

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

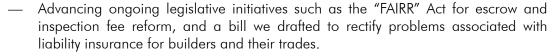
NJBA recognizes and appreciates the expertise of its members. In this spirit we invite and encourage our members to submit articles for publication in Dimensions. NJBA reserves the right to make the determination on which articles will be published, the timing of the publication and, if need be, the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

LETTER TO NJBA'S MEMBERSHIP

Dear Valued NJBA Members:

I am honored to serve as your President and am grateful for the trust you have in me to lead our Association. While last year was marked by significant legislative success, we have much more to accomplish.

During my term as your President, I will concentrate on areas to sustain and grow our businesses and Association, including:





David B. Fisher, PP, AICP President, New Jersey Builders Association

- Charting a rational course for the provision of affordable housing in New Jersey. We will make it a priority to see that (1) the courts implement reasonable COAH regulations and, if necessary, implement rules by way of a Court master; or (2) help lead the way for amendments to the 'Fair Housing Act' that would re-establish a defensible and simplified regulatory structure that produces affordable housing obligations statewide.
- Finding a way to encourage state government to prioritize development and redevelopment objectives in light of the absent and outdated state planning framework. We will work with the Administration and/or Legislature to encourage a coherent set of investment and infrastructure priorities tied to realistic WQM plans that align with economic goals for the state.
- Forming a Task Force consisting of NJBA members, as well as representatives from the building industry trades NAIOP and the Smart Growth Economic Development Coalition along with other stakeholders such as PlanSmartNJ, NJ Future, APA, and County Planners. The Task Force will work toward the meaningful reform of certain practices to minimize long delays and begin to address the duplicative reviews and unproductive hearings that plague our current system. The goal of the alliance will be to (1) define the problems and (2) form a framework for how the M.L.U.L. and other related laws can be modified to promote better outcomes for development proposals with the objective of producing a more efficient land use process consistent with demographic demands and job growth.
- Conducting interactive Board Meetings which will allow us to better focus on key action items.
- Working to increase NJBA's membership by maximizing the benefits of being a member, and enhancing opportunities between builders and associates.

We have an aggressive agenda for 2014-2015. I look forward to working with all of you to accomplish our goals.

Sincerely

David B. Fisher, PP, AICP

President

New Jersey Builders Association

SUPREME COURT DENIES REVIEW OF DECISION ON VARIANCES FOR INCLUSIONARY DEVELOPMENTS

By: Thomas F. Carroll, III, Esq. and Stephen Eisdorfer, Esq.

On April 1, 2014, the New Jersey Supreme Court declined to address the issue of whether inclusionary developments are entitled to preferential treatment in applications for zoning variances.

The Supreme Court's action left untouched a decision issued by the Appellate Division of Superior Court in November 2013 in a case entitled Advance at Branchburg II v. Branchburg Board of Adjustment. That decision upheld a ruling by the Zoning Board in Branchburg Township that a proposed residential development in which 20 percent of the units were low or moderate income units was not an "inherently beneficial" use.

Because the builder did not seek review of the Appellate Division's decision, Hill Wallack LLP made an application on behalf of the New Jersey Builders Association seeking to intervene in the Supreme Court, and further requesting that the Supreme Court review the Appellate Division's decision. The Supreme Court has now denied that application.

Although the decision leaves the opinion of the Appellate Division untouched, the Supreme Court did not rule on the merits of the issue. The Court merely decided not to review the matter.

Does the Branchburg Decision Bind Other Courts?

The opinion of the Appellate Division is cast in broad terms. At first blush, it seems to declare that a project in which 20 percent of the units are low and moderate income units can never be given preferential treatment as "inherently beneficial." In its decision, however, the Appellate Division took note of some facts peculiar to Branchburg.

For example, Branchburg was apparently in compliance with its constitutional fair





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share housing obligation. The proposed site had never been identified by the municipality's planning professionals as a prospective site for affordable housing. The municipality claimed that it had numerous other potential suitable sites for affordable housing. At least one trial court has since ruled that a zoning board in a municipality without these peculiar facts wrongly concluded that the inclusionary development at issue in that town (Rockaway Township) was not inherently beneficial. The use variance in that town also proposed that 20 percent of the units would be low and moderate income units.

In addition, the Appellate Division opinion in *Branchburg* leaves open the possibility that a project with a higher proportion of low and moderate income units might be deemed "inherently beneficial." For example, another Appellate Division opinion, arising out of Eastampton Township, holds that a 100% low and moderate income development is an inherently beneficial use.

Other Types of Use Variances

Under New Jersey case law governing use variances, it is preferable if a proposed use is found to be inherently beneficial because it is easier to then satisfy the "negative criteria" of the variance statute (concerning impacts on the zone plan and the public good). However, it must also be recalled that use variances can be proposed for other "special reasons" as well. For

example, a use variance applicant can assert before a zoning board that the site in question is particularly suitable for a proposed use. An applicant can also assert, when the facts justify it, that a use variance must be granted to avoid undue economic hardship to the applicant. When arguing particular suitability or economic hardship, it is more difficult to satisfy the negative criteria raised by variance applications.

The Bottom Line

The Branchburg case is clearly bad news for those who have proposed use variances for inclusionary developments. However, it is possible (although a challenge) to distinguish the Branchburg case if asserting that an inclusionary development is inherently beneficial, and it may also be possible to argue that a given site is particularly suitable and/ or that economic considerations justify the use variance. Applicants can also consider foregoing the use variance route, and press for a rezoning instead. All such cases are different, and each must be carefully analyzed to determine the optimal course of action.

About the Authors

For more information on the practical significance of the Supreme Court's decision or the decision of the Appellate Division, readers are encouraged to contact Thomas F. Carroll, III, Esq., or Stephen Eisdorfer, Esq., of Hill Wallack LLP, at 609-924-0808.

Thomas Carroll, a partner with Hill Wallack LLP, concentrates his practice in land use law, including the acquisition of permits and approvals, litigation arising from permitting decisions made by governmental agencies, litigation contesting zoning, including Mount Laurel-related litigation and COAH proceedings, redevelopment projects, and related legal matters arising from the development of real estate.

Stephen Eisdorfer, a partner with Hill Wallack LLP, concentrates his practice on environmental and land use applications before local, state, and federal agencies and in litigation in the state and federal courts. He has been involved in housing and exclusionary zoning matters since 1975.



PERMIT TRANSFER APPROVAL - DON'T CLOSE WITHOUT IT!

By Steven M. Dalton, Esq.

Economists and financial consultants have projected an improving and stronger real estate market in 2014 through 2015 based on various factors including increased new home construction activity. With a recovering economy and improving market conditions, increased land transaction activity should follow suit. It is critical to ensure that development approvals remain valid in connection with the land transfer process, particularly with the sunset of the Permit Extension Act looming.

Often overlooked in the due diligence process until the last minute or entirely is the requirement to obtain approval from the New Jersey Department of Environmental Protection ("DEP") or other government agencies for transfer of certain permits. While many approvals run with the land, some approvals such as DEP wetland and flood hazard approvals do not, and require that DEP approval be obtained in connection with the transfer of the property or in connection with the transfer of the permit to a third party or a newly created corporate entity that will complete the authorized project. Given the commonly held belief that approvals transfer with the land, it is not uncommon for land transfers to occur without the interested parties securing necessarv consent authorizations. When this occurs, the results may include the technical invalidation of the approvals as to the new owner, as only the original permittee may conduct the permitted activities; increased risk exposure of a stop work order or an enforcement action if a person other than the original permittee undertakes the permitted activities; and, ultimately, post-closing scrambling (and related disputes) to secure after the fact transfer authorization from DEP. avoid these pitfalls, interested parties should critically analyze their permits to determine whether transfer approval is Giordano Halleran & Ciesla ATTORNEYS





required based on the specific terms of the permit or by the rules or regulations by which the permit was issued.

When such approval is required, appropriate action should be taken prior to closing or permit transfer to obtain DEP authorization for transfer of approvals. Interested parties or those representing them should: identify all project or property approvals obtained; determine what DEP approvals by their terms or by applicable regulations require transfer authorization; and submit appropriate applications to DEP. The applications often can be submitted in letter format together with certain required materials, including a DEP checklist, application form and, of course, an application fee. Because the transfers are considered to be minor modifications, public notice of the applications are not required. In the context of an application to modify approvals to reflect a transfer to a contract purchaser, the landowner / permittee must provide appropriate certifications as to its ownership of the property, the interest of the contract purchaser and whether it owns adjacent parcels, and the contract purchaser's agreement and consent to accept the approval and to adhere to

the conditions of the subject approvals. Confirmation must also be provided in the application process that, except for the identified property owner and permittee, no other changes to the conditions of the permit are necessary. The applicant must also demonstrate that the approval for which transfer authorization is sought remains valid. This may require information regarding application of the Permit Extension Act. The application process also invites the possibility of compliance review by DEP. Accordingly, interested parties who intend to submit a request for permit transfer authorization to DEP should carefully review and confirm permit validity and condition compliance before the submission is made to avoid inadvertently triggering an enforcement action.

Note that DEP will not issue transfer approval for emergency permits or approvals based upon a hardship exception. In the unlikely scenario that a parcel is conveyed at roughly the same time as issuance of an emergency approval, a new approval would need to be obtained.

Unfortunately, despite best efforts and intentions, deals often die during the due diligence process or prior Property owners and to closina. permittees are often concerned that if permit transfer authorization is obtained prior to closing, and the transaction is then terminated without closing, they will have lost their permit rights by transfer of approvals and/or will need to submit a subsequent application to be renamed as the permittee. Contract purchasers are often concerned that they will be assuming obligations before actually acquiring title to the property. In the flood hazard context, DEP has expressly addressed this concern and practical dilemma, as permit transfer authorization from DEP only becomes

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EPA WITHDRAWS PROPOSED NUMERIC EFFLUENT LIMITATION FOR CONSTRUCTION SITES

By George J. Tyler, Esq. and Matthew J. Krantz, Esq.

On March 6, 2014, the United States Environmental Protection Agency ("EPA") published a final rule amending the effluent limitations guidelines and standards applicable to construction site stormwater discharges. Significantly, the rule, which becomes effective on May 5, 2014, removes the controversial numeric effluent limitation for the pollutant turbidity.

The numeric limit for turbidity was first adopted by the EPA in December 2009 and required construction sites disturbing 10 or more acres at one time to sample stormwater discharges, submit reports to EPA and ensure compliance with a numeric effluent limitation of 280 NTU.

Shortly after adoption of the effluent limitation guidelines in 2009, the EPA received two petitions for reconsideration of the rule from the United States Small Business Administration ("SBA") and the National Association of Home Builders ("NAHB"). Simultaneously, the NAHB, the Wisconsin Home Builders, and the Utility Water Act Group filed separate suits in court, which were consolidated in the Court of Appeals for the Seventh Based on the arguments made by these parties which identified a potential error in the calculation of the numeric limitation, on August 13, 2010, the EPA filed a motion to vacate and remand the numeric limitation to the EPA for reconsideration under the petitions and requested that the case be held in abeyance until February 15, 2012. Although the Court granted the request, it did not vacate the numeric limit.

As a result, in November 2010, the EPA issued a final direct regulation and proposed regulation to indefinitely stay the numeric limitation for turbidity. When no adverse comments were received, the regulation took effect in January 2011.





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After staying the numeric limit, EPA continued to consult with stakeholders to obtain data "on the effectiveness of technologies in controlling turbidity in discharges from construction sites and information on other related issues."

The EPA also met with representatives of the NAHB, Wisconsin Home Builders and the Utility Water Group to resolve the outstanding litigation. In December 2012, the parties entered a settlement The March 6, 2014 agreement. rule was promulgated by EPA as a condition of the settlement agreement. In addition to removing the numeric limitations for turbidity, the rule also added a definition of "infeasible" and revised the non-numeric effluent limitations relating to best available technology economically achievable ("BAT"), effluent limitations reflecting conventional the best pollutant control technology ("BCT"), and the new source performance standards ("NSPS") reflecting the best available demonstrated control technology.

Significantly, the publication of the final rule on March 6, 2014 brings to rest five (5) years of uncertainty concerning numeric limitations for turbidity. At the time the EPA proposed the stay of the limit in November 2010, EPA estimated that sixteen (16) states were already scheduled to incorporate the 2009 rule changes, including the numeric

limitation for turbidity, in 2010 and 2011. Although the stay was meant deter the states from incorporating the numeric limit, some states still chose to include it in their revised permits. For those states, EPA's decisive action to remove the numeric limit may influence them to remove the limit when the applicable permit is next considered for renewal.

The EPA's decision to eliminate the numeric limitation for turbidity will ultimately benefit both builders and homebuyers. The costs associated with sampling, monitoring and reporting requirements which accompanied the numeric limitation would have increased the cost of construction. These costs would have inevitably been passed on to the homebuyer. As a result of the efforts of the building industry, however, the numeric limitation and associated costs have been averted for now. Still, the EPA has not completely eliminated the possibility of considering a numeric limitation in the future. It reserved the sections formerly containing the numeric limitation "for potential revisions should EPA decide to propose and promulgate additional effluent limitations guidelines and monitoring requirements in a future rulemaking."

About the Author

George J. Tyler, Esq. is a founding shareholder of Tyler & Carmeli, P.C. He handles a wide variety of business, corporate, land use and real estate matters. He concentrates in environmental law with extensive practice before state and federal agencies. Mr. Tyler is a member of the NJDEP Site Remediation Advisory Group, the Chemical Industry Council Environmental Committee and NJBA's Environmental Committee. He can be contacted at 609-631-0600 or gtayler@tcglaw.com.

Mathew J. Krantz, Esq. handles a variety of environmental, business, corporate, land use and litigation issues. He has assisted clients with site remediation, including both the regulatory and insurance aspects and satisfying permit requests. Mr. Krantz can be contact at 609-631-0600 or mkrantz@tcglaw.com.



DON'T JUST "AGREE TO AGREE" ON OFF-TRACT IMPROVEMENTS

By Craig M. Gianetti

With numerous towns throughout the state having capacity issues with existing sanitary sewer and water infrastructure, issues related to off-tract improvements have becoming an increasingly common theme with both residential and commercial projects. In late 2013, there was an unpublished Appellate Division decision concerning illegal exactions and off-tract improvements: Victor Street Condominium Association, et al. v. Raymond Plaza, et al. The decision seemed like a straight forward illegal exaction case; however, it may have opened the door for objectors to challenge certain approvals with off-tract improvements on procedural grounds.

In 520 Victor Street, the defendantdeveloper was before the Saddle Brook Zoning Board for site plan and variance approval for a multistory residential building, to which plaintiff was objecting. During the presentation, there was discussion of the existing sanitary sewer problems within the town. At the hearing, reference was made to a prior report prepared by the Board Engineer citing the town's capacity problem and recommending certain upgrades town-wide at an estimated cost between \$250,000 to \$350,000. The developer offered, as part of any site plan approval, to contribute \$200,000 towards fixing the town's problems. The Board came back and requested \$400,000 without any analysis of how much was really needed, and the developer agreed. The contribution became a condition of approval.

The plaintiff challenged the approval and on appeal the Appellate Division held that the \$400,000 was an illegal exaction because it did not comport with N.J.S.A. 40:55D-42 in determining that the improvements were necessitated by the proposed development. Since the contribution was a condition of

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approval that was so intertwined with the approval, the Appellate Division held that the condition could not be excised. The approval was invalidated and the matter remanded to the Board.

What is interesting in that case is that the Appellate Division also struck down the approval for not comporting to the town's ordinance concerning off-tract improvements. As many towns have, the Saddle Brook zoning ordinance provides that when off-tract improvements are determined necessary, the Board shall (1) determine the total cost of the improvements, (2) determine the proportionate share of the cost to the applicant and other property owners, and (3) notify the governing body of the Board's recommendation of the estimated cost. None of that was done in this case.

Based upon a reading of this case, even if the Board had properly determined that the off-tract improvements were necessitated by the project, the approval could have possibly still been invalidated because the Board never made the specific findings and calculations required by the ordinance. This case should provide caution for developers dealing with off-tract improvements (especially when objectors involved). As mentioned above, Saddle Brook's ordinance concerning off-tract improvements is not uncommon. However, it is also a common practice for a developer to agree with a board that it will be responsible for its fair share of off-tract improvements and the actual calculations for total cost and pro-rata share are determined as part of resolution compliance and dealt with in the developer's agreement with the town.

If the town's ordinance requires the board to make findings of the cost of off-tract improvements and the developer's pro-rata share, then it makes sense for those issues to be specifically addressed during the planning board process as opposed to later in connection with a developer's agreement; otherwise, the door is left open for an objector to challenge the approval.

About the author:

Craig Gianetti, Esq. is an attorney at Day Pitney LLP. Mr. Gianetti can be contacted at 973-966-8053 or <u>cgianetti@daypitney.com</u>. More information on the value Day Pitney can bring to a relationship is available at <u>www.daypitney.com</u>.

PERMIT TRANSFER APPROVAL

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effective upon closing. Accordingly, if closing never occurs, notwithstanding DEP's approval of the transfer, the transfer is not effective.

In the grand scheme of environmental permitting, obtaining DEP authorization for transfer of approvals is not particularly daunting. Difficulties arise when the issue is neglected. With some careful thought, attention and effort, preferably before the day of closing, transfer approval can be secured without project interruption and potential problems for landowners and developers can be avoided.

About the Author:

Steven M. Dalton, is a Shareholder in the Environmental Department for Giordano, Halleran & Ciesla, PC. Mr. Dalton focuses his practice in all areas of Environmental Law. He assists business and individual clients in state and federal environmental permitting, regulatory compliance, solid and hazardous waste remediation, underground storage tank compliance, land use matters and related litigation matters. He can be contacted at 732-741-3900 or at sdalton@ghclaw.com.

ATLANTIC BUILDERS CONVENTION CONFERENCE & EXPO – WHERE BUILDING BEGINS

The 65th annual Atlantic Builders Convention (ABC) was held this past March at the Atlantic City Convention Center. The Convention was an impressive program that included informative seminars, exceptional special events and an energizing exhibit hall that welcomed over 6,500 attendees and showcased nearly 400 exhibits.



Tuesday, March 25, 2014



The NJBA Board of Directors meeting, where Rob Fallone bid farewell to the Board and was lauded for an extremely productive tenure as President of the NJBA.

The 2014 NJBA Annual Economic Forecast, heard from esteemed economic experts Jeffrey Otteau, President Otteau Valuation Group, Inc. and Michael Wolf, Economist Wells Fargo Securities, LLC. The panel was moderated by NJ 101.5 Radio, Veteran Correspondent, David Matthau.





The NJBA Annual Installation Banquet, welcomed more than 200 guests who celebrated the installation of David B. Fisher as NJBA's 61st President as well as his fellow 2014 class of elected officers. As the only NJBA president who was once an employee of the Association,

Dave's chosen theme was to celebrate NJBA's rich history. Invited officiants included the 3 former NJBA CEO's Philip Cocuzza, Patrick J. O'Keefe and Timothy J. Touhey.







The festivities concluded with an extraordinary performance by These Three Tenors who presented an unforgettable program of music from opera to Broadway.

Wednesday, March 26, 2014



The Exhibit floor opened with a traditional saw cutting ceremony on Wednesday. President Dave Fisher making the final cut and opening the 2014 ABC Exhibit Floor.

On Wednesday evening, the NJBA Master Sponsors hosted an exclusive cocktail reception for the NJBA Builder Members. Hundreds attended this Margaritaville-themed event. Nobody was wasting away in this Margaritaville!!! The Master Sponsors extend their appreciation and congratulations to Dean Mon who was selected to receive the Sponsors' Choice Award. This prestigious award is given to a builder or company that utilizes the most products and services offered by NJBA Master Sponsors.



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ABC HIGHLIGHTS

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Thursday, March 27, 2014

2014 Exhibitor Award Winners

NJBA thanks our 2014 award winners whose expertise, professionalism and quality exhibits contributed to the overwhelming success of ABC 2014. We appreciate your support and look forward to your participation in future events!



Exhibitor of the Year Award Burns GMC Truck - Booth MA4 Exhibit - 10 x 20 or larger

Save the Date ABC 2015!

A great many exhibitors have already expressed their intention to return in 2015. Onsite booth sales resulted in over 100 booths sold and many more have reserved since the 2014 ABC.

Are you interested?

Contact diane@njba.org

Atlantic Builders Convention.... Where Building Begins

Conference: March 24 – March 26 Expo: March 25 – 26, 2015 Atlantic City, New Jersey



1st PlaceProcida Funding & Advisors, LLC - Booth 1019



Parksite - Booth 1616



Penn Jersey Signs - Booth 802

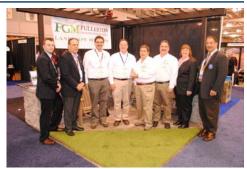
Exhibit - 10 x 10



1st PlaceCarl's Fencing, Decking & Home Improvements
Booth 423



Minno & Wasko Architects
Booth 715



3rd PlaceFullerton Grounds Maintenance LLC
Booth 1725

Sales & Marketing Awards (SAM) Banquet

Industry professionals gathered on Thursday, March 27 to honor the industry's most creative and successful sales and marketing initiatives at the 27th Annual Sales and Marketing (SAM) Awards Banquet. The SAM Award is the highest honor NJBA presents to sales and marketing professionals throughout the state of New Jersey. These prestigious and highly regarded awards recognize the accomplishments of builders

and associates that are truly "Best in Class." This year's event featured the first presentation of the Above and Beyond Community Service Award. The inaugural recipient was Christopher Gaffney of Toll Brothers, Inc. who was selected for his work with Covenant House, a nonprofit charity serving homeless youth with a network of shelters across the Americas. To view a list of the 2014 SAM Award recipients and

photos, <u>click here</u>. Congratulations to all the winners!

Thank You ABC 2014 Sponsors

A special thank you to our sponsors for their support of the Atlantic Builders Convention. Without your help and support, the ABC would not have been possible. To view the list of sponsors, <u>click here</u>.

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ABC HIGHLIGHTS

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Annual Industry Awards Winners

The NJBA honored the individuals that made an impact on the Association and the industry in 2013 during the Annual Industry Awards Luncheon, held on Wednesday, March 26.



Builder of the Year Robert J. Fallone Fallone Group, LLC Metro



Associate of the Year Michael Borodinsky Caliber Home Loans Metro



Kojeski Construction Company BLSJ





Associate Hall of Fame William C. McNamara Cowan, Gunteski & Co., P.A. SBACNJ



Service Arnold E. De Masi, Jr. De Masi Construction Co., Inc. BRANNJ



Service
Frederick Patterson
Robertson Douglas Group
SBACNJ



Service
John Cioletti
Reno's Appliance
BRANNJ



Silver Hammer Dean R. Mon D.R. Mon Group, Inc. Metro



Silver Handshake Michael Kurpiel Universal Supply Co. BRANNJ & SBACNJ



Spike Advocate Edward Walters, Jr. The Walters Group SBACNJ



Special Service
Danny McKearan
Ducky Johnson Home
Elevations, LLC
SBACNJ



Special Service Victoria Reczkowski Ferguson Enterprises BRANNJ



Affordable Housing
George Vallone
Hoboken Brownstone
Company
BRANNJ



Affordable Housing Saint Joseph's Carpenter Society (Pilar Hogan Closkey, Exec. Dir.)



for Outstanding Political Action Carl J. Goldberg Roseland Property Company Metro



Preservation of the American Dream Edward Walters, Jr. The Walters Group SBACNJ



AwardMichael J. Kokes
The Kokes Organization
SBACNJ



Ironman Award John Cioletti Reno's Appliance BRANNJ



Ironman Award
Perri Wachter
Paparone Homes of New
Jersey, Inc.
BLSJ



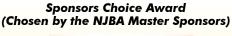
Ironman Award Stephanie Shaffery Flair Marketing Group SBACNJ



Ironman Award
Eric Keller
Omland Engineering
Associates, Inc.
Metro



Distinguished Service Senate President Stephen Sweeney New Jersey Senate





Dean R. Mon D.R. Mon Group, Inc. Metro