



DIMENSIONS

Newsletter of the New Jersey Builders Association



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Dimensions newsletter is produced by the New Jersey Builders Association (NJBA). NJBA is a housing industry trade association of builders, developers, remodelers, subcontractors, suppliers, engineers, architects, consultants and other professionals dedicated to meeting the housing needs of all New Jersey residents and facilitating 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 Grant Lucking at grant@njba.org.

A Message From NJBA President Michael Canuso



Dear NJBA Members,

I am honored to have this opportunity to address the membership in my first Dimensions message as President of the New Jersey Builders Association. I'd like to thank NJBA's Immediate Past President Corey Wescoe for his service over the past year and for his dedication and commitment to our association and the building industry.

Our association has been through difficult times before, perhaps none so consequential as the current global pandemic we face, but I assure you I will do all I can over the next year to position our industry not only to survive, but also thrive as we emerge from this crisis.

The global COVID-19 pandemic has affected residents throughout New Jersey and the state's economy in profound ways. Social distancing has become the new normal. Strict measures urged by public health officials to stop the spread of the virus have shuttered businesses, disrupted supply chains and led to tremendous job losses. However, NJBA continues to service the membership and has transitioned to working remotely and virtually, with staff working diligently to assist members during this crisis. We have been in constant communication with New Jersey's legislative leadership, members of the Governor's Administration and various departments and agencies to maintain up-to-date information

and resources available to our members.

We also began a multifaceted lobbying effort to ensure that many government functions continued to be performed and necessary construction projects would proceed. As a result of these efforts, when Governor Phil Murphy issued Executive Order 107, construction was designated an essential service. EO 107 was followed by several guidance documents from the Department of Community Affairs that provided critical direction on how towns should continue the vital functions necessary for construction to move forward.

Later, as the Governor was being pressured to scale back on the types of businesses that could remain open, NJBA aggressively advocated for the homebuilding industry and when Executive Order 122 went into effect, many homebuilding projects were permitted to continue as "essential construction."

NJBA then maintained a dialogue with the Governor's Administration stressing the importance of homebuilding to the state economy and worked to demonstrate how most construction activity could respect social distancing and follow worker safety protocols. As a result, when the Governor formed his Restart and Recovery Advisory Council tasked with providing guidance on the reopening and recovery of New Jersey's economy, NJBA CEO Carol Ann Short, Esq. and several NJBA builder members were named to the Council.

Fortunately, the lifting of restrictions on construction projects has been swift. On May 13, Governor Murphy issued Executive Order 142 which allowed all non-essential construction to resume Monday, May 18. Executive

Order 142 also outlined the safety requirements for all construction projects and non-essential businesses and it is vital that our members adopt and strictly comply with the necessary safety policies and procedures.

Throughout this changing landscape, NJBA has worked to make certain that members are apprised of all salient information and are able to maintain relationships. NJBA created a COVID-19 resource page on njba.org as a repository of useful resources and information. Some of the content includes housing-related news updates, guidance from state agencies and departments, updates on public meetings, available state and federal grant/loan opportunities, other employer assistance programs, changes to employee responsibilities, changes to landlord-tenant policies including eviction restrictions and changes regarding mortgage relief. And recently, NJBA hosted a webinar on COVID-19 issues in the building industry featuring experts exploring the multitude of issues builders and business owners are facing during this health emergency. NJBA also held a "Virtual Happy Hour" which gave builders and associate members an opportunity to collaborate on how to move forward in a digital world.

Corey did a yeoman's job steering us through the initial shutdown and now I must work with the new slate of officers to answer the difficult questions that the association faces: What barriers continue to impede our industry? How will we proceed as a trade association? What will our events look like? How do we position our industry to maximize our opportunities moving forward?

The economy and state are undergoing rapid changes as permissible activities and guidelines continue to evolve

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The Impact of the Bankruptcy Code on the Claims of Contractors and Subcontractors in New Jersey

By David L. Bruck, Esq.

New Jersey provides certain statutory protections including lien rights to contractors and subcontractors supplying goods and services to construction projects throughout the state. However, when the owner or the general contractor of a project seeks protection under the Bankruptcy Code, the rights of contractors to file and pursue the enforcement of liens are impacted.

The New Jersey Construction Lien Law provides that contractors who are unpaid for work and materials provided on a construction project may file a lien against the project owner for the unpaid amount. The effective date of the lien in NJ is the date of filing of the lien, rather than the date of performance of the work. Filing the lien as early as possible – upon signs of financial distress by either the owner or general contractor – is a good practice for subcontractors. However, once a bankruptcy is filed, the ability to either file or enforce the lien by commencing a lawsuit will be stayed by the Bankruptcy Code.

Upon the filing of a bankruptcy by a general contractor, the provisions of Code section 362 stay both the filing of a lien and collection efforts by the contractor of its pre-bankruptcy lien against the “debtor and the property of the debtor.” “Property of the debtor” includes accounts receivable owed to the general contractor in the hands of the owner. Even when the owner is not the debtor, courts have held that the lien claimant cannot pursue the accounts receivable held by the owner, which belong to the debtor. Such would be a violation of section 362. Notwithstanding barring enforcement

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of liens against the owner when the general contractor is the debtor, subcontractors may have recourse against the owner under common law causes of action. The argument in favor is that (1) the statute states that remedies provided in the statute allowing the filing of liens are not exclusive remedies, and (2) whereas enforcing the lien against the account receivables is stayed, a common law cause of action for unjust enrichment by the subcontractor has no effect on property of the debtor’s estate and may be permitted.

The Lien Law treats the rights of contractors providing goods and services to residential construction projects differently than the rights of contractors in industrial or commercial projects, as the path for residential project contractors to acquire a lien is more burdensome. When a lien is filed by a contractor working on a commercial or industrial project, the lien is effective as of the filing date; this is not the case when filing a lien against a residential project. NJ courts have determined that while protecting the rights of contractors is important, “the ability to sell and purchase residential housing is essential for the preservation

and enhancement of the economy of the State of New Jersey.”

The statutory scheme for residential projects includes single family homes as well as large residential developments, as determined in the Kara Homes bankruptcy case (2007) – this ruling was subsequently included in 2011 amendments to the Lien Law, clarifying that mixed-use projects including residential housing units are considered residential construction projects. In order to obtain a lien on a residential project, a subcontractor must first file a Notice of Unpaid Balance (NUB) and a demand for arbitration. The NUB filing is not the equivalent of filing a lien; it is the first step in the process to obtain the right to file the lien. Should the general contractor file for bankruptcy either before the NUB filing or after the NUB filing but before the arbitrator decides that the lien can be filed, the process will be stayed by the bankruptcy.

Despite the impact of the stay on the lien process, having a lien in place prior to bankruptcy by the general contractor has value. In a case presently pending in the U.S. Bankruptcy Court, subcontractors holding pre-petition liens against the debtor and the owner of a project were able to negotiate a better return than other project subcontractors in a court-approved settlement. Refusing to agree to the settlement without additional consideration in recognition of their alleged ability to continue litigation against the project owner provided the leverage to strike a better deal than the subcontractors without valid liens.

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Building Resiliency in our Housing Stock

By Evan Carberry

Building resiliency is the ability to reduce the magnitude or duration of disruptive events for a building's occupants. The concept of resiliency, at least in our state, was brought to the forefront following the devastation of Superstorm Sandy in 2012. In the following days, months and years our state has considered ways to increase resiliency in an effort to minimize the impact that the next superstorm will have on our state's infrastructure, grid, critical services, building stock and more. Designing our buildings to be more resilient to superstorms often involves ensuring that we do not develop new land that is in a floodplain, moving mechanical systems out of the basement or raising them off of the ground and sometimes adding on-site power generation along with many other considerations.

During Superstorm Sandy 1.7 million people lost power and it took around 8 days to get it back. Fortunately, the outdoor air temperature in the following days was mild with highs in the 60s and lows staying above 50. Had an outage like this occurred during summer months, with sweltering temperatures, the magnitude may have been amplified. A building's ability to maintain temperature during a power outage is a function of the building envelope; buildings that are well insulated and air sealed will stay comfortable for longer when the power is out. As an example, look at the Passive House Ice Box Challenge in NYC. Over the past few summers, energy efficiency advocacy groups have constructed two structures resembling sheds and stuck a one-ton block of ice inside each. The first is built to meet energy code standards and the other is built to

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meet Passive House. After a month of a New York summer this past year, the energy code ice block melted to 126 pounds while the Passive House ice block was still 756 pounds. Bottom line, if you live in a well insulated and air sealed home, you will stay comfortable for longer during a power outage.

COVID-19 has created a new 'disruptive' event (which is an understatement to say the least). While we are all being impacted uniquely, we do have one thing in common: we are spending much more time at home. Because of this, a healthy living environment in itself is becoming a measure of building resiliency, as it can reduce the magnitude of our current shelter in place order. One area to consider is indoor air quality – studies have shown that increasing indoor air quality can improve cognitive function by as much 101%.

In order to improve indoor air quality, we should first limit the pollutants that we bring into our homes by minimizing Volatile Organic Compounds (VOCs). Green building programs like LEED provide a framework for minimizing VOCs in construction and interior design. In addition to minimizing VOCs, we can increase indoor air quality by

properly ventilating – specifically in kitchens. Cooking causes high levels of indoor air pollution in the form of Particulate Matter (PM). PM is small enough to pass through the nose and throat and lodge in the lungs, which over a period of time can increase the risk of serious health issues. Well-designed kitchen exhaust systems greatly reduce the amount of PM that we inhale. Builders and designers can reference The Home Ventilating Institute, which provides guidance on the correct air flow that should be used in kitchen hoods.

HVAC systems that move air throughout a building are currently being examined for their role in spreading COVID-19, but the research is ongoing. We do know that research has shown that providing adequate levels of outdoor air can dramatically reduce the spread of influenza. ASHRAE has also published guidance on operating HVAC systems to minimize the spread of infectious aerosols. We can anticipate that increased attention will be paid to ventilation and filtration systems, especially in high-risk locations like nursing homes.

More traditional resiliency measures, like those created to handle extreme weather and natural disaster, are built into programs like LEED. RELi is a certification program that provides a framework for comprehensively planning, designing and constructing a building for optimized resilience and can be used as a framework to better understand the considerations that can be taken throughout the development when considering resiliency.

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Clock Starts on DEP Stormwater Management Green Infrastructure Rule

By Steven M. Dalton, Esq.

DEP published its Green Infrastructure Stormwater Rule in the New Jersey Register on March 2, 2020. The amendments followed an extended stakeholder and review process spanning several years. They replace the nonstructural stormwater management strategies provisions of the prior rules, which were subjective and often led to inconsistent results, with specific green infrastructure stormwater quality and quantity BMPs. The amendments have a delayed implementation date of March 2, 2021 to allow sufficient time for municipalities to conform stormwater ordinances and accommodate pending projects. To avoid having to redesign, projects designed without green infrastructure BMPs will need to diligently pursue and obtain approval or a completeness determination prior to March 2, 2021. For those in the early planning stage of development, critical decisions must be made about whether or not to design with green infrastructure, and, if the latter, whether there is sufficient time to secure vested rights prior to March 2, 2021.

The following is a summary of some of the noteworthy amended rule provisions.

- DEP's Stormwater Management rules, N.J.A.C. 7:8-1.1 et seq., green infrastructure amendments follow the prior non-structural point system that was found by the courts to be in violation of the Administrative Procedures Act.
- The amendments replace the requirement that "major developments" use nonstructural strategies to the maximum extent practicable with a requirement that major developments use "green infrastructure" practices designed in



accordance with the Stormwater BMP Manual, such as pervious paving, infiltration basins, and bioretention systems, or as otherwise approved, to meet water quantity, water quality, and groundwater recharge standards. The nonstructural strategies remain in the rules (section 2.4(g)) for consideration in the municipal planning context.

- To determine whether a project is a "major development," the rules clarify that the relevant amounts of cover and/or disturbance are the cumulative amounts that have occurred since February 2004.
- The green infrastructure provisions of the rules and BMP Manual place a premium on treatment of stormwater runoff near its source to mimic natural hydrogeologic processes, and require stormwater facilities to be designed in most cases based on small-scale, limited contributory drainage areas (2.5 acres and 1 acre limits). The rules recognize the impracticability of requiring water quantity standards to be met exclusively through small-scale green infrastructure for larger sites, and allow for use of a combination of BMPs that

are not subject to limitations on contributory drainage area. Structural stormwater management measures will continue to be incorporated into project stormwater management design where appropriate, for example, to reduce stormwater runoff velocity.

- An applicant may demonstrate that implementation of green infrastructure is not technically feasible, but DEP will not take cost into account in the feasibility analysis.
- Corresponding changes have been made to the BMP Manual, which now includes provisions for Green Roofs and Cisterns. Additional BMP updates are anticipated to address various provisions of the amended Rules including soil testing requirements for sites with multiple green infrastructure BMPs. DEP does not currently treat the BMP Manual as a rule subject to formal notice and comment despite its general applicability, scope and breadth.
- The amended rules requires the recording of a deed notice describing and identifying the location of all approved stormwater management systems, in addition to the previously existing requirement for filing of Stormwater Management plans.
- The amendments expand the definition of "major development" for purposes of projects subject to DEP stormwater review. The concept of major development is not changed for purposes of municipal stormwater management plans.
- Major development for DEP stormwater now includes the proposed addition

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Construction of Housing Beyond COVID-19

By Irina B. Elgart, Esq.

Prior to March towns were scheduled to proceed with Fairness Hearings, preparing their fair share plans, adopting ordinances, and anticipating final judgments of compliance. When New Jersey shut down in March, trial courts initially struggled with remote technology, as did the municipalities' boards and council. Eventually, courts proceeded with the business of finalizing affordable housing settlements of Mount Laurel Declaratory Judgment actions – albeit remotely, and interestingly, with more public participation than normal. The few declaratory judgment actions that are still pending present a juxtaposition to the larger majority of municipalities who have reached settlements years ago and are on the eve of their “Mid-Term Reviews” in July 2020.

The full fallout of COVID-19 will be profound, but inklings of hope are in-sight. The vast majority of settlement agreements require municipalities to report their housing activity at multiple intervals, the most comprehensive being the Mid-Term Review. Mount Laurel case law has already established that the interim review of the compliance mechanisms cannot be superficial and ministerial in nature. This means that the review procedures will be beyond perfunctory to allow for a meaningful review, and opportunity to comment.

Each settlement agreement is different and each project presents its own set of circumstances. The Mid-Term Review serves the important purpose by allowing courts to assess whether affordable housing projects in an approved housing plan have been completed according to schedule, and if not, whether they still present a “realistic opportunity” for the development of affordable housing.



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Projects in housing plans that have not come to fruition will be revisited during the Mid-Term Reviews, and may require towns to substitute projects, which are no longer economically viable and/or feasible.

As the Council on Affordable Housing (COAH) recognized in its Second Round regulations, not all types of projects are treated alike. Inclusionary projects, which are self-subsidizing since the market rate units fund the creation of the affordable housing units, are considered more likely to develop, and thus, are less scrutinized than 100% affordable projects. COAH regulations require, among other things, that a municipality demonstrate the viability of 100% affordable housing projects by evidencing a stable source of funding. Many of these projects rely upon potentially tenuous awards of low income housing tax credits. In addition, a housing plan may have incorporated a project that a municipality planned to designate as an area in need of redevelopment pursuant to the Local Redevelopment and Housing Law, N.J.S.A. 40A:12A-5, with the power of condemnation to acquire the property. These projects may prove to be problematic now with the anticipated decline in local tax revenues and collections.

Moreover, a town that received a vacant land adjustment are required to demonstrate that it has taken sufficient measures to generate redevelopment opportunities and had not squandered those that have presented themselves. Vacant land adjustments allow a municipality to postpone the satisfaction of its affordable housing need due to the lack of sufficient developable and available land, until redevelopment opportunities arise. Whether opportunities provided by a municipality are “realistic” are determined by the actual amount of housing completed, and whether municipalities took “affirmative” measures to make it likely that low and moderate-income housing will actually be built, economic conditions allowing.

The Mount Laurel saga for the Third Round (1999-2025) had several bumps along the road, including the economic downturn in 2008 and the invalidation of COAH regulations twice by the courts. Now, COVID-19 has forced New Jersey developers to halt all nonessential construction projects, which incorporates inclusionary developments. Essential construction projects – transportation, infrastructure, utility, healthcare facilities, and 100% affordable housing projects – were permitted to continue with restrictions that reduced productivity for the greater benefit of workers' protection, by requiring heightened sanitization practices, at least 6 feet of distance between employees, and employees to wear cloth face coverings and gloves, among other things.

While COVID-19 will have a profound impact on the industry, many analysts have predicted that builders are

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A Pandemic Requires Heightened Focus on Security

By Cathy Coloff

Criminals look for weaknesses or openings. And with the business world in a state of chaos right now given the COVID-19 pandemic, these outlaws are finding plenty of security gaps. Be sure they do not find yours!

This is happening because so many businesses are working remotely. Management must equip their staff with ways to enhance their networks and organization's security level. This is important because fraud and criminal tactics are becoming more professional and sophisticated. All of us are targets of a breach, so everyone must become aware and develop proactive and defensive plans. We recommend the following strategies for all business managers and owners at this very difficult time:

Stay compliant – Each industry has either compulsory strictures on IT security or at least a set of guidelines. It is incumbent upon management in each organization to know and understand what those requirements are. At the very least, each should have a cybersecurity plan and cybersecurity insurance in place.

Take stock – Whether with an outside consultant or internally, take an objective and detailed look at everything you do. Pinpoint everyone who touches any critical business data or confidential personal information. Identify the weak links and/or the areas of higher risk and take actions to limit those.

Enforce password policy – Many organizations have taken advantage of



password management programs to put in place strict policies regarding password strength, password multiplicity of use and password change. With so much remote work and with the difficulty in keeping track of so many passwords, especially ones that provide access to confidential data, this is a must do.

Know the enemy – Most managers know their competition inside and out. That is smart business. Now managers must also be current on what the criminal enemy is doing because they are a bigger threat. Stay in touch with your industry peers and remain connected to trade associations that provide this guidance so you can be aware and not in the dark. That is half the battle!

Educate the team – Your organization's staff are another very key line of defense. Their awareness and heightened sense of urgency regarding information security is of paramount importance. Since social engineering (through interactions with people) is where the largest number of breaches occur, be sure your staff knows all the warning signs and knows how to defend your data.

Implement Multi-Factor Authentication (MFA) – Proving you are who you say you are to an email account, remote server, or specific computer is the way of the world. Newer methods are even including fingerprint scans. Make use of it. Not doing so is a huge increase in your risk factors.

Lock the front door – Email is like the front door to your business in terms of access from the outside. It is a bigger front door than your literal front door! Fraudsters of all types use email as the access of choice in most cases. So, do all you can to lock it down and back it up. Use your most complex password for email and never use it for anything else. Encrypt email communications, and never share confidential information, account numbers etc. via email.

Trust No One – That sounds harsh, but it is the best strategy. Confirm via phone or in person any email requests involving funds or confidential information. Criminals are great impostors; do not fall for their taking on the identities of your staff, vendors or clients!

The uncertainty of a potential security breach is something that we all must proactively plan for. Do not let the turmoil of COVID-19 in this difficult and turbulent time cause you to ignore key security strictures. The time is now to heighten them, not lessen them.

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Are We In The Midst of Another Mortgage Meltdown?

By Michael Borodinsky

Things are changing rapidly in the mortgage market. Almost overnight, loan programs have disappeared, interest rates are all over the place, and more than a few lenders are closed for business indefinitely. This is all despite the Federal Reserve buying more than \$100 billion / week of mortgage debt. Is this yet another meltdown?

The Forbearance Tsunami, and the Breaking of the Mortgage Market

The CARES Act encourages homeowners to request a forbearance (a break from making mortgage payments) in cases where the ability to pay has been impacted by the coronavirus. At the same time, it prohibits lenders from verifying a borrower's income, which has in many cases been affected. If one thing is responsible for the breaking of the mortgage market, this is it.

Why? Because many of them will skip payments simply because they can. Combine these people with those who've actually lost jobs (or those who soon will) and the mortgage market is facing a bigger, faster drop in payments than the worst doomsday scenarios ever imagined by mortgage bankers. This forbearance tsunami is actually at the root of all the other issues. Mortgage investors have no interest in rolling the dice and hoping some government bailout or epidemiological breakthrough will quickly enable homeowners to begin making payments again. They have no faith they'll see their cash again in a timely way. Under a more normal dire scenario, mortgage servicers would continue to forward at least the interest portion of payments to the investor (principal too in many cases). If servicers couldn't pay, investors could be made



whole by Fannie Mae, Freddie Mac, or Ginnie Mae, the huge housing agencies that stamp investor guarantees on a majority of mortgages in the US. Under this dire scenario, investors have no faith that servicers and agencies have remotely enough cash on hand, should some forbearance predictions come true. There too, the uncertainty of predicted outcomes is a problem unto itself. Even if investors knew they'd get their money back, they still have no way to know what the timing or profit would look like.

All of the above makes investor-buying demand for mortgages dry up. Demand for the riskiest, most costly programs goes first. Unfortunately for borrowers needing a government loan (FHA/VA/USDA), servicers of those loans are required to pay investors BOTH principal and interest on time, even if homeowners aren't paying. As such, this group has seen some of the biggest changes in availability and biggest spikes in rates. It's worth noting that Ginnie Mae (the agency that guarantees these government loans) has all but promised a backstop facility will be in place for servicers soon. In that same announcement, they also acknowledge that the backstop alone wouldn't be enough for some scenarios and that they continue working on other solutions. That's not the sort of thing that fills a mortgage investor with confidence, even if it's significantly better than no game plan at all. Until

investors can have more confidence and more certainty about how they'll be repaid, they are being extraordinarily cautious. That means the amount of dollars available to fund mortgage loans will be much lower than normal and rates for certain programs will be much higher. It also means that no amount of mortgage bond buying from the Federal Reserve is going to fix the system or force rates back to all-time lows.

So, does that mean this is indeed worse than 2008? In many other important ways, 2020 is much better than 2008. The mortgage market didn't cause the coronavirus pandemic. The average mortgage leading up to 2020 was much higher quality than those seen in 2005-2007. Income documentation, employment verification, improvements in home valuation transparency, and unified underwriting standards mean that whatever meltdown we're about to see will not need to be blamed on the mortgage or housing market. In other words, we're not facing down a housing/mortgage crisis that destroys confidence in the entire system for years to come. We're facing down an 'everything' crisis that merely happens to be sweeping up housing/mortgages in the tide of ill effects.

That's not to say the road ahead won't be bumpy or that things won't get worse before they get better. But while the mortgage market was destined to endure more pain for a longer time than the broader economy in 2008, the swiftness of our recovery this time around will only be limited by the swiftness of our fight against the pandemic. Indeed, many housing and mortgage market participants will be eager to get back to business when America gets back to work.

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Navigating Vertical Restrictions on Facebook Real Estate Ads

By Jeff Horn

September 2019 was a defining moment for real estate marketing on Facebook and Instagram. After settling with several civil rights groups, Facebook implemented massive changes to prevent potential discrimination.¹ These changes affect how advertisers are able to use Facebook's data and target ads by criteria such as location, age, and gender on the two networks.

Prior to the settlement, advertisers could target ads to specific zip codes. Today, you can target a 15-mile radius around a selected city or pin drop but cannot exclude specific locations. The audience must include all genders and ages 18-65+. Additional targeting options, like income, are also no longer available using Facebook's data.

Despite these restrictions, it still makes sense to advertise your properties on Facebook and Instagram. Nationally, Facebook accounts for 45% of monthly social media visits, making it one of the top networks in the country.² In New Jersey, 4.3 million adults ages 18+ are considered engaged Facebook users. That's 60% of the state's adult population.

You can still reach your intended audience on Facebook if you understand the ways to overcome their targeting restrictions while remaining compliant. Consider utilizing both the Facebook data that is available, such as users who "declare" intent to move by their "liked" pages and sites visited, and then layer in additional data sources available outside of Facebook. Leverage first and third-party data sources to create custom targetable audiences that can be imported without worry that your

campaign will be rejected by the platform.

First-party data is any data that you own, such as that collected from your website and CRM. **Third-party data** is aggregated through a variety of websites, apps and platforms. Most often, the collectors have no direct relationship with consumers and so the data is not provided explicitly by the user but based on past behavior such as browsing history. You might consult your marketing partner for guidance on best types of data sources and perhaps request access to their data to assist in your marketing efforts.

Just as essential as targeting the right audience, you must also choose campaign and creative types that align with your business model and resonate with your audience. First, decide between running either a Facebook lead generation campaign or a traffic campaign.

Traffic ads drive a prospect to your website to convert, storing data collected on your website platform or CRM. It is important to place a Facebook pixel on your website so that the ad platform can help optimize your campaign. **Facebook lead generation ads** capture information directly through the ad itself. Data collected from lead gen ads is stored within the ad platform, unless you have the technology to push it directly to your salesperson or CRM. Because the interaction with the ad happens directly on the network, no Facebook pixel is needed. Facebook has the information on its users that can be used to optimize your campaign.

The key to success for either type of campaign is speedy follow-up. You will want to respond to all leads as quickly as possible from the time the inquiry is submitted. It is recommended to experiment with both types of campaigns and optimize towards the most effective for your goals.

In either type of campaign, you should implement a variety of ad types to appeal to different members of your audience.

Collection ads feature a primary video or image which will pop open up to four additional images if a user engages with the ad. **Dynamic ads** allow the platform to dictate which description text, call to action buttons and images are served to users based on their interests and behaviors. **Carousel ads** enable you to showcase your properties with up to 10 different images or videos, allowing users to tour your spaces virtually. **Video ads** deliver an auto-play attention grabbing message that allows you to track engagement with the video. **Static image ads** offer one image of your property and a description with call to action button.

No matter the campaign or creative types you implement, advertising on Facebook can be valuable in moving your properties. Obstacles shouldn't deter you from giving it a chance.

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Seizures, Shutdowns and Social Distancing - What are the Limits of the Government's Powers?

By Anthony F. DellaPelle, Esq.

Emergency declarations and executive orders have been entered during the COVID-19 pandemic by the President, many Governors, and others at local and regional levels of government. Of the many Executive Orders issued by Governor Murphy, the ones that likely will have the greatest impact upon the real estate and construction industries include:

Executive Order #103 – activates emergency power “commandeer and utilize” private property

Executive Order #107 – directs all “non-essential” businesses to close and work remotely

Executive Order #113 – activates power to take personal services and/or real or personal property

Executive Order #122 – directs all “non-essential” construction to cease as of 4/10/2020

These orders interfere with property rights and liberties in ways that we have not experienced in our country's history, except perhaps in times of war. Any true emergency may empower government to undertake action(s) that would not be authorized in non-emergent situations. But emergencies do not create government power, nor do they diminish limitations on that power.

Faced with the prospect of more emergency actions and orders in the future, and a possible prolonged state of emergency, how can our citizens measure whether these governmental actions and mandates are, in fact, lawful? To answer this question, we must remind ourselves that *all* government power in our country emanates from

the United States Constitution, *which was written during a state of emergency and because of that state of emergency*. It purposefully established (a) a system of checks and balances with three branches of government, (b) the principal of federalism, which creates and recognizes two sovereign powers, the federal and state governments, and (c) the Bill of Rights which specifies the limitations of the government's powers. The U.S. Constitution imposes these limits by dividing government against itself.

In recognition that laws are made by the legislative branch of government and administered by the executive branch, how can an executive like the President, Governor, regional or county leader, or mayor, therefore sign an “executive order” which authorizes the government to seize or “commandeer” private property, or to “shut down” certain businesses and liberties and not others? The order needs to be authorized by legislation to be lawful. President Trump's March 12 emergency declaration refers to the powers created by Congress in 1988 legislation known as the Stafford Act, and his declaration administers those powers, mainly through the Federal Emergency Management Agency. Similarly, Governor Murphy's executive orders authorize emergency seizures based upon existing legislation – the N.J. Civil Defense and Disaster Control Act, *N.J.S.A. App. A:9:51*.

But when does an executive order, apparently authorized by legislation, go too far? How can a Governor decide which businesses are “non-essential”?

When do the government's actions, presumably undertaken under its police powers to protect the health and safety of its citizens, rise to the level of a compensable taking of private property, entitling the owner to just compensation which is guaranteed by the Constitution? While shutdown orders on properties such as golf courses and beaches have already been upheld by courts in Pennsylvania and Florida, a federal lawsuit challenging Mississippi's shut down of a church's “drive through” religious services has caused the U.S. Justice Department to intervene, suggesting that restriction on the First Amendment rights of the congregants may have gone too far. Ultimately, courts will be asked to weigh the relative harm caused by the orders against the public health and safety benefits provided.

The limits of executive power or legislative power *are supposed to be* reviewed by our courts. While courts generally give deference to government actions, and are likely to give greater deference to government actions undertaken during emergencies, if the actions violate other Constitutionally-guaranteed rights, the checks and balances should provide Americans with some assurance that the violation of their rights, even during our state of emergency, can be reviewed by our courts. And although individual rights may be deprived during the state of emergency, hopefully that deprivation will not be lengthy, will not cause irreparable harm, and where the deprivation is unlawful, the deprived party can seek protection from our judiciary in order to determine whether it is entitled to a viable remedy at law or in equity.

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Due Diligence for Development Projects: Getting a Jump on Historical and Archaeological Issues

By Richard Grubb

When a property is acquired for development or redevelopment the developer is knowledgeable about the types of development allowed, the density of that development, and generally the DEP permits required for the project to proceed. What is unknown to many developers are the agency requirements, particularly with regard to Freshwater Wetlands, Waterfront Development and Coastal Area Facility Review Act permits, to address whether a property contains significant architectural and archaeological resources. Compounding this lack of general awareness is the timing of the requirement for the applicant to address historical and archaeological issues. Even at a pre-application meeting with the DEP these issues are not always discussed. It is only when the State Historic Preservation Office (HPO), a department within the DEP, has reviewed an application that a determination is made whether to require the applicant to conduct a historical and/or archaeological survey. Suddenly timing becomes critically important because in cases such as this the DEP permit is often the last item needed before construction can proceed.

So what can be done to prevent the last minute panic attack? Well, there are actually quite a few options all of which do not require a significant effort. The first option - and a variation to that option - is when a development property is undergoing its Due Diligence period. At this point, a simple screening will identify whether any State or National Register of Historic Places

and archaeological sites have been recorded on the property. The variation would be to include an assessment of whether the property has the potential to contain previously unknown historical and/or archaeological resources. The positives of doing a screening are to get a handle early on about the real and potential historical and archaeological issues that may need to be addressed if the HPO requires a historical and archaeological survey.

A screening can also be very useful when planning the lay out of a proposed commercial or residential development. Development can be planned taking into consideration historic and archaeological sites and areas that may be sensitive for archeological sites. A screening can also identify any regulations that might come into play for a particular type of development project. An option to a screening would be the more formal Phase IA historical and archaeological survey. The Phase IA survey report can be used to initiate consultation with the HPO if it is suspected or known that a formal request for such a survey will be required. The Phase IA survey report can potentially be used to officially "clear" a property of any concerns for potential historical and archaeological issues or it can be used to formulate a streamlined approach moving forward that would serve as an alternative to a "boilerplate" request from the HPO at the worst possible time.

Finally, to begin the process of dealing with potential historical and/or archaeological issues early on goes

a long way to establishing a good relationship with the HPO should a formal survey be required or if resources are identified, which might require additional consultation with the HPO.

There are additional ways that a historical and archaeological survey can be required for a development or redevelopment project. For example, the Pinelands Commission have regulations that can require an applicant to conduct a survey; NJ Highlands Rules for historical and archaeological resources apply if a project falls in the Preservation Area; if a State listed historic resource is on a development property, conformance with the regulations of the New Jersey Register of Historic Places Act can apply if the project is sponsored by the state, county or municipality; and if the project is a Federal undertaking or if Federal funding is in place Section 106 of National Historic Preservation Act might apply whose regulations in many ways mirrors those of the HPO. In short, it is recommended that when feasible a developer should strongly consider identifying potential historical and archaeological issues that might arise in the planning stages of a project, preferably during the Due Diligence phase. Lastly, it should be emphasized that the various laws are in place to allow a development project to proceed. By identifying real or potential historical and archaeological issues, the delays that can be caused by waiting until a formal survey is required late in the process can be avoided.

About the Author: Richard Grubb and Associates (RGA) is a consulting firm that performs historical and archaeological studies to comply with Federal, State and local regulations. These services are often required by the NJDEP, Division of Land Use Regulation and other agencies for permits needed for public and private commercial and residential projects. RGA serves on the NJBA Environment Committee and represents the industry when proposed rule changes could affect the conduct of historical and archaeological studies. Rich can be reached at rgrubb@rgaincorporated.com and 609-915-8197.

Debating Discharge Reporting During Due Diligence

By Rodger Ferguson, LSRP

LSRPs and environmental lawyers often debate whether Licensed Site Remediation Professionals (LSRPs) are bound by their statutory code of conduct to report discharges of hazardous substances discovered during pre-acquisition environmental due diligence to the New Jersey Department of Environmental Protection (NJDEP) Spill Hotline. The passage of amendments in 2019 to the Site Remediation Reform Act (SRRRA) has stoked this fire again.

There is a lot to wade through in this debate. The original statutory language in the SRRRA was a compromise over who should report discharges of hazardous substances: the responsible parties or their environmental professionals who became LSRPs.

The LSRPs didn't want the reporting obligations of their clients; nonetheless, the SRRRA directed LSRPs to report discharges discovered on "sites for which they were responsible." The best reading of the statutory language was, and remains, that LSRPs are obligated to report the discovery of a previously unreported discharge if they are retained as the LSRP of Record, meaning they were hired by the person responsible for conducting remediation to remediate a site and notified the NJDEP of the engagement. In comparison, the statute requires an LSRP to report an Immediate Environmental Concern, a potentially acute health concern, regardless of any "responsibility" for the site.

Following passage of SRRRA, the NJDEP advocated a broad interpretation of LSRP reporting obligations and muddied the question by stating that LSRPs "cannot take off his or her hat," meaning they should report what

they see at all times. Transactional lawyers began excluding LSRPs from due diligence teams, ostensibly to avoid the possibility of a discharge report to NJDEP that could crater a transaction and leave the seller holding the bag.

Against this backdrop, it was almost surprising that in an administrative proceeding in 2011 the LSRP licensing board declared an LSRP is not obligated to report discharges identified during due diligence:

"The discovery of the discharge ... did not occur on a contaminated site for which the LSRP was responsible. Specifically, at the time of the discovery, the LSRP had not been retained as the LSRP for the site. Rather [the LSRP] was hired ... as part of the developer's appropriate inquiry into the previous ownership and uses of the property."

Stakeholder proceedings for SRRRA 2.0, as the SRRRA amendments from 2019 are known, engendered raucous debate over discharge reporting. The NJDEP argued that reporting obligations of all parties should be expanded, not just of LSRPs.

Proposals were made that "any person" who became aware of a discharge should report it and that real estate contracts that limited disclosure of discharges should be outlawed. The Licensed Site Remediation Professionals Association advocated to clarify the SRRRA language that LSRPs do not have a reporting obligation. This would ensure the "best and brightest" (i.e., LSRPs), would be available to assist in transactional due diligence. None of these proposals were included in any bill introduced in the legislature.

Now, a polite discussion has begun about whether other SRRRA 2.0 amendments clarified the discharge reporting obligation during due diligence. Center stage is an amended definition of "remediation" and the idea that a prospective purchaser is a "person responsible for conducting remediation." But that argument is flawed.

In a nutshell, remediation and pre-acquisition due diligence are different. A prospective purchaser conducts "all appropriate inquiry," as defined in the Spill Act, to establish its knowledge about a property and support the innocent purchaser defense.

A prospective purchaser is not a "person responsible for conducting remediation," as defined in the Brownfields and Contaminated Site Remediation Act, who investigates and then remediates known or suspected discharges. The definition of "remediation" still does not reference due diligence. The Brownfields Act still exempts prospective purchasers from the obligation to hire an LSRP.

The legislators certainly heard people advocate for expanded or clarified reporting obligations and chose not to include these proposals in the SRRRA 2.0 legislation. The legislation also did not change the licensing board's unambiguous determination in 2011 that LSRPs are not obligated to report discharges discovered during due diligence. Beyond that SRRRA 2.0 did little to clear muddied water.

To end this debate, the LSRP licensing board, charged to interpret the LSRPs' code of conduct, should adopt rules to clarify, again, that LSRPs do not have a discharge reporting obligation during due diligence.

About the Author: Rodger Ferguson, a member of the New Jersey Builders Association, is President of Pennjersey Environmental Consulting. He thanks Steve Senior, a Partner with Riker Danzig, and William Hose, Assistant Executive Director of the Licensed Site Remediation Professionals Association, for their assistance with this article.

Preparing for the Unthinkable: The Time to Act is Now

By Jack Callahan

Before the COVID-19 pandemic, I was certain that, in my 40 years in this industry, I had not seen an expansion that didn't contract within 10 years. Well, we went 11 years with growth, and now I can honestly say that I have never seen anything impacting our industry like this crisis. This is uncharted ground for all of us.

Considering this, we want to provide the following thoughts and potential action items for construction developers in responding to this crisis:

1) Cash is and always will be king. Assess your current cash position and keep a very close eye on accounts receivable collections, timing of accounts payable payments, and effective utilization of your line of credit. Model out your cash flows weekly, monthly, and quarterly to better understand your liquidity situation.

2) Develop and/or review a wind-down strategy to determine how quickly you can cut overhead, and in which areas, in the event of work stoppages. Assess how best to reduce overhead and communicate these reductions so that you won't lose the key players you need once full operations resume. What other obligations can be extended or adjusted?

3) Labor management is critical. Ask your labor counsel how to manage furloughs effectively. Legislation recently passed to provide relief to those impacted by COVID-19 includes paid sick leave and family leave that could substantially impact your business. Effective, timely, and honest communication will be critical to minimize the impact.

4) Review essential external commitments. Talk to your banker, your surety agent, your insurance agent, and your legal representation. Nearly every state – New Jersey included – has pending legislation that would require business interruption insurance to cover COVID-19-related disruption. Know all your requirements and deadlines and be sure no commitments are missed without effective communication.

5) Tighten site security. Have contingencies in place to quickly and effectively shut down a construction site. This includes locking down equipment, safely storing cranes and heavy equipment, making sure building materials and small tools are secured. Government shutdowns will not stop the criminal element from targeting unmanned sites.

6) Refamiliarize yourself with your contract clauses – specifically those with owners, subcontractors, and suppliers. Understand when required notices must be given and procedures that must be followed to best protect your company's position in the event of a claim.

We hope that this list will get the conversations going among your internal team and with your trusted advisors. Amid and beyond the current COVID-19 climate, there are ongoing considerations to help you position your company for success.

The time to plan for tough times is now. When backlog is strong and cash flow remains positive, you need to take a hard look at your business. As you plan year-end financial wrap-up meetings

with your accountants, look past the current reported results and gauge your preparedness.

Have you...

- Invested in your people?
- Invested in technology?
- Shown strong cash management skills?
- Surrounded yourself with a strong team of independent and knowledgeable advisors?
- Established strong and trusted banking and surety relationships?
- Demonstrated restraint in overhead growth?
- Shown the ability to forecast and plan?
- Established clear succession plans?
- Invested in client relationships so that you are viewed as a contractor of choice?
- Built up significant book to tax deferrals?

These are just some of the questions you will need to answer as you assess your long-term ability to succeed – especially in a down market. The well-positioned developer with the right team around them will be better situated for growth.

When the market is strong, the actions I have laid out are important to your success. When things have turned, they could be critical to your survival. In the past, we have seen the developer market adversely impacted for a year or more following a market correction. Clearly, the effects of COVID-19 are immediate. It is never too soon to prepare for the unexpected.

About the Author: Jack Callahan is the National Construction industry practice leader at CohnReznick LLP, with over 35 years serving the advisory, assurance and tax needs of contractors and developers. He can be reached at Jack.Callahan@CohnReznick.com and (732) 380-8685.

A Message From NJBA President Michael Canuso

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almost daily. This highlights the need for our industry and association to remain nimble and responsive as we navigate this new environment. I am confident that the building industry will be the economic engine that helps the state rebound but in order to do so, NJBA must continue to pursue critical legislative priorities that will facilitate the recovery and address longstanding affordability issues. We need to continue to advocate for the building code inspection reforms which have been championed this past year by Corey but also work on other new initiatives like the creation of a homebuyer incentive program. Further, we need to persist in reforming the Municipal Land Use Law and find ways to repurpose the state's stranded commercial assets that are blighting communities. Lastly, we need to remain steadfast in pushing back on utility and environmental regulations and delays that are unnecessarily increasing the cost of housing.

As a family of builders and associates committed to working together to provide all New Jerseyans with decent and safe places to call home, I know our industry will emerge from this public health crisis better and stronger. We survived both the Great Recession and Superstorm Sandy, and we will survive this, as well.

I look forward to working with each of you as we advance our collective interests and thank you for the opportunity to represent you as NJBA President. As we work together to help lead the state out of an economic crisis, I am proud to be at the helm of an association that is also working to help all New Jersey's residents obtain the American Dream of Homeownership.

Clock Starts on DEP Stormwater Management Green Infrastructure Rule

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of one-quarter acre of motor vehicle surface, defined to include pervious and impervious surfaces intended to be used by motor vehicles/aircraft and that are exposed to precipitation. For such surfaces, DEP will look only to surfaces added after the March 2, 2021 operative date of the rules. Certain alterations of existing stormwater management systems affecting the functionality of such systems may also be considered major development even if the disturbance and impervious cover thresholds are not met.

The amended Rules (section 5.5(c)) require water quality treatment for sites discharging to a combined sewer overflow. With respect to water quantity treatment, sites in a tidal flood hazard area must now meet quantity requirements unless analyses demonstrate that flood damage will not increase below the point of discharge or where stormwater is discharged directly into a tidal water body. For combined sewer overflows, this means water quantity may need be addressed and attenuated before discharge into the sewer system.

DEP is currently engaged in another stakeholder process to discuss additional, comprehensive proposed changes to the Stormwater Management rules regarding stormwater facility design and maintenance. The "Phase II" rule amendment process will likely take place throughout this calendar year. DEP notes numerous topics to be considered such as climate change impacts, potential changes to numeric runoff quantity and quality standards for new and redevelopment sites, and TMDLs.

On a more positive note, DEP rejected

petitions by environmental organizations for implementation of land use controls and buffers in the Stormwater Rules, noting they are addressed through DEP's various other regulatory programs.

Construction of Housing Beyond COVID-19

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better prepared and will not face the same devastating impact as the downturn in 2008. New construction pre-COVID-19 was a far cry from the manic levels that preceded the 2008 collapse. Since then, demand for multi-family rental housing has supplanted single-family home craze – delivering lower cost housing in greater numbers for households who cannot make a down payment, or who are on the cusp, but do not qualify for affordable housing. Lower cost housing, whether for sale or rentals, may have the added benefit of boosting demand. Potential homebuyers may opt for rental housing due to the economic uncertainty, further increasing the multi-family market.

Developers since 2008 have adjusted their business model in anticipation of a potential economic contraction – which may just be the benefit of hindsight necessary in 2020.