SUMMER 2015

NJBA NEW JERSEY BUILDERS ASSOCIATION

DIMENSIONS

Newsletter of the New Jersey Builders Association

IN THIS ISSUE

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

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

APPELLATE DIVISION INTERVENTION CONCERNING MUNICIPAL AFFORDABLE HOUSING DEVELOPMENT FEES PRESENTS OPPORTUNITIES FOR DEVELOPERS

By: Meryl A.G. Gonchar, Esq. and Matthew J. Schiller, Esq.

On April 9, 2015, the New Jersey Appellate Division in In Re Failure of the Council on Affordable Housing to Adopt Trust Fund Commitment Regulations enjoined the Council on Affordable Housing (COAH) and New Jersey's executive branch from seizing affordable housing development fees collected by municipalities. Going forward, the use and disposition of such funds will be decided by courts on a case-by-case basis, subject to the timelines and parameters set forth in the New Jersey Supreme Court's March 2015 decision in In re Adoption of N.J.A.C. 5:96 & 5:97. As the balance of municipal affordable housing trust funds in New Jersey currently exceeds **$168,000,000**, increased judicial oversight of affordable housing development presents a unique, immediate opportunity for developers and land owners to partner with municipalities seeking to address and "commit" their available affordable housing trust funds.

In 2008, amendments to the Fair Housing Act (FHA) enabled COAH to authorize municipalities that petitioned for substantive certification to impose and collect affordable housing development fees from developers of residential properties. Municipalities, however, could not spend or "commit" to spend collected funds without first obtaining COAH's approval. Moreover, municipalities were required to commit to spend the funds within four years of collection. If municipalities failed to do so, the funds were to be transferred to the New Jersey Affordable Housing Trust Fund, where they could be subject to transfer to the State.

The 2008 FHA amendments mandated that COAH promulgate regulations regarding the establishment, administration and enforcement of the expenditure of affordable housing development fees. However, COAH failed to take administrative action concerning those fees, creating uncertainty for municipalities as to how and when the funds were "committed" for expenditure and therefore ineligible for transfer to the Affordable Housing Trust Fund and the State. Without regulations, municipalities feared committing to spend funds as COAH could subsequently enact more stringent guidelines, resulting in "committed" funds being seized by the State and forcing municipalities to use/raise their own funds to cover project costs to which the funds had been allocated. As a result, many New Jersey municipalities accumulated significant affordable housing trust fund balances without committing to their expenditure and/or use.

The recent Appellate Division ruling rejected COAH's contention that the 2008 FHA amendments provided sufficient clarity and that no regulations were needed as "unworthy of further discussion in a written opinion." Rather, the Court concluded that COAH ignored the Legislature's mandate to promulgate rules concerning affordable housing development fees, which placed municipalities in an uncertain position with respect to their ability to commit collected affordable housing trust funds towards the development of affordable housing. In line with the Supreme Court's March decision and order, the Court concluded that COAH's failure to act necessitates judicial intervention to resolve fee disputes and decide the use and disposition of affordable housing development fees going forward.

According to municipal data reported to COAH, as of May 18, 2015, 38 municipalities have affordable housing trust fund balances in excess of $1,000,000, of which 18 have balances greater than $2,000,000. An additional 8 municipalities have

Continued on page 12

About the Authors:
Meryl A.G. Gonchar and Matthew J. Schiller are partners in the Woodbridge office of Greenbaum, Rowe, Smith & Davis LLP (www.greenbaumlaw.com).

Ms. Gonchar is co-Chair of the firm's Redevelopment & Land Use Department. Her practice encompasses all aspects of land use, zoning and related litigation. She can be reached at 732-476-2690 (direct) or mgonchar@greenbaumlaw.com.

Mr. Schiller is a member of the firm's Real Estate Department. His practice encompasses a wide range of commercial real estate transactional and litigation matters. He can be reached at 732-476-2396 (direct) or mschiller@greenbaumlaw.com.

TOWNS, BUILDERS GEARING UP FOR NEXT ROUND OF *MOUNT LAUREL* CASES

By: Thomas F. Carroll, III, Esq.

The New Jersey Supreme Court's March 10, 2015 decision in the COAH rules litigation provided for a 30 day window, beginning on June 8, 2015, within which municipalities wishing to pursue Mount Laurel compliance are to file declaratory judgment ("DJ") actions with the trial courts. Subsequent to the March 10 decision, there have been some initial skirmishes, especially with regard to the establishment of fair share obligations. Moreover, towns and builders are now positioning themselves for the next chapter of Mount Laurel compliance. This article summarizes where matters now stand, and discusses what we are likely to see in the months to come.

Fair Share Numbers

Because COAH failed to adopt lawful fair share numbers for the past 15 years, it now falls upon the trial courts to do so, and trial courts cannot adjudicate the compliance of municipal fair share plans until fair share numbers are first established. Thus, fair share numbers are the first order of business.

The Fair Share Housing Center ("FSHC"), working in concert with David Kinsey, P.P., has released proposed fair share numbers for the entire State of New Jersey. Those numbers are based upon COAH's "prior round methodology" and updated data sources. Per the rulings of the Supreme Court, the prior round methodology must be used to establish new fair share numbers for the post-1999 era (the "third round"). The FSHC analysis concludes that there is a statewide third round need of 201,382 units of low and moderate income housing, with that statewide need being allocated to the 565 municipalities of the State. Working with the NJBA, Art Bernard, P.P., has also calculated fair share numbers for New Jersey's municipalities.

It is anticipated that many municipalities will oppose the FSHC fair share numbers, arguing that the numbers are too high as applied to those towns. Those municipalities will presumably propose their own analysis, and their own fair share experts, in opposing the FSHC numbers. Trial courts will then have to weigh the positions of the parties and establish fair share numbers as a matter of law. Some municipalities have discussed retaining the services of Robert Burchell, Ph.D., of the Rutgers University Center for Urban Policy Research. Dr. Burchell oversaw the preparation of fair share numbers for COAH in 2014 – the much-criticized numbers that COAH declined to adopt.

Fair Share Plans

In addition to examining their likely fair share numbers, many towns are in the process of analyzing sites for the purpose of preparing fair share plans to meet those fair share obligations. The Supreme Court's March 10 opinion very forcefully noted that matters are to move quickly upon the municipal filing of DJ cases, with the Court ruling that fair share plans are to be filed no later than five months after the filing of the DJ complaints (and sometimes less). Some municipalities will no doubt seek extensions and attempt to stall proceedings beyond five months, but it is hoped that the trial courts will recognize that far too much delay has already occurred, with municipalities being held to the timeframes provided in the Supreme Court's decision.

The Roles of Builders

Many builders have already made proposals to towns, asking that their sites be considered for inclusionary zoning (zoning allowing for both lower income housing and the market rate housing that subsidizes the affordable housing). Builders have also written to towns asking to be considered "interested parties" in municipal DJ cases raising Mount Laurel issues, as the Supreme Court's March 10 decision provided that municipalities must provide notice of their DJ cases (and notice of any immunity motions towns file) to those who indicate that they are interested parties. Such notices must also be provided to the NJBA, the FSHC, and other parties to the appeals that contested COAH's regulations.

In consultation with their counsel, builders must also quickly decide how they wish to participate in the upcoming DJ cases, i.e., the types of pleadings to be filed (which may include builder's

Continued on page 12

About the Author
Thomas F. Carroll, III is a partner of Hill Wallack LLP and is partner-in-charge of the Land Use Division which encompasses the Land Use Litigation and Land Use & Environmental Applications Practice Groups. He has significant experience in the land development application and permitting process, as well as the litigation of land use matters at the trial level and in the appellate courts. He can be reached at 609-734-6336 or tcarroll@hillwallack.com.

OWNING VERSUS RENTING IN NJ

By Kevin Gillen, Ph.D.

Whether you are renting or owning, New Jersey continues to be one of the costliest states to do either. According to a recent report from the National Low Income Housing Coalition, New Jersey is the 5th most expensive state to rent in, behind only Hawaii, D.C., California, and New York. Data from Meyers Research shows that New Jersey is the 10th least affordable state in which to buy an existing home. While affordability will always exhibit some variation from one locality to another within any state, New Jersey as a whole persists as a relatively expensive place to live. But although the cost of living in the state remains high, the dynamics in the rental market and home buying market have differed noticeably since the housing recovery started. We take a look at some comparable homeownership and rental stats and examine how they size up against each other.

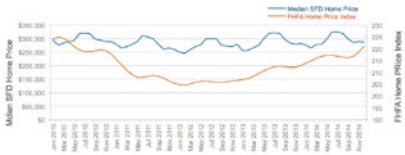
First, it is important to note that overall economic conditions have not helped matters. Sluggish wage growth and elevated levels of unemployment are negatively impacting both renters and homebuyers in New Jersey. While this might normally be expected to depress rental and house price appreciation, New Jersey's lack of buildable land and pervasive regulations have also acted to significantly constrain supply. Renters are especially suffering the brunt of the punishment since rents over the past several years have steadily increased while home prices have struggled to return to pre-recession levels. Data from the Census Bureau shows that average household income rose just 2.7% from 2009-2013. Comparatively, rent prices increased almost four times that rate while home prices across the state remained relatively flat over that same period. Principal and interest payments on a mortgage, based on a 20% down payment, are still well below their peak levels due to lower mortgage rates.

New Jersey: Home Prices

Rental demand has been on the rise since the housing recovery began several years ago. People who lost their homes during the downturn, or who are unable to qualify for a mortgage (read: debt-burdened and income-constrained Millennials) still need a place to live and have mostly all turned to renting. Based on data from the Census Bureau's American Community Survey (ACS), gross rents have increased almost 11% from 2009-2013. The data also shows that rental vacancy rates dropped noticeably during this period because inventory shrunk from high demand and many apartment units were also converted to condos during the boom years. The rental vacancy rate for New Jersey fell to just below 6% in 2012, which is the lowest level in the history of the data. While that number has since risen to 6.2%, it remains noticeably lower than the U.S. average of 6.5%.

While home prices have recovered since the housing bust, they still remain below their peak levels of 2006 during the housing boom. The home price index for New Jersey is still down roughly 15% from its peak, according to data from the U.S. Federal Housing Finance Agency (FHFA). The median price for an existing single-family home is also down 2.4% over that same period. As you can see in the chart below, both home price gauges for New Jersey are still slightly below their levels five years ago. The average rate on a 30-year fixed mortgage is down over a full percentage point over that span so the cost to own a home, with all else equal, has come down over the past several years in the state.

New Jersey: Home Prices



The cost of living does vary from place to place within the state. According to Fair Market Rent data from the U.S. Department of Housing and Urban Development, Cape May County was the most affordable place to rent in 2014 while Hunterdon County was the least affordable. Existing home affordability

Continued on page 12

About the Author
Kevin Gillen, Ph.D., Chief Economist at Meyers Research LLC. Dr. Gillen received his Ph.D. in Applied Economics in 2005 from the Wharton School of the University of Pennsylvania, and received both the U.S. Department of Housing and Urban Development Dissertation Award and Lincoln Land Institute Dissertation Fellowship. With a background in urban economics and real estate finance, Dr. Gillen's research and consulting work is concentrated in applied work in the analysis of real estate developments and operation of real estate markets, including their fiscal, economic and financial implications. Dr. Gillen is based out of Philadelphia, PA and can be reached at kgillen@meyersresearchllc.com.

OBAMA ADMINISTRATION PROPOSES NEW FLOODPLAIN MANAGEMENT STANDARDS

By Michael J. Gross, Esq. and David J. Miller, Esq.

Earlier this year, President Obama issued Executive Order ("E.O.") 13690, which is aimed at limiting the cost to the federal government of relief and recovery in the wake of a flooding disaster. EO 13690 is connected to the President's Climate Action Plan ("CAP"), which calls for federal agencies to make updates to the standards by which they attempt reduce the risk of flood-related damage to projects receiving federal funding.

E.O. 13690 amends an earlier executive order signed by President Carter in 1977, which established federal policy for agencies to avoid impacts to floodplains. The 1977 executive order, E.O. 11988, applies to "federal actions," which includes the construction and management of federal facilities; federal financing and other assistance to construction projects; and, importantly, federal activities and programs "affecting land use, including water and related land use planning, regulating, and licensing activities". It is important to note that E.O. 13690 does not replace E.O. 11988, but simply amends it without specifically addressing to which federal programs the new provisions will apply. Thus, the broad application of the original executive order to federal programs, including permitting, likely applies to the new floodplain definitions, despite the suggestion in the CAP that new floodplain standards should only apply to federally funded projects.

In short, E.O. 13690 directs federal agencies to update their floodplain management policy by implementing the Federal Flood Risk Management Standard ("FFRMS" or "the Standard"). The FFRMS includes three major provisions affecting projects receiving subject to the FFRMS. First, the Standard establishes a policy favoring the use of natural features and nature-based approaches when federal actions implicate floodplains. Second, the Standard requires a higher vertical elevation in establishing a floodplain to avoid flood risks. Third, the elevation and corresponding floodplain are to be determined using one of three approaches described in E.O. 13690 and incorporated into the FFRMS.

The vertical elevation requirement, referred to in the FFRMS as the "elevation component," applies to all new construction and "substantially improved structures," defined as improvements or rehabilitation that equals or exceeds 50 percent of the value of the structure. Generally, the elevation component requires a vertical elevation of the base flood elevation ("BFE") plus an additional two feet. The BFE is the elevation of the 100-year floodplain, i.e. the area susceptible to a one percent chance of annual flood. In the case of "critical actions," defined as actions that cannot withstand any chance of flooding such as prisons and hospitals, the elevation component requires an elevation of the BFE plus three feet.

The FFRMS also requires updates to agencies' approach to delineating a floodplain. Pursuant to the updates in E.O. 13690, a floodplain can be defined by applying one of three approaches. The first approach defines a floodplain as the elevation and flood hazard area that result from using a "climate-informed science approach" which employs the "best-available, actionable hydrologic and hydraulic data and methods." The second approach uses the "freeboard value," which mirrors the elevation component, to define a floodplain. The freeboard value is determined by adding two feet to the BFE or three feet in the case of "critical actions." The third approach simply defines a floodplain as the area subject to flooding by the 0.2 percent annual chance flood (i.e., a 500-year floodplain). Additionally, E.O. 13690 allows the possibility of additional floodplain definition approaches established in updates to the FFRMS. Of the three approaches, the freeboard value approach has been predicted to be the most likely adopted by federal agencies.

Currently, guidelines for implementing the changes to floodplain management

Continued on page 13

About the Authors:
Michael J. Gross is NJBA's Environmental Counsel and Chair of the Environmental Department at Giordano, Halleran & Ciesla, P.C. He can be reached at 732-219-5486 or mgross@ghclaw.com.

David J. Miller is an Associate in the firm's Environmental Department concentrating on environmental compliance and development matters. He can be reached at 732-741-3900 or dmiller@ghclaw.com.

IDENTITY THEFT – THE GROWING MENACE

By Anthony Bevilacqua, CPCU

Identity breach is a daily occurrence. The problem for all of us is we don't know it is happening. The frequency of these events has become so common place that media outlets no longer seem interested to report them anymore – they don't grab headlines or attention. But, cyber risk is everywhere. Every business that uses a computer, desktop, laptop or mobile device to conduct its business is at risk. Even though the media may feel it is no longer news worthy, businesses must prepare or face significant financial hardship.

Small business owners, those companies defined with fewer than 100 employees, have their eyes closed to the reality of this problem. A recent study by a national insurer shows only 27% of these businesses believe they are at risk of a data breach. Over 30% believe there would be no impact to their company if such an event occurred. If your business was exposed to a hurricane every day, you would take action to minimize its impact. But hurricanes don't happen every day. Data breaches do. It seems illogical for a business to ignore this daily threat.

A recent survey of 117 data breach claims by a national insurer reveals these startling statistics:

$2.9million - the average claim payout for companies with revenues between $50million and $300 million

$733,100 - the average claim payout for companies with revenues less than $50 million

$145 per notification – the cost to notify everyone potentially affected by a data breach. It is not unusual for a company to have a data base containing the personal information of thousands of customers and employees. Each must be notified regardless if they are a current customer, past customer, or prospect. The same is true of current and past employees

Do these figures get your attention? Don't think it could happen to you? You are wrong. Consider the highly publicized case of involving Target a couple years ago. Target had what they believed to be a very strong and intelligent cyber security system. Unfortunately, the hackers accessed millions of their customer's personal data through a vendor contractor's computer that was allowed access to Target's data system.

The first line of defense is proper internal controls over your data system. Businesses should make certain all their software is protected by anti-virus and malware programs. Avoid leaving your computer on after you leave for the day. Use data encryption services for sensitive personal information such as social security numbers, driver license numbers, dates of birth, and credit card numbers. Install internal fire walls that limit the amount of data an employee can access. Block access to social media sites that are not necessary to the operation of your business.

The fact most businesses do not maintain their own software and hardware but utilize cloud computing or third party vendors to access and store sensitive personal information is immaterial to the exposure. It is important to investigate the quality of these vendors to assure they have established appropriate internal controls to protect your data and against a breach.

Once you have set up internal data breach controls, Cyber Insurance is an important consideration for every business today. The coverage has evolved over the past 10 years to address the multitude of expenses a business incurs when a breach occurs. Many insurers offer two types of insurance coverage. The first type is a very stripped-down, limited coverage rider that is attached to a Business Owner Package or Commercial Package. The second is a comprehensive policy that wraps together coverage for direct and indirect expenses resulting from a data breach, plus liability insurance for lawsuits that arise from the breach.

The stripped down version may cost only $300 to $1,000 annually. Remember, coverage is very limited but it is still

Continued on page 12

About the Author
Anthony Bevilacqua, CPCU is President of Anthony & Company, Inc., an independent insurance agency with special insurance and risk management services tailored to the needs of the commercial and residential development community. You can reach Mr. Bevilacqua at 908-806-8844 or email him at anthony.bevilacqua@anthonycompany.com.

YOUR WARRANTY PROVIDER'S BIGGEST CHALLENGE

By Don Sechler

Building homes is a very complex thing. The National Association of Home Builders estimates that over 3,000 components are used in constructing a house. The single most problematic component for your warranty provider is the foundation, a wall of concrete block resting on a footing, supporting the full weight of the house, its contents, and inhabitants. This component is arguably the most important component. Why then is it the most problematic?

When designing and constructing a concrete block (CMU) foundation there are many very important elements that need to be considered. The single biggest dynamic that we are faced with is resistance to lateral movement. The forces that laterally impact CMU foundations should be considered when using this method of foundation construction. Steel reinforcement, introduction of pilasters, solid grout along with rebar in hollow cores and attention to backfill and soil types go a long way in constructing an adequate foundation wall that can resist lateral forces.

When a claim is made to your warranty provider a fact finding inspection is ordered. A professional engineer will be scheduled to visit the home and assess all aspects of the condition reported. There are external factors that can affect CMU foundation performance. The height of the backfill along with the type of soil (clay, shale, sandy, expansive, etc.) may have required special attention when it was placed. The installation of perimeter drain systems whether internal or external will be evaluated. Is a sump pump installed and has the homeowner been proactive in using and maintaining the system? If the system is day lighted, is the line clear and does it function properly? Hydrostatic pressure created from over saturated soil has tremendous weight that can test the limits of the foundation wall if a potential water condition is not mitigated.

The warranty provider steps in when a foundation, under New Jersey Statutes, has failed or is deemed a pending failure by a licensed professional engineer. In most instances the mode of foundation movement is lateral and our responsibility is to restore the load-bearing function of the foundation wall. The engineer will evaluate the unbalanced fill condition as he evaluates the foundation wall. Any actions that the homeowner may have taken regarding landscaping, patio installation, modifications to the downspout locations or re-routing of the downspouts along with overall grading and drainage that may have been modified after the home was delivered by the builder, are noted and taken into consideration.

During this phase of investigation your warranty provider will reach out to you, the builder, and inform you that a claim has been made. You have the most knowledge about this home. You have been intimate with this structure from the first idea that a home should be constructed until settlement changes title to your buyer. We understand and respect that you are most knowledgeable. We rely on your expert knowledge and ask that you provide us with the details regarding how this foundation was designed and built. This will include requests for drawings and details regarding any service orders or warranty claims that you have dealt in the first two years of the home's life. Anything that you can provide to us so we can carefully evaluate every aspect of this claim and determine if coverage is afforded or if exclusions that deny coverage may apply.

If a CMU foundation wall is granted coverage, we will be required to make repairs that will restore the covered CMU foundations load-bearing ability. We are not obligated to rebuild the foundation wall however this may be necessary dependent on the severity of the lateral displacement. Our efforts commonly involve reinforcement utilizing solid core grouting and rebar installation and more recently the use of carbon fiber reinforcement. This work is most often performed from the interior of the home negating the extensive cost of exterior excavation. It is important to recognize that this work will be accomplished in accordance with a sealed structural repair plan provided by a licensed engineer and the work will be certified at completion by the same professional. Remember, the Limited Warranty requires that the load-bearing function be restored, that does not necessarily mean that a wall that shows signs of lateral movement needs to be

Continued on page 12

About the Author
Don Sechler is a Warranty Performance Supervisor with Residential Warranty Company, LLC (RWC). Don has been employed with RWC for 17 years. Prior to his employment with RWC, Don worked in all phases of residential and light commercial construction and owned and operated several residential new construction and remodeling oriented companies. For more information, contact RWC at info@rwcwarranty.com.

PARTNERING WITH A PREFERRED LENDER

By Michael Borodinsky

As new home sales continue to rise, home builders play a crucial role in the buying process and have a great opportunity to provide buyers guidance about the financial concerns customers face.

Since buying a newly constructed home can take anywhere from three to 12 months to complete (or more!), there is significant time for complications to arise that could derail a buyer's loan approval. To ensure a smoother progression toward closing, home builders should work with their real estate agent and lending partners to discuss the following with clients:

- Help home buyers understand financing options. Communicating the different financial tools available can help home buyers determine which mortgage is best for their circumstances. Our loan officers provide on-site coverage to allow for face to face interaction with prospective buyers. This can support point of sale pre-approvals to better help both the buyer and builder/seller. It is especially important to help home buyers understand longer term rate lock options. For example, Caliber Home Loans offers the ability to lock in an interest rate for up to 12 months during the home construction period with the option to lower the rate 60 days before closing if market rates have declined. These types of options help buyers secure their rate and payment in a fluctuating rate environment.

- Avoid incurring new debt: Since the contract to close cycle can take longer than a resale, buyers are more susceptible to credit changes. Home builders should communicate the dangers of adding new debt or depleting assets during the construction process. Many times a buyer's exuberance can lead to other new purchases such as a new car or furniture. Adding additional debt or liquidating assets can potentially have a negative impact on their original qualifying credit. Working with preferred lenders who understand how to counsel buyers through longer build cycles is crucial to ensuring the buyer can close. We offer credit repair services to buyers who may benefit from higher "FICO" credit scores due to prior financial challenges or inconsistent reporting by the repositories.

- Communicate all changes to the lender. Home builders should ensure any additional costs incurred during the building process (i.e. additional upgrades) are immediately relayed to the lender. Buyers may not be fully aware of the impact to their payments or qualifying debt ratios for the loan. Furthermore, any changes in the build cycle timeline should be communicated to the lender to ensure it will not jeopardize the buyer's rate lock expiration.

- If the project is a condominium, Caliber Home Loans offers specialized condominium approval support services (FHA/FNMA) along with unique valued added features including waived pre-sale requirements and non-warrantable condominium programs.

- Not all borrowers are "credit ready" at point of sale. Some may need to accumulate additional savings to cover down payment and closing costs. Some may have had credit histories that need repair in order to meet lender guidelines (this is where the credit repair services come into play). Some may need to restructure their debt service in order to qualify. Even if a prospective buyer isn't qualification ready, today, we can work with them over the construction period to make them mortgage eligible prior to completion.

- Caliber offers programs to assist those specific buyers who "don't fit inside the box". Our "Fresh Start Program" features higher debt to income ratios, lower credit score requirements and forgiveness for recent short sales, foreclosures and bankruptcies inside of the past 3 years. We can assist more potential buyers and support more sales velocity for our builder partner.

About the Author
Michael Borodinsky is Vice President/Regional Builder Branch Manager (nmls #460228343) for Caliber Home Loans in Edison, NJ. He can be reached at 732-382-2654 or michael.borodinsky@caliberhomeloans.com.

PROACTIVE MAINTENANCE LEADS TO IMPROVED COMPUTER HEALTH

By Cathy Coloff

"We are what we repeatedly do," Aristotle proclaimed. We all know that we should brush our teeth twice a day, eat healthy, and get regular exercise. Sadly, not everyone does this.

Just as we should take care of our bodies, in business we should take care of our computer network because quite often it's what makes everything flow through the business. And as with our personal health, quite often a business' computer network is not well maintained.

A computer network has many components that make up the complete system. The maintenance required for each component varies as does the recommended frequency. Quite often, businesses will elect to maintain their computer network themselves, aka DIY. And if they are well-disciplined or designate someone within the organization to actually perform the maintenance, then this approach can be successful. However, in our experience, most companies assume the maintenance is being done but do not track it nor can they easily confirm it.

With the rise of various compliance requirements and the increased knowledge in business about computer networks, more and more businesses are being required to not only perform maintenance but also prove it. At IT Radix, we feel this tracking requirement is a good thing. Why? Because it leads to better computer maintenance habits which ultimately reduces your overall total cost of ownership for a computer network.

Have you filled out a business insurance application lately? The insurance companies have realized that proactive maintenance is a process and not an event. Nowadays, their applications include questions about what your business is doing to protect itself from cybercrime, data loss and more. This is akin to the permit/inspection process that most construction projects undergo.

Here's where IT Radix' proactive maintenance plans can really help a business. We have processes in place to check anti-virus status daily, to confirm successfully backup completion daily, to monitor event logs for critical conditions real-time, to roll-out and confirm the successful installation of Microsoft patches, to upgrade firewall firmware, and more. Just think—you don't have to "brush your teeth twice a day" when it comes to your computer network because IT Radix will do it for you.

Just like many homeowners aren't ready to hire a contractor, we understand that not all businesses are ready to outsource their computer maintenance responsibilities. If that's the case, we'll gladly share our knowledge and advise you as to how you can do more to proactively maintain your computer network yourself. This is similar to situations where a homeowner acts as the general contractor and subs out portions of a project to specialists.

Often a construction project will be a DIY situation, if the project is on the small side and the homeowner is on the younger side. So, too with computer projects. We find that many businesses will take on small computer projects especially when younger staff members are involved. Sometimes in these situations, like in construction projects, there is overconfidence. The result is that the person thought they knew everything needed, but fell short especially if unexpected problems occur. Often a small problem can quickly turn into a big problem if not handled correctly. As in construction, a percentage of our business involves salvaging do-it-yourself projects or problem resolution that has gone wrong.

If you prefer "DIY-computer network maintenance" or are ready to let someone else handle computer network maintenance so you can focus on your business, give us a call today to learn how IT Radix can help you improve your computer health.

About the Author
Cathy Coloff, is a Managing Member with IT Radix, LLC. She has 20+ years of experience in network systems with particular emphasis on local area networking and business applications. With extensive corporate experience at Exxon and Bear Stearns, Cathy works with IT Radix clients to develop their IT best practices without the big corporate price. She can be contacted at 973-298-6908 or itsales@it-radix.com.

NJDEP'S NEW FILL MATERIAL GUIDANCE DOCUMENT

By Neil Rivers, LSRP

I have excess soil from my project and nobody wants it without test results – what do I do? I was provided laboratory test results for fill material – what do they mean? If you find yourself asking these questions, NJDEP's recently updated Fill Material Guidance might just have the answers. Representing NJBA on NJDEP's guidance development team since 2010, I worked with the Environmental Committee to bring a builder's perspective to this guidance document.

The April 2015 guidance document replaces the December 2011 Alternative and Clean Fill Guidance and applies specifically to brownfield and environmental cleanup projects conducted under NJDEP's Site Remediation Program (SRP). The new guidance describes approaches to characterizing and using various types of fill material including: clean fill, alternative (contaminated) fill, quarry/mine material, recycled concrete, asphalt millings, and dredged materials. Developers, remediating parties and Licensed Site Remediation Professionals (LSRPs) are the target audience for this guidance.

Some of the more important topics addressed in this new guidance are outlined below.

When it is permissible to bring contaminated fill to a site. When fill material contains contaminants at concentrations that exceed NJDEP cleanup standards, it is called "alternative fill". Alternative fill can be used at SRP sites under certain conditions, provided that no new contaminants are brought to the area being filled, or that the contaminant concentrations in the fill don't exceed those known or suspected to exist at the receiving area. In other words, NJDEP doesn't want the imported material to worsen site conditions. Be aware that clean fill and other types of capping may be necessary to mitigate exposure where alternative fill is used.

One important use of alternative fill is as an economical source of material to raise the elevation in areas subject to flooding. The guidance describes instances where NJDEP will allow the use of alternative fill beyond that required for remediation to meet the FEMA 100-year flood elevation, and the procedures for seeking NJDEP preapproval when excess alternative fill will be imported to exceed the FEMA 100-year flood elevation.

How to determine if material is "clean fill". The guidance describes the sampling frequencies and laboratory test protocols used to determine whether fill material meets the SRP definition of clean fill, or whether it can be used as alternative fill at a site. The guidance also provides options for reducing the cost of these evaluations.

Procedures for the on-site consolidation and/or relocation of contaminated soil. The guidance describes cases where NJDEP will allow property owners to consolidate or move contaminated material around a site. In general, this would be allowed when a sizeable clean area will be created, or when the total areal extent of contamination is reduced significantly in size. Be aware that an NJDEP regulatory variance will be required in these cases. Placement or encroachment on clean areas is not allowed, and the consolidation must not result in the mixing of incompatible materials, the creation of a vapor intrusion pathway, or increased groundwater contamination in the receiving area.

A special exception is afforded to contiguous properties containing historic fill. Provided the historic fill has been properly characterized and delineated, it may be relocated across property lines within the same redevelopment project.

Procedures for using materials from quarries and mines as a source of fill. In the most significant change from the 2011 guidance, the 2015 document outlines new procedures for evaluating sand, gravel and rock obtained from quarries and mines that will be used for remediation at SRP sites. Laboratory testing is optional if the material is from a licensed commercial quarry or mine and the quarry/mine operator certifies that the material has not been subject to a discharged hazardous substance at any time. As testing is optional, the remediating party or LSRP may still elect to test material prior to importation to verify compliance with NJDEP Soil Remediation Standards.

Sand, gravel or rock from unlicensed quarries/mines or from licensed quarries/mines without a certification needs to be evaluated using the clean fill protocols. This will typically involve testing and/or an evaluation of the donor site's history and geologic setting.

Over the last three years, NJBA has taken a leadership role in developing these new procedures for using quarry/mine material. NJBA was instrumental in developing a workable solution and

Continued on page 13

About the Author
Neil Rivers is a Vice President with Langan Engineering & Environmental Services. He is a New Jersey LSRP and has over three decades of site remediation and redevelopment experience. Neil has represented NJBA on numerous site remediation stakeholder teams. He can be reached at 609-282-8013 or nrivers@langan.com.

NEW JERSEY SUPREME COURT CREATES UNCERTAINTY IN CERTAIN APPLICATIONS OF THE STATUTE OF REPOSE

By James A. Kozachek, Esq.

On April 30, 2015, the New Jersey Supreme Court unanimously held that the New Jersey Statute of Repose, N.J.S.A. § 2A:14-1.1 et seq., (the "Statute") does not begin to run on claims involving an improvement that serves an entire multi-phased project until that improvement has been connected to every building it is intended to serve. The defendants in State of New Jersey v. Perini Corporation, et al., argued that the 10-year statute of repose began to run when their work was complete and their high temperature hot water ("HTHW") system began to provide hot water to buildings in the first phase of the three phased, twenty-six building correctional facility project ("Project"). The Supreme Court rejected the defendants' arguments and ruled that "[t]he statute of repose for a single improvement that is intended to supply critical utilities, such as heat and hot water, cannot be considered substantially complete until it has been connected to every building it is intended to serve." The Supreme Court also ruled that another defendant who supplied products incorporated into the HTHW system was not a professional contractor and was therefore not protected by the statute of repose.

The Statute provides in the relevant part that "no action ... shall be brought against any person performing or furnishing the design, planning, surveying, supervision of construction or construction of [an] improvement to real property, more than 10 years after the performance or furnishing of such services and construction." N.J.S.A. § 2A:14-1.1.

The Statute was intended to limit the "'potential liability to which architects and building contractors, among others,'" were increasingly subject. Cyktor v. Aspen Manor Condo. Ass'n, 359 N.J. Super. 459, 470 (App. Div. 2003) (quoting Rosenberg v. Town of North Bergen, 61 N.J. 190, 194 (1972)). "The primary consideration underlying a statute of repose is fairness to a defendant, the belief that there comes a time when the defendant ought to be secure in his reasonable expectation that the slate has been wiped clean of ancient obligations[.]" R.A.C. v. P.J.S., Jr., 192 N.J. 81, 96-97 (2007) A statute of repose imposes a "fixed beginning and end to the time period a party has to file a complaint" that "bears no relationship to when the injury occurs or the cause of action accrues." Id. at 96. The Statute does not bar a remedy, but rather prevents the cause of action from ever arising. Port Imperial Condo. Ass'n v. K. Hovnanian Port Imperial Urban Renewal, Inc., 419 N.J.Super. 459, 469 (App.Div. 2011).

The Supreme Court's recent ruling naturally raises some concerns. Construction professionals working on multi-phased projects can no longer be confident that they are secure from claims ten years after their work has been performed or furnished. If their work is tied in some fashion to work being performed after they are done, there is now a possibility that their ten-year statute of repose will not begin to run until all of that later work has been performed or furnished. The other lingering question is what happens if later phases of the project are completed many years later or not at all? Could arguments be made that the existence of additional work to be performed on a project prevents the Statute from ever beginning to run? The Supreme Court expressly did not address that question, stating simply that "[w]e need not address in this appeal the implications for statute of repose purposes of a multi-phase project that proceeds with substantial idle intervals between phases."

The Supreme Court has created new uncertainty in the application of the Statute and injected a new fact-based response to the Statute's application that previously did not exist. It is now no longer a question of when a particular tradesman's work was completed, but when any subsequent and adequately related work has been completed. Increased litigation in connection with the application of the Statute is therefore likely. It may also be prudent to reexamine contract documents used in such multi-phased projects to account for this ruling.

About the Author
James A. Kozachek, Esq., is Owner/Principle of Cartusciello & Kozachek, LLC. He has over 23 years of experience serving clients in a broad range of areas with a focus on complex and commercial litigation (including arbitration and mediation) relating to construction, real estate, contracts, product liability, insurance claims, consumer protection, labor law and environmental issues. He can be reached at 609-324-8200 or jkozachek@cklawllc.com.

APPELLATE DIVISION INTERVENTION

Continued from page 2

trust fund balances slightly under $1,000,000. Municipalities reporting the five largest affordable housing trust fund balances are: (1) Monroe Township (Middlesex County), which has a reported balance of $13,119,800.21; (2) Marlboro Township (Monmouth County), which has a reported balance of $6,544,729.87; (3) Mount Laurel Township (Burlington County), which has a reported balance of $5,564,206.03; (4) Edison Township (Middlesex County), which has a reported balance of $4,104,746.75; and (5) Hillsborough Township (Somerset County), which has a reported balance of $3,564,704.87.

In Re Failure of the Council on Affordable Housing to Adopt Trust Fund Commitment Regulations is the most recent example of the New Jersey judiciary's newfound willingness to proactively address the state's many unresolved affordable housing issues. The extent to which a municipality already may have committed affordable housing trust fund balances to developments or property acquisitions must be reviewed on an individual municipal basis. However, given the numbers reported to COAH, it appears likely that significant funds may remain available. Municipalities will become subject to significant judicial scrutiny as they seek judicial confirmation of their Mt. Laurel compliance. Accordingly, many may be receptive to new development proposals and consideration of vacant land for sale within their borders that will yield affordable housing through the use of their available affordable housing trust funds. Developers and land owners therefore have a unique, immediate opportunity to pursue partnerships with municipalities to obtain judicial approval for developments that will include subsidized affordable housing elements.

TOWNS, BUILDERS GEARING UP

Continued from page 3

remedy claims), possible intervention, and similar questions. These decisions will sometimes vary depending upon the circumstances surrounding different municipalities. The obvious goals of builders in such proceedings will include defeating (or minimizing) any municipal claims for immunity from builder's remedy suits, along with the ultimate acquisition of favorable rezonings. Similarly, builders and their counsel must decide the strategy to be employed as to towns that do not file DJ cases within the 30 day window.

Conclusion

NJBA and Hill Wallack LLP, as NJBA's Land Use Counsel, will be working together in the weeks and months ahead to track municipal DJ filings and otherwise provide information concerning the upcoming flurry of Mount Laurel proceedings. This next chapter of Mount Laurel compliance provides considerable opportunities to builders wishing to seek favorable rezonings and provide much-needed affordable housing.

IDENTITY THEFT

Continued from page 6

better than nothing. A broad form Cyber Risk policy contains such coverage as security breach remediation and notification expense, credit monitory expense, crisis response management expense, regulatory defense expense, business interruption and loss of profits, program and data restoration expense, e-commerce extortion threat, forensic technology expense to discover the source of the breach and patch the hole, and third party liability coverage for lawsuits that arise from the breach of personal data. Broad coverage policies typically start around $5,000.

Whichever policy type you choose, make sure you choose one. The exposure to loss is too great for businesses to self-insure.

OWNING VERSUS RENTING

Continued from page 4

statistics from Meyers Research shows that Cumberland County had the highest existing home affordability ratio in March 2015 while Morris County had the lowest. It is interesting to note that both Cumberland County and Gloucester County rank in the top-3 to buy or rent in the state.

	Most Affordable to Rent	Most Affordable to Own
1	Cape May County	Cumberland County
2	Cumberland County	Gloucester County
3	Gloucester County	Somerset County
	Least Affordable to Rent	**Least Affordable to Own**
1	Hunterdon County	Morris County
2	Middlesex County	Union County
3	Somerset County	Bergen County

In conclusion, market conditions do make it a very favorable time to be a homebuyer, even if personal economic conditions do not. The rental market will still see elevated levels of demand although increased supply and a transition from renters to homebuyers will help rents stabilize. The cost of renting has risen far quicker than the cost to purchase a home over the past several years. With improving economic conditions and a more favorable lending environment, homebuyers are well-positioned to take advantage of historically low mortgage rates before they start to steadily rise as the year goes on.

WARRANTY BIGGEST CHALLAGE

Continued from page 7

plumb when the repairs are complete.

Your warranty provider understands that you are truly professional builders. When we have to deal with this significant structural problem, we know you have done your due diligence throughout the construction process and you will be able to provide us with the important data we need to ensure a fair evaluation of the claim and an adequate repair when required.

** Please note: Each warranty provider may not follow the exact process identified in this article for evaluating and repairing CMU foundation walls.*

OBAMA ADMINISTRATION

Continued from page 5

included in E.O. 13690 and the FFRMS are in the final stages of the administrative rulemaking process. In March and April of this year, the Federal Emergency Management Agency ("FEMA") held eight "listening sessions" to hear public comment on the proposed guidelines and the period for submitting comments on the draft guidelines ended on May 6, 2015. The National Association of Home Builders ("NAHB") has been at the forefront of the industry's response to E.O. 13690 and submitted comprehensive comments detailing the various problems with the guidelines as drafted.

Reaction to the draft guidelines was mixed, but drew criticism on several fronts. Initially, E.O. 11988 has been, at best, loosely implemented since in 1977. Commenters, including the NAHB, raised concerns about federal agencies suddenly promulgating regulations to implement E.O. 11988 without clear direction or a designated lead agency. As noted above, E.O. 13690 has also been accused of going beyond the scope of the changes envisioned by the CAP, which only calls for changes to federally funded projects as opposed to all federal programs related to flooding.

In terms of the various methods of delineating a floodplain established in E.O. 13690, there is no requirement that federal agencies select an approach uniformly, even within a single agency. Consequently, different programs within one agency can reach different conclusions as to the reaches of a floodplain, thereby creating uncertainty as to whether or not property is or is not in a floodplain. The language of E.O. 13690 and the FFRMS themselves also sows uncertainty surrounding implementation of the floodplain management standards. For example, it is unknown what the term "climate-informed science approach" means or, in fact, what agency should determine what it means. The significant public participation describing the above-referenced issues during FEMA's listening sessions has contributed to increasing Congressional interest in these issues. Congress is currently deciding on if and how it will respond to E.O. 13690, however appropriations legislation has been introduced which would prohibits funds from be used to implement to FFRMAS. Congressional action could clarify the confusion in the FFRMS and proposed guidelines as proposed, ideally to address the specific concerns noted above.

While the concern is not immediate as the guidelines remain in draft form and agencies have not begun to propose new regulations to comply with the Executive Orders and the FFRMS, there is the potential for impacts to builders in New Jersey in the future. Apart from those issues discussed above, the new floodplain definition, if widely adopted by federal agencies, could expand the scope of the National Flood Insurance Program ("NFIP") and result in more locations being subject to mandatory flood insurance. This, however, would require FEMA to change its current NFIP regulations defining floodplains, which has not been proposed to date. That said, such a change to the regulations would seem authorized, if not mandated, under the current language of the Executive Orders and the FFRMS. This would be true for all federal agencies, but the question whether agencies will adopt the FFRMS across the board remains unanswered.

Similarly, the Executive Orders and the FFRMS do not appear to have an immediate impact on New Jersey's treatment of flood hazard areas. While the Flood Hazard Area Control Act rules do provide for a method of determining the extent of a flood hazard area by reference to FEMA flood zone maps, they do not peg ultimate flood hazard area designations to the federal rules, but rather establish independent standards. Those standards would have to be changed by the rulemaking process is in order to expand New Jersey's floodplain definitions. However, if FEMA adopts new flood zone maps incorporating the floodplain definitions from the FFRMS and E.O. 13690, New Jersey's floodplain standards will no longer match what is shown on the FEMA maps, creating a dilemma for the regulations that rely on the FEMA maps.

In sum, the eventual effects of E.O. 13690 are not yet known. Many factors will impact the ultimate outcome, including the impact of ongoing public participation, possible Congressional intervention, and the possibility that federal agencies simply will not adopt new regulations in the wake of E.O. 13690. NJBA will be closely monitoring the process of adopting the FFMRS and the implementation guidelines and updated its members as new information develops.

NJDEP'S NEWS FILL MATERIAL

Continued from page 10

obtaining the agreement of NJDEP and a broad range of stakeholder groups representing the quarries, LSRPs, and remediating parties. This was a significant achievement.

Like other NJDEP guidance documents, the Fill Material Guidance provides property owners, builders, and their LSRPs with opportunities to apply creative solutions to address site-specific conditions and reduce project costs. Some examples include reductions in sampling frequencies, reduced laboratory test requirements, and flexibility in evaluating whether new contaminants will be brought to the site in alternative fill. You should discuss these options with your LSRP – they could save you time and money.