person the lessee must also acquire other QOZ Business Property with a value that equals or exceeds the value of the leased property (using a present value calculation) within no more than 30-months from the date the lessee takes possession of the leased property.

Qualified Opportunity Zone Business

A QOZ Business is a trade or business in which 70% of the tangible property owned or leased by it is QOZ Business Property (among other rules) and is not the type of business contained in a list of prohibited ventures.

The prohibited businesses are golf courses, country clubs, massage parlors, hot tub facilities, suntan facilities, gambling establishments, and stores that sell alcohol for off premises consumption. Nothing more, nothing less. With states now coming on line with both medical and recreational marijuana it appears from this list that a marijuana facility of any type would not be prohibited by this list. It is important to note that this list is not a creature of regulation but instead derived by statute; it would therefore take an act of Congress to change it. The IRS cannot do so on its own. For Congress to add cannabis to this list it would have to acknowledge that, notwithstanding the federal stance on marijuana, it is a legal substance under the laws of several states.

How Congress deals with this existential question will be very interesting to watch. Furthermore, an argument can be made that any legal marijuana facilities set up under the current formulation

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Indoor Air Quality: A Growing Concern

By Evan Carberry

Since the passing of the Clean Air Act in 1970 the EPA has extensively studied outdoor air quality. From this we know that exposure to outdoor air pollution is linked to a variety of negative health effects.[1] More recently, a small but growing body of work is examining indoor air quality – which makes sense when you consider that Americans spend almost 90% of their time indoors.[2] While research is still ongoing, there is mounting evidence that suggests that we should design our buildings to ensure that we have healthy indoor air. This means minimizing installing products that emit pollutants as well as installing effective exhaust systems that remove pollutants so that concentration levels do not build. Both of these are particularly important as buildings are designed to be more energy efficient and air tight.

Many products that we put into our buildings contain volatile organic compounds (VOCs). In the short-term, exposure to VOCs can cause irritation to the eyes and respiratory tract, headaches, dizziness and memory loss problems. In the long term, it can cause nausea, fatigue, damage to the liver, kidneys, and central nervous system and cancer.[3] Even the typical levels of VOCs found indoors can have adverse effects. For example, one Harvard study placed individuals in a controlled office environment. They tested cognitive function at conventional VOC levels verses those typical to green buildings where VOC content in products is actively minimized. The study found that in typical green building conditions cognitive function was 61% higher than in the conventional conditions. When they also increased ventilation cognitive function was 101% higher than in the conventional conditions.[4]

Over the past decade VOC content has become more widely reported and green building programs like LEED have normalized a framework for specifying products with reduced levels of VOCs. For projects that are not pursuing a green building certification but are still concerned with indoor air quality, the LEED indoor air quality prerequisites and credits can be used as a reference point. Furthermore, there are a variety of third-party certifications that verify chemical emittance of products. For example, a large array of carpet manufacturers offer products with GREENGUARD certification. A GREENGUARD Gold carpet has been verified as low-emitting. Lastly, the EPA has developed the Indoor airPLUS program which allows builders to demonstrate that they have built a home with healthy indoor air quality without going through a more exhaustive program like LEED.

In addition to VOCs in our homes, we also must consider pollutants from cooking. In homes that use gas appliances we have to be concerned with the open combustion of gas. Additionally, in all homes we have to be concerned with the controlled combustion of the food being cooked. Both of these instances are known to cause high levels of indoor air pollutants, specifically particulate matter (PM).[5,6] PM is a complex mixture of small particles made up of things like acids, organic chemicals, metals and dust. PM generated from cooking can be dangerous because it is small enough to pass through the nose and throat and lodge in the lungs which over a long period of time can increase the risk for serious health issues.[7,8]

Pollutants from cooking can be removed from the home through well designed kitchen exhaust systems, though often kitchens are designed to be ventilated through a nearby window. Naturally ventilating the kitchen does not allow the pollutants to be removed as reliably or as rapidly as needed. The best option is to provide a well-designed range hood that covers the entire stove-top and with an air flow rate as recommended by the Home Ventilating Institute.[9] Ideally the fan will operate efficiently and quietly, such as those that are ENERGY STAR certified.

As previously mentioned, programs like LEED are already taking strides to address indoor air quality. In the newer versions of LEED, the credits have become stricter and reflect the more detailed research that is being published. While it seems there is still some time before indoor air quality is regulated in New Jersey code, there is precedent in California which has regulated indoor air quality in various ways through their health and safety codes. Regardless, we will be closely following the emerging research and regulations that are developed throughout the country.

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The Real Impact, Liability And Cost Of NJDEP's New Groundwater Mounding Requirements: What Every Developer Should Know Before Their Next Major Project

By Wayne J. Ingram, P.E., P.L.S., P.P., C.M.E

"My basement never flooded until that development next door was constructed". The common complaint we've all heard at some point in our careers. Good news- your engineer will now be able to prove that isn't the case. Unfortunately, this proof comes with a cost, literally.

The NJDEP is in the process of adopting a requirement for the analysis of groundwater mounding within infiltration basins designed for major projects as part of the Groundwater Table Hydraulic Impact Assessment Guide for Infiltration BMPs. Essentially, Groundwater Mounding is the rise in the groundwater table that occurs in the vicinity of an infiltration structure due to the introduction of a concentrated amount of water during storm events. That mounding is highest at the source of the introduction (the basin) and, based on a variety of factors, dissipates the further away from the source you go. Currently, the required analysis vaguely necessitates that the project engineer provides an analysis to ensure there won't be any negative impacts from groundwater mounding. The intended program to assess mounding is known as the *Hantush Spreadsheet*, though other complex detailed programs exist.

The impacts of this requirement will create varying levels of cost and liability for both the design engineer and the developer. The issue of cost is one that will take the "pay a little now or pay a lot later" approach. A well thought out stormwater design, which, while costing more, will ultimately save significantly in construction costs. On the surface, the *Hantush Spreadsheet* requires very little time and data to produce results and requires very little beyond the normal soils and basin design data that is usually part of a site stormwater design. The results of this minimalistic approach, however, can lead to enlarged (or additional) basins, more earthwork, or more drainage to ensure that the mounding results don't show any negative impacts. This potential is amplified in areas outside the coastal regions where consolidated layers are more prevalent and are given overly restrictive default values.

The spreadsheet lacks the ability to factor in slopes and grades as you extend away from the basin as does not account for fluctuations in the estimated seasonal high water table in areas beyond the basin. The engineer must take the outputs of the spreadsheet, and manually plot them against topographic maps to provide evidence that the mounding is not creating negative impacts. Without additional data beyond the basin limits, it becomes difficult to truly assess those impacts. Additionally, it becomes more important to know what the elevations of the lowest levels of adjacent structures are to ensure that mounding will not create negative impacts to those structures. Here lies the increased liability. The engineer is being asked through this analysis to essentially ensure and certify that no such impacts will occur. However, the "first" time that basement does flood, it could be blamed upon the developer and his professionals. Property owners adjacent to a new development usually won't admit that their basement flooded prior to the development.

The factors of safety are welcomed in that they provide an added level of protection from this concern. However, in its current state and without the added geotechnical data to back up the conclusions, the factor of safety is such that it has the potential to create a significant amount of additional construction expense in situations that, in reality, pose no real impact.

A more forward-thinking approach would be to involve more engineering leading up to the spreadsheet. A thorough geotechnical engineering investigation can provide the additional data that will more easily demonstrate the acceptability of a stormwater design without the need for further factors of safety, for which the spreadsheet and its required inputs already have many. Performing additional permeability tests and at varying depths as well as performing exploratory excavations at the site perimeter (and beyond if feasible) can provide the information necessary to create a more accurate depiction of the mounding and allow for modification of some of the default spreadsheet

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Controlled Insurance Programs On Construction Projects

By Edgar Alden Dunham, IV Esq.

Controlled insurance programs, sometimes called "WRAPs" or "CIPs," have been around for years. But while their use in the past was generally limited to very large projects, now they are being utilized much more widely on projects of much more moderate size. The purpose of this article is to acquaint developers and contractors who have not had any experience with a WRAP or a CIP with what to expect if they encounter one.

CIP stands for controlled insurance program. CIPs are generally project-specific insurance programs typically combining general liability and workers compensation insurance. The two types of CIPS are OCIPs and CCIPs. A CIP can be owner controlled, in which case it is called an OCIP, or it can be contractor controlled, in which case it is called a CCIP. The purpose of the CIP, in either case, is to lower the cost of a project by avoiding the expense of each participant bringing the cost of its own insurance to its price to do the work.

Under a typical CIP, the owner, the general contractor, and the participating subcontractors will all be covered under the CIP. At the same time, those covered will not be covered under their regular insurance policies for work on the project covered by the CIP, thus entitling the participants to reductions on their regular policies. Because they will not have the normal expense of their regular insurance, the bids or negotiated prices from the general contractor and the participating subcontractors will all be covered under the CIP. At the same time, those covered will not be covered under their regular insurance policies

for work on the project covered by the CIP, thus entitling the participants to reductions on their regular policies. Because they will not have the normal expense of their regular insurance, the bids or negotiated prices from the general contractor and the participating subcontractors will be correspondingly lower than they would otherwise be if those entities were supplying their own insurance. By combining all of the coverage, economies of scale lower the ultimate cost of the premium and reduce the likelihood of litigation over insurance coverage. The lower bids and the lower ultimate cost of the insurance result in a lower overall cost to the project.

CIPs are high-deductible plans, with a loss reserve based on the estimated number of likely claims. Premiums can change over the life of a project depending upon the number of persons actually working and other similar factors. The loss reserve is the maximum amount the purchaser can be held liable for. The estimate for the loss reserve takes into account the size and duration of the project as well as its type and the claims history of the parties involved. If, at the end of a project, the dollar value of the claims on the project is less than what was estimated and there is an amount left in the loss reserve (the "savings"), it is returned to the party that funded the loss reserve. Because an emphasis on safe construction practices can substantially lower the likelihood of accidents and injuries, and the general contractor or construction manager is typically in the best position to establish and enforce the use of safe construction practices on a project, it is not unusual to have a savings bonus arrangement, where the savings are divided between the owner and the party implementing the CIP in order to incentivize safe construction practices.

The advantage of a CIP is the ultimate reduction in overall cost to the owner, which is achieved through the lower bids for work that do not include separate insurance costs for each bidder and the economies of scale achieved by having all of the insurance under one policy. A secondary benefit is fewer legal battles over whose carrier is covering any personal injury or worker compensation claims that may arise. Finally, projects that include a bonus provision will likely have fewer injuries because of the incentive to avoid claims.

The disadvantage of a CIP, particularly to a subcontractor, is the administrative burden. Subcontractors need to alert their own carriers that they will not be covered under their regular policies when working on a CIP project. There are usually other administrative hurdles as well. Typically, contractors' workers may have to take drug tests and register with a CIP administrator before being permitted on the job. They may be required to take physicals or even be

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Sealing The Envelope

By Scott Lackey

Building in coastal areas has its challenges. The methodology is very different from building inland and requires special attention to detail particularly when it comes to the building envelope. As builders, you understand that the foundation and framing systems are the backbone of a building. Together, they provide the strength and support to both dead and live loads of the structure. This is often the builder's primary focus during construction due to the local municipal permit inspection requirements. While this aspect is very important, it is equally important to focus on the building envelope and good building envelope performance.

The building envelope is made up of many parts including but not limited to; fenestrations such as doors, windows, skylights and vents. It encompasses wall coverings, roof shingles and veneers, flashings and caulking, as well as, floor systems for raised or open foundation structures. These components provide protection for the structural elements, internal mechanical systems and interior finishes of a building from weather. A failure, breach, poor installation or poor performance to any part of the building envelope may compromise the envelope's ability to protect the structure and its internal components.

Weather is the predominant hazard to consider when building in coastal areas. The building envelope is continually exposed to excessive wind speeds, wind driven rain, salt laden air and corrosion. These conditions can break down building envelope's components allowing water to infiltrate through small openings and fenestrations. The long-term effects of weather infiltration to the internal building structure may compromise the structure's load bearing components.

Rushed production, undertrained workers improper and/or lower quality materials also have a significant impact on the building envelope's performance and its ability to protect the structure. These conditions provide the opportunity for the entry of elements. In many cases, moisture breaches go un-noticed until such time that drywall, insulation, and interior finishes are so severely saturated, moisture finally reveals itself as stains, mold, or other infestations leading to structural instability and failure.

Complacency is not an option when it comes to the building envelope. Focus on the day to day construction practices for the assurance of good workmanship, quality materials and proper installation. Building envelope components containing water-soluble adhesives, paper-based/wood-based materials that are affected by water and lose integrity are not recommended. Using proper materials, policing the installation, exercising quality control and performing inspections are very effective for good building envelope performance.

Working with an experienced design professional is always a good idea. Their knowledge and expertise will provide the pertinent structural aspects of the building and will also provide specific details regarding the building envelope's materials and installation. Appropriate building materials and proper installation are essential. Pressure treated or natural durable wood products are typically preferred. Concrete masonry units should be reinforced and fully grouted. Structural steel should be coated to resist corrosion. Insulation may be plastics, closed cell foam or synthetics. Exterior sheathing, siding and subflooring should be marine grade or treated. Vinyl or cement board siding is preferred.

All exterior materials should be moisture resistant. Proper installation requires attention to detail while following the manufacturer's installation recommendations. Moisture resistance materials along with proper installation can greatly extend the life of the building envelope.

All building envelopes require routine maintenance and repair. Weather conditions affect all building materials. Wet and dry cycles affect concrete, masonry, brick, vinyl siding, flashings, paint, seals and sealants. Heating and cooling cycles may cause building envelope components to expand and contract. Freeze/thaw cycles and ultraviolet rays have a significant impact on seals and sealants and can affect the performance of painted materials. To assure good building envelope performance, annual inspections should be performed, and failed products should be removed and replaced. The envelope must remain sound and capable of minimizing weather penetration for good performance and requires your diligence in sealing the envelope.

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Newly Proposed Opportunity Zone Regulations Further Encourage Redevelopment, New Business Growth And Leasing Opportunities

By Matthew J. Schiller

On April 17, 2019, the IRS released its second round of proposed regulations concerning the Opportunity Zone program (the OZ Program) created under the Tax Cuts and Jobs Act of 2017. The new regulations supplement and amend the October 2018 proposed regulations and guidance and provide substantial additional guidance concerning development, operational and leasing matters under the OZ Program.

To date, most of the attention concerning the OZ Program has focused on investing capital gains through Qualified Opportunity Funds (QOFs) in new developments and redevelopment projects. While incentivizing new development in Opportunity Zones (OZs) is a key aim of the OZ Program, it is also critical to remember that the growth of new businesses within OZs is an equally important goal that can benefit real estate operators. For example, Qualified Opportunity Zone Businesses (QOZBs) can be attractive tenants at new or existing projects since they will likely have lease terms of 10 years or more in order for the QOZB to maximize the OZ Program's tax incentives. Moreover, businesses in the "active conduct or trade" of leasing and operating real property may qualify as QOZBs. Accordingly, the OZ Program will have a broader impact on the real estate industry than simply serving as a new means to raise capital for real estate developments.

The initial proposed regulations provide critical guidance as to how QOFs and QOZBs can satisfy the "substantial improvement" test upon acquiring previously improved property (i.e., in the case of previously improved real estate, double the basis of the improvements on the property within a 30 month period). As cash does not constitute QOZ Property, QOZBs are given a 31 month "working capital safe harbor" under the October 2018 regulations to deploy sufficient capital to satisfy the substantial improvement test. The newly proposed regulations modify these requirements by excluding buildings that have been vacant for five years or more from the substantial improvement test. Thus, the redevelopment of qualified vacant properties will be considered an "original use" onsite. Moreover, the new regulations toll the 31-month working capital safe harbor for delays caused by government inaction (provided that a complete zoning application is submitted in a timely manner prior to the expiration of the safe harbor period). Thus, the new regulations should ease concerns that qualified redevelopment projects in New Jersey can comply with the timing requirements of the OZ Program.

The newly proposed regulations also provide significant guidance as to how QOZBs can operate and lease property in OZs.

For leased property to constitute QOZ Property, it must simply be subject to a lease (i) entered into after December 31, 2017, and (ii) on market terms, and need not satisfy the substantial improvement or original use test. Moreover, qualified leases between related parties can now potentially constitute QOZ Property. This change is critical because parties who owned real estate in OZs prior to December 31, 2017 can now potentially operate their own new QOF or QOZB on their property (which was previously prohibited).

QOZBs must generate at least 50% of their gross income within an OZ. The proposed regulations provide the following three safe harbors and a facts and circumstances test to determine whether sufficient income from a QOZB is being derived within an OZ: (i) the volume of services performed within an OZ (based on hours worked), (ii) the amount paid to QOZB employees working in an OZ, and (iii) the amount of tangible property and management or operational functions performed in an OZ. By providing such guidance, owners and tenants can now better identify which kinds of operations may occur within an OZ.

QOZBs must be engaged in the active conduct of a trade or business within the OZ. The new regulations provide that the ownership and operation (including leasing) of real property used in a trade or business has been deemed to be an active conduct of a trade or business. Accordingly, new real estate businesses may constitute QOZBs, however be cautioned that merely entering into a triple-net lease and/or holding land for investment purposes may not qualify.

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New Public Access Law: A Codification Of The Public Trust Doctrine?

By Steven M. Dalton, Esq.

Summer is upon us and beach access issues are once again in the news. Senate Bill 1074, referred to as the public trust doctrine / public access law, was signed by the Governor on May 3, 2019. The law requires the New Jersey Department of Environmental Protection ("DEP") to address public access in connection with permitting decisions consistent with the public trust doctrine, but whether the law is a complete codification of the doctrine, or something less than that, is debatable.

The public trust doctrine is a common law doctrine tracing back to English common law and Roman civil law that has long been recognized by New Jersey. Arnold v. Mundy, 6 N.J.L. 1 (Sup. Ct. 1821). It recognizes that the State "holds ownership, dominion and sovereignty over tidally-flowed lands in trust for the people," Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296 (1972), and the "public has a right to use the land below the mean average high water mark where the tide ebbs and flows." Matthews v. Bay Head Imp. Ass'n, 95 N.J. 306 (1984).

Private property rights are often at odds with the public trust doctrine. The New Jersey Supreme Court has established that public access rights extend to privately owned dry sand beaches in limited circumstances, striking a careful balance between the public's right of access to tidal waters and the rights of private property owners. The Court's decisions of Matthews and Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, Inc., 185 N.J. 40 (2005) address the public's limited rights with respect to use of privately-owned dry sand beach areas and perpendicular access to such lands. The Matthews Court noted that the question of the public's right to privately-owned dry sand beaches arises in two contexts: (1) perpendicular access across privately-owned dry sand beaches to gain access to the foreshore, and (2) access to dry sand beach for recreational use akin to use of public beaches. Public access in the context of private property is not an absolute right, but rather, at times it is appropriate for private property owners to exclude the public. The public's right of access "is satisfied so long as there is reasonable access to the sea."

The Court established factors for an individualized, case-by-case determination of whether reasonable access to water areas exists and whether private property owners may be required to accommodate public access for use of tidally-flowed waters. These factors include examination of: geographical proximity of the dry sand to the wet sand areas; availability of publicly owned upland sand area; the nature and extent of public demand; and usage of the upland by private owner. The Raleigh Court, applying the Matthews factors, held that public use of privately owned beach was reasonable. The facts demonstrated the beach had historically been open to the public for perpendicular access and unlimited use of the dry sand beach and water. Accordingly, it was unreasonable to deny access "after years" of public use.

Under these decisions, and progeny, the public trust doctrine does not create a per se right of public access across or use of privately owned lands. Rather, a fact-specific, individualized review is necessary to determine whether burdening private property with public access is reasonable. Where public access is not supported by such an individualized review, "the government may not create a right of public access without payment of just compensation." See Bubis v. Kassin, 404 N.J. Super. 105 (App. Div. 2008).

The law is being touted by DEP and others as a codification of the public trust doctrine. It does require DEP to make decisions consistent with the public trust doctrine. However, critical tenets of the doctrine are absent from the law, including a requirement in all cases involving privately owned lands to apply the Matthews reasonableness factors.

While questions exist regarding the extent of codification of the public trust doctrine, the law contains straightforward provisions that owners and developers of beachfront or other land along tidal waters should carefully consider. DEP permitting decisions must be consistent with the public trust doctrine and

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Making The Homebuying Process Simpler

By Sean Loomis

Building a house requires buyers to take time to make a lot of detailed decisions.

Carpet or hardwood flooring? Quartz or granite? Light creamy gray or dark bold? Or how about a medium grey with some blue undertones?

With all the decisions to make on the house, one thing that can help make the buying process easier for buyers is to work with a lender who is investing in providing both the guidance buyers want in the lending process and in making the process convenient through digital options and tools, such as an online application.

"Consumers today expect that most anything can be accomplished with a few taps on their mobile devices," says Perry Hilzendeger, head of Wells Fargo's Home Lending Retail division. "We're aligning the mortgage experience to that expectation."

For buyers, the mortgage experience has been changing. Lenders are looking for ways to take the work out of the process wherever possible by striving to collect more and more of the information needed for the application on customers' behalf, and they are serving customers when, where and how they want – even from the convenience of your kitchen table.

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Consider this scenario: You're a buyer who's ready to build so you pull out your phone and select a mortgage lender, such as Wells Fargo. They have an online mortgage application, and because you're already an online banking customer, you can log in and be presented your profile information, checking and savings account balances and other account information you have with the bank to help you move quickly through the application. Your application is quickly in, and you're ready to go! There were no paper documents to track down and you never left the couch.

As your customers pick their lender, here's some tips for what they should look for:

• Make sure the lender has a robust online application that allows you to easily apply and provide information.

• Just because you can do it all online, doesn't mean you want to. Shop around for a full-service provider who can offer guidance throughout the process.

• Be sure you can apply for the loan when, where and how you want. Your mortgage company should meet you where you are. If you want a face-to-face conversation with a mortgage consultant, you should be able to do that. If you want to do it all online, you should have that choice, too.

• Know that not all homebuying situations are alike, and complicated financial situations may require a little more legwork. Work with a trusted lender who will take the time to guide you through the process.

• Look for a lender who has a breadth of products and services and can offer the right options for your situation, as well as the convenience of digital tools.

"Take time to find a lender who is accessible in the way you want, committed to simplifying the experience and can guide you down the right home financing path for you," Hilzendeger said.

About the Author: *Sean Loomis is a Regional Builder Sales Consultant at Wells Fargo, supporting builders and our originators in Ohio, Pennsylvania and New Jersey. He has experience working both on the builder side of the business and on the financing side. Before joining Wells Fargo, he worked for seven years originating home loans with a concentration on new construction. He also served for 13 years in sales and marketing for a regional builder in the Midwest. He also is active in NJBA, serving as vice chairman for the master sponsor program last year and chair of the program for 2019.*

The Emerging Contaminant Challenge, How PFAS Can Impact Your Deals

By George J. Tyler, Esq., Margaret B. Carmeli, Esq. and Meredith Harris, P.E.

Per - and polyfluoroalkyl substances or "PFAS" are a broad class of ubiquitous chemicals that are being increasingly regulated as emerging contaminants. When acquiring property, purchasers should consider the potential presence of PFAS as part of their environmental due diligence to protect against future liability and make sound cost-benefit decisions. This article will provide an update on recent developments in PFAS regulation, environmental liabilities and offer some practical considerations for purchasers of real property.

PFAS include hundreds of synthetic chemicals, although laboratories only typically measure the 20-30 PFAS that are characterized by their carbon-fluorine bonds. The strong carbon -fluorine-bond and molecular structure typical of PFAS result in unique characteristics such as high-water solubility and resistance to degradation. PFAS are most commonly associated with fire-fighting foams but have been used in a wide range of applications including food packaging, stain repellants and cleaning products. PFAS are ubiquitous in the environment and the Centers for Disease Control (CDC) has asserted that most people in the U.S. have measurable amounts of PFAS in their blood.

The health effects of certain PFAS chemicals have been studied with varying conclusions. Some studies have shown that PFAS exposure may affect cognitive development, fertility, hormones, cholesterol levels, the immune system and may also increase cancer risk. Additional study is ongoing to better understand PFAS including a recent $20 million study undertaking by the Agency for Toxic Substances and Disease Registry and the CDC.

In 2016, the USEPA issued a combined health advisory for two PFAS, perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). More recently USEPA initiated actions to designate PFOA and PFOS as "hazardous substances", pursuant to the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" aka "Superfund ") as amended and develop Maximum Contaminant Levels (MCLs) under the Safe Drinking Water Act and groundwater cleanup recommendations.

New Jersey, along with several other states, made a decision not to wait for USEPA to publish standards. On April 1, 2019, NJDEP opened a sixty (60)-day public comment period for new PFOA and PFOS rules. As proposed, these rules will:

- Establish MCLs under the N.J. Safe Drinking Water Act and set groundwater quality standards for PFOA and PFOS of 0.014 ppt and 0.013 ppt.
- Require testing of private wells and newly constructed wells for perfluorononanoic acid (PFNA), PFOA, and PFOS.
- Add PFNA, PFOA, and PFOS to the permit testing requirements for Discharge to Groundwater permits.
- Add PFOA and PFOS to the list of Hazardous Substances under New Jersey's site remediation laws.

These regulatory changes will have widespread impacts on property transactions. ASTM E1527-13 defines a hazardous substance as "a substance defined as a hazardous substance pursuant to the CERCLA". Legislation has been proposed in Congress to designate PFOA and PFOS as CERCLA hazardous substances and USEPA already considers PFOA and PFOS contaminants for the purpose of responding to imminent threats to human health and the environment under CERCLA. As such, PFOA and PFOS must be considered when performing Phase 1 Environmental Site Assessments to satisfy the All Appropriate Inquiry requirement for landowner liability protections under CERCLA.

Similarly, under current NJDEP regulations, PFAS must be considered as part of Preliminary Assessments which are required for innocent purchaser protection under the NJ Spill Compensation and Control Act ("Spill Act"). When a remediation site has been occupied by a facility that manufactured, stored or handled PFAS, LSRPs must address these substances during the investigation and any necessary cleanup.

Given the attention and resources currently focused on PFAS, additional future regulation can be expected including development of soil and ecological criteria and the addition of other PFAS compounds to the New Jersey and the federal hazardous substances lists.

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'E.D.' Why Home Builders Should Be Concerned

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

No… this is not an article about those uncomfortable television commercials that always seem to come on when you're watching late-night television with the kids. "E.D." in the new home warranty industry, is an acronym for "Early Development." Early Development refers to the timing of when structural claims occur during the 10 year warranty term. What factors determine when structural claims occur? Why is this important to home builders?

Over 70% of structural claims occur four or more years after the sale date of the home. Claims that occur earlier than this are characterized as E.D., and are often a sign of a more severe problem. E.D. claims cost an average of 33% more to repair than the average of all claims. The timing and severity of claims is particularly important to home builders that maintain financial reserves to pay claims.

The conditions that cause E.D. on one lot are often found on other lots in the same development. For this reason, it is important to quickly identify the cause and take action to avoid additional claims. Structural claims are often caused by the performance of active soils on the foundation.

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As the water content of active soils changes over time, the soils swell causing heave, or shrink causing settlement. As the soils move, so does the foundation. Typically, this movement is not uniform and causes structural defects, which become claims.

The soil moisture content below foundations normally increases over time and can cause heave. The soil moisture increases since the natural upward migration of subsurface water vapor is cut off by the foundation. That is why when you turn over a large rock or log it is moist underneath. Soil moisture content can also increase due to over-irrigation of landscaping and inadequate drainage away from the foundation. Soil moisture content can also decrease causing settlement. This is caused by abnormally dry conditions or drought.

Settlement can also be caused by consolidation of improperly compacted fill material, collapsible soils or weak natural soils that contain excessive voids. When the load of the house is placed on soils with voids, the voids can quickly close, causing settlement.

If foundation movement and related structural distress occur, it typically takes many years to develop. Early Development of structural claims is likely indicative of a significant drainage problem, severe over-irrigation or improperly compacted fill material.

For E.D. sufferers, make an appointment with your engineer to discuss your problem.

About the Author: *Mr. Keaveny is the Risk Manager and Principal Engineer for the leading new home warranty company, 2-10 Home Buyers Warranty. He earned a Bachelor's degree in Geological Engineering and a Masters in Geotechnical Engineering. He is licensed as both a Professional Engineer and a Professional Geoscientist, and has over 30 years of diverse engineering experience. He serves on the Construction Performance Standards Committee for the Texas Association of Builders, and is an invited speaker and author. Mr. Keaveny's work on the subject of structural claims has been published in major newspapers and has drawn international interest. Check out 2-10.com/walts-corner-l or call (877) 777-1344.*

Predictable Monthly IT Expenses Help Manage Operating Costs And Prevent Downtime

By Cathy Coloff

Risk-taking is par for the course for entrepreneurs. Taking the leap to start a business is just the first in a series of risks an owner will take to gain a competitive edge and move the enterprise forward. But excessive or impulsive risk-taking can destroy a business. A well-informed risk-taking spirit recognizes gambles that are worth taking and those that aren't. Predictable monthly IT expenses and all-inclusive service is a gamble well worth taking to ensure the certainty of unlimited and uninterrupted service.

A Proactive Approach to IT Gives Peace of Mind

Keeping an eye on the general health of computer systems 24/7 can detect and prevent most potential IT issues before they happen. Ensuring your networks and computers are current with the latest software updates, anti-virus and critical security patches is essential. Having a proactive approach in place allows you to focus on your business without worrying about any technology glitches.

Top Quality, Proactive, State-Of-The-Art IT Management;

- Keeps an eye on the status and general health of your computer systems 24/7, each and every day. With remote monitoring tools, the vast majority of potential IT issues can be detected and prevented—BEFORE they happen.
- Keeps your network and computers current with the latest software updates, anti-virus and critical security patches.
- Ensures that an experienced managed IT professional reviews your computers and network every month from soup-to-nuts—it's called "Proactive Maintenance" and it's designed to supplement state-of-the-art automated tools.
- Takes a proactive approach to monitor AND maintain your network and computers to prevent problems before they happen.

Why Consider an IT Management and Support Plan?

More and more business owners are turning to managed services companies to keep their technology running smoothly, allowing them to focus on running their businesses instead of dealing with constant technology issues. The benefits include:

- Reduced IT support costs
- Improved network availability
- Improved productivity
- Peace of mind so that you can focus on running your business

An IT Management and Support Plan Can Benefit Your Business, Save You Money and Give You Peace of Mind

IT Management and Support Plans along with recommendations for your network will give you peace of mind. Knowing the exact health and security of your network can make your computer problems a thing of the past! To learn more give IT Radix a call.

About the Author: *Cathy Coloff is the Managing Member with IT Radix. Recognized in 2018 as one of New Jersey's Best Women in Business by NJBIZ and in 2015 as the Morris County Chamber of Commerce Middle Market award winner, Cathy has 25+ years of experience in network systems. With extensive corporate experience at Exxon and Bear Stearns, Cathy helps IT Radix clients to harness the power of technology to stay up and running, maximize productivity, be secure, reach their goals and achieve success. Cathy can be reached at 973-298-6908, itsales@it-radix.com or www.it-radix.com.*

How Far We've Come With 10 Years Of The SRRA

By Caryn L. Barnes

Back in 2009, New Jersey took the bold step of passing the Site Remediation Reform Act (SRRA) to expedite the clean up of contaminated sites, address the impacts of its industrial past, and embrace a new process for the future. SRRA changed the role of regulators and established a credentialed group of experts - Licensed Site Remediation Professionals (LSRPs).

According to the New Jersey Department of Environmental Protection (DEP), SRRA fundamentally changed the process of site remediation and allowed state officials to concentrate on other priorities, including brownfield redevelopment.

"With the primary goal of reducing the threat of contamination to public health," DEP wrote on its website, "the cleanup program has also demonstrated success in returning underutilized properties to productive use."

For nearly 50 years, New Jersey has been at the forefront of environmental remediation, but SRRA came about after many years of remediation experience. Our state's history as an industrial center and residential hub for the cities of New York and Philadelphia left thousands of contaminated sites both big and small. Large, contaminated industrial sites lay fallow. Underground heating oil tanks leaked next to homes and businesses.

To remediate its past, New Jersey created the DEP in 1970, becoming one of the first states to devote a department to protecting the environment. In 1976, New Jersey passed the first program in the nation for the cleanup of contaminated sites that posed a risk to human health and the environment. It became a national model and led to the creation of what is commonly called the federal Superfund program.

By the 2000s, the pace of environmental clean ups was lagging. In April 2008, then DEP Commissioner Lisa Jackson said, "[R]eform of the Site Remediation program is needed. There is no doubt. The option of maintaining the status quo does not exist as the environmental, health and economic consequences are too great."

At that time, New Jersey had a backlog of approximately 20,000 cases in need of remediation - including former industrial, commercial and residential areas - and the backlog was growing. Now, 10 years after SRRA became law, more than 14,000 cases have completed remediation. And despite new cases being added every year, the total number of cases requiring remediation is going down.

Cleanups are faster. From 2001 until 2008, DEP case managers closed approximately 3,000 cases. With LSRPs nearly doubling the number of case managers, in the first eight years following SRRA, 2009 to 2016, 6,000 cases were closed by LSRPs with no loss in quality.

According to DEP figures, these weren't just the simple sites. Pre-SRRA, 31 percent of the completed remediations were complex sites; sites with complicating factors such as multiple impacted media, comingled contamination, or complex geology. Post-SRRA, this percentage increased to 37 percent. At the neighborhood level, underground oil tanks are being removed, old gas stations and former dry cleaners are being cleaned up. Industrial sites are being restored and redeveloped.

Environmental remediation over the past 10 years has impacted every county, changed the landscapes of waterfronts, and helped bring new businesses to old sites in cities across the state.

SRRA instituted three major innovations. It established an obligation for responsible parties to remediate their sites within mandatory time frames and regulations. It created LSRPs to keep responsible parties on task, on time, and in compliance with regulations. And it created a licensing board to oversee requirements for LSRPs and their performance.

Modeled on programs in Massachusetts and Connecticut, LSRPs were a new concept to New Jersey in 2009. DEP continued to have final authority over the clean-up process but LSRPs oversaw day-to-day management of clean-ups.

Today, most contaminated properties, with some exceptions, are required to have an LSRP. These environmental professionals must have more than 5,000 hours of remediation experience in the past five years before they can qualify to take the rigorous licensing exam. They also must complete continuing education courses to maintain their licenses. SRRA also set a strict code of conduct for the LSRPs, ensuring that their first priority is the protection of public health and the environment.

The Licensed Site Remediation Professional Association (LSRPA), which is also celebrating its 10-year anniversary, was created to advance the

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About the Author: *Caryn L. Barnes is a Principal and Vice President of Langan Engineering and Environmental Services, Inc., and President of the Licensed Site Remediation Professionals Association.*

A Message From President Wescoe
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will add 300ft. Riparian Zone buffers to both the 749 river miles and their tributaries.

While these protections are likely justified in many instances, certain designations appeared to be based on poorly documented data and sampling that threw into question the validity of the expanded protections. Accordingly, NJBA asked DEP to restart the rulemaking with a new, more encompassing and thorough stakeholders' process. NJBA will keep members apprised of any new information as DEP evaluates public comments.

Our association will be busy over the next year as we continue to build a more affordable, sustainable and vibrant housing and retail and industrial market in New Jersey. With the support of our members, we will be able to accomplish much for New Jersey residents and the homebuilding community.

I want to thank each of you for the opportunity to represent you as NJBA President. I am proud to be at the helm of an association that is working to help all New Jersey's residents obtain the American Dream of homeownership. I look forward to seeing you all on August 19 at the NJBA Annual Golf Outing at the Cherry Valley Country Club in Skillman.

IRS Makes QOZs Compelling But You Have To Mine The Regulations
Continued from page 4

of the law will have to be grandfathered if the law were to change.

Notable Rules Governing the Investment in the QOF

Not only is the federal government reducing the amount of deferred gain recognized by up to 15% it is also indemnifying a portion of this investment by effectively stating that a taxpayer with a bad investment might avoid paying the tax on some or all of the 85% remaining amount deferred. When the final reckoning comes on the deferred gain the gain will be recognized on the earlier of the date the QOZ investment is disposed of or by December 31, 2026. Furthermore, if the deemed sale date is December 31, 2026. Furthermore, if the deemed sale date is December 31, 2026, the amount of gain will be computed by subtracting the taxpayer's basis in the QOZ investment on that date from the lesser of the remaining deferred gain or the fair market value of the QOZ interest on that date. This is a gift! If the investment in the QOF is doing well the deferred gain ultimately recognized is capped at the amount deferred. If the investment is doing poorly it is possible the recognized gain can be lower than the amount deferred.

In addition an investment can be made in-kind and qualify for deferral. However, services to a QOF -- carried interests -- are not considered an investment resulting in an interest in a QOF that will qualify for tax benefits.

The Real Impact, Liability And Cost Of NJDEP's New Groundwater Mounding Requirements
Continued from page 6

values which would otherwise produce overly conservative results. While these additional engineering services will undoubtedly increase the design cost, the potential for savings during construction makes it an investment well made.

Groundwater mounding is an important factor to be assessed in any good stormwater management design. To ensure that a design is effective but not overly taxing on the budget, it is important to engage initially with a skilled engineering team who understands these intricacies and can recommend an appropriate scope of engineering and testing to provide a comprehensive design protective of both the neighbor's "perpetually dry basement" as well as the developers bank account.

Controlled Insurance Programs On Construction Projects
Continued from page 7

subjected to background checks. On the other hand, they will typically be entitled to refunds on their regular policies for the time and effort spent on CIP projects. At the end of the day, whether a CIP project is good for you or not is open to debate, but CIPs are becoming much more commonly used in construction, and contractors, developers, and owners should know about them.

Newly Proposed Opportunity Zone Regulations Further Encourage Redevelopment, New Business Growth And Leasing Opportunities
Continued from page 9

This article merely highlights several of the many amendments and supplemental provisions provided in the April 2019 proposed regulations. The Treasury is scheduled to conduct a public hearing in July 2019 concerning the OZ Program, and additional regulations will likely be released later this summer. Notwithstanding that the OZ Program is a "work in progress," developers, landlords and entrepreneurs should be conscious of the OZ Program's many real estate benefits as well as the December 31, 2019 deadline to maximize the OZ Program's tax incentives. Those seeking to participate under the OZ Program should promptly speak with their attorneys and accountants to discuss how they can best take advantage of the OZ Program.

New Public Access Law: A Codification Of The Public Trust Doctrine?

Continued from page 10

municipalities are encouraged to include public access plan elements in their master plans. DEP is required to protect the public's right of access to tidally-flowed lands and adjacent shorelines to the greatest extent practicable. For any application involving a change in the existing footprint of a structure, a change in use of property, or beach replenishment or dune maintenance activities, DEP shall review the availability of existing public access and determine whether additional public access is necessarily consistent with principles established under the public trust doctrine. DEP is required to consider the scale of any proposed change in footprint or use of the subject property, the demand for public access, and aspects of any DEP approved municipal public access plan.

The law becomes applicable to individual permit applications starting 60 days after the May 3, 2019 effective date. For other approvals, such as general permits, GPs by certification, or permits by rule, DEP has 18 months to adopt regulations identifying activities for which no public access is required, ***and identifying activities for which public access is required but no individual review is necessary***. With respect to the latter, the absence of an individual review directly conflicts public trust doctrine principles established under Matthews. Will a general permit applicant subject to public access without an individualized review challenge the public access requirement on grounds that the absence of an individualized review and determination of whether the public access condition is reasonable is inconsistent with the public trust doctrine?

Interested parties are encouraged to monitor DEP's forthcoming rule-making to assess how the agency proposes to implement the new law through amendments to its Coastal Zone Management regulations, which currently include a lengthy public access rule recently adopted September 2018, and carefully consider the implications of those amendments.

The Emerging Contaminant Challenge, How PFAS Can Impact Your Deals

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PFAS are tricky to sample and resistant to most treatment technologies. As PFAS are present in many consumer products and regulatory limits are very low, special handling is required to avoid contamination of samples. Many common materials, equipment and clothing cannot be used when sampling PFAS such as Teflon™, chemical ice packs, water-proof field books, Gore-Tex®, Tyvek® and certain personal care products. Not all laboratories are certified in the approved PFAS analysis methodologies and there almost certainly be a backlog of samples once the PFOA and PFOS standards in New Jersey are adopted. Currently, the only known but only somewhat effective method for groundwater remediation for PFAS is to pump-and-treat contaminated groundwater through granular activated carbon. Membrane and in situ chemical oxidation applications are under development.

Regulation of PFAS will create additional, and at present very uncertain, cost impacts for property transfers including incorporation of PFAS into the due diligence process and remediation when warranted. Other risks include uncertainties in future regulation and the potential for PFAS to cause previously approved remediation projects to be re-opened.

So what can purchasers do to protect themselves?

1. Make certain PFAS are included in your due diligence. PFAS has been used in a wide range of industries and may be present at the sites of accidents and first responder training where fire-fighting foams were utilized.

2. Know which PFAS chemicals are regulated and standards that are pending. Develop sampling plans as part of Phase 2 due diligence or other site investigation activities that target the appropriate PFAS chemicals.

3. Understand proper PFAS sampling protocols and make sure that the laboratory is certified in the approved analysis methodologies. Allow for additional time for due diligence as qualified laboratories may be backlogged.

4. Be prepared to estimate costs for investigation and cleanup and negotiate with the seller.

How Far We've Come With 10 Years Of The SRRA

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profession. The LSRPA provides information, education, and technical resources to LSRPs and other professionals involved in environmental remediation in the state. With more than 800 members, the LSRPA is recognized by the DEP as the primary representative of the profession and provides front-line feedback to the state on site remediation issues.

At this 10-year milestone, New Jersey officials are again considering updates to SRRA, but its foundation will likely remain unchanged: mandatory timeframes, requirements to remediate, and LSRPs. The program works and its dedication to clean water, land, air, and the protection of people are steadfast and constant.