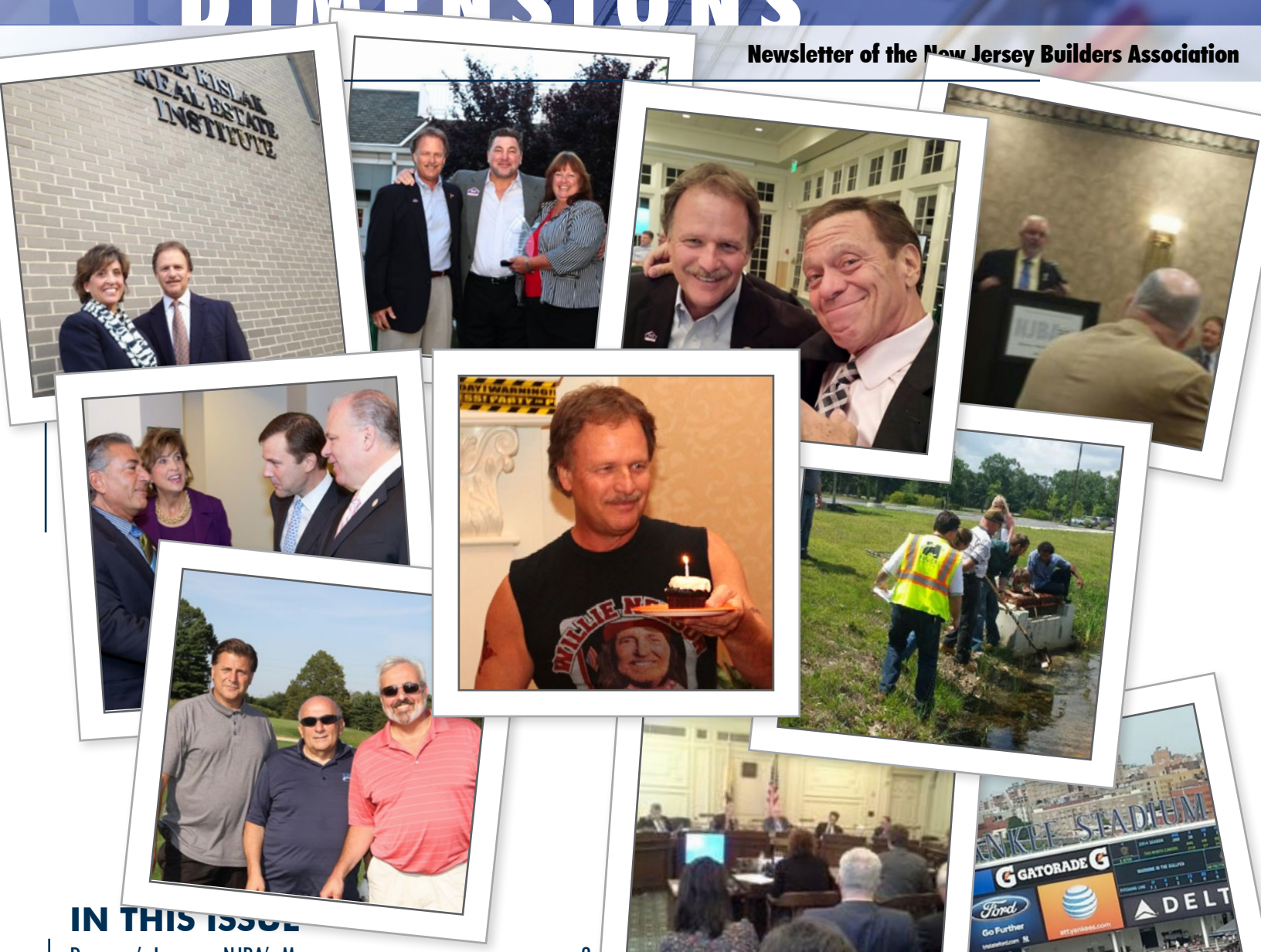
FALL 2014

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 Lisa Obolsky at lisa@njba.org.*

LETTER TO NJBA'S MEMBERSHIP

By David B. Fisher, PP, AICP

The holiday season is upon us and this seems like the most appropriate time to reflect on an extremely busy summer and fall. On the social front, we "took you out to the ballgame" with an August road trip to Yankee Stadium. At our annual Golf Outing in September, we hit the greens and paid tribute to our Associate Members during Associate Appreciation Night while rubbing elbows with a well-known local celebrity, Joe Piscopo. Most recently, NJBA helped me to mark a personal milestone by celebrating my 60th birthday and raised funds for BPAC in the process. And plans are well underway for ABC 2015 (March 24 – 26, 2015 in Atlantic City) which holds many promises of great fun, useful information and productive networking for NJBA members and the entire building community.

David B. Fisher, PP, AICP
NJBA President

In the policy arena, we've been going full steam ahead. The Legislative Affairs Committee has screened hundreds of bills so far this session. Notable among them was the Association's own critical initiative, the Permit Extension Act. NJBA's membership, as well as many members in our allied associations, expressed a desire to pursue another 2-year extension of the law, which is set to expire at the end of this year. NJBA leadership began discussions with a number of key legislators in both the Assembly and the Senate, including Assembly Majority Leader Greenwald, Assembly Speaker Prieto, Senate President Sweeney, as well as, Senators Sarlo, Oroho, and Kyrillos. As a result of these meetings, Assembly Bill 3815 (Green/Burzichelli/Singleton/Johnson/Diegnan/Moriarty/Rible/Dancer) was introduced and referred to the Assembly Housing and Community Development Committee on October 16, 2014. Just a couple weeks later on October 27, 2014, its companion measure, Senate Bill 2551 (Sarlo/Kyrillos/Oroho), was introduced and referred to the Senate Community and Urban Affairs Committee. NJBA continues to work with the leadership in both houses to gain support for this proposal.

We are also actively engaged in the affordable housing debate and COAH's latest attempt to adopt Third Round Rules that would be deleterious to the home building industry. NJBA critiqued the proposal from a legal and policy perspective through both the submission of extensive written comments and testimony at the public hearings. Recently, COAH met for the purpose of adopting the recently proposed third round regulations with the planned publication of the rules in the November edition of the NJ Register. However, a surprise 3-3 vote ensued and because COAH was unable to garner the necessary support for passage, the regulations were not approved by COAH. There is undoubtedly additional litigation to come as COAH and the other interested parties evaluate their options.

The Land Use Task Force that I formed at the beginning of my term as President continues to meet monthly. The charge to the Task Force is to identify and draft meaningful reforms to the Municipal Land Use Law (MLUL) that would facilitate the land use process and improve the way in which local land use decisions are made. The Task Force is currently finalizing the first in a series of legislative reforms – a proposal whose purpose and intent is to restore the Legislature's original vision for the MLUL so that we have a better defined (true) preliminary approval, as distinguished from a more detailed final approval with all requisite engineering documentation. Much more work on other related MLUL reforms will be forthcoming.

NJBA has actively advocated before the Red Tape Review Commission and the Governor's Office to urge that the Highlands Council cease its abuse of the Checklist Ordinance and to abide by the statutory requirements for municipal plan conformance. For the Pinelands Region, NJBA successfully applied for grant monies from NAHB to evaluate scientific studies and policies relating to the Kirkwood-Cohansey Aquifer study.

NJBA has been leading a coalition of aligned trade groups to present to DEP a balanced resolution to the Clean Fill debate. Additionally, in an effort to encourage redevelopment in New Jersey, NJBA members are developing alternatives to the overly restrictive groundwater regulations.

On another front, NJBA members participated in Coastal rules, Stormwater Management rules and Remediation Standards stakeholders' processes. The Water Quality Management Planning rules and Flood Hazard rule proposals are anticipated to be released over the coming months, which should alleviate many of the restrictions on development activities statewide.

All of our efforts would not be possible without the support of the NJBA Membership. I especially thank all the NJBA Members who are donating their time, energy and resources to support the Association's mission and goals.

As we continue our work to build a healthy and vibrant homebuilding industry, I look forward to seeing you all in Atlantic City, March 24 – 26, 2015 for ABC 2015.

GOVERNOR CHRISTIE CONDITIONALLY VETOES BILL TO EXTEND MORATORIUM ON NON-RESIDENTIAL DEVELOPMENT FEES; DEMANDS COMPREHENSIVE LAW TO REFORM COAH PROCESS

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

By way of A1907, both houses of the Legislature passed a bill to extend the moratorium against the imposition of the 2.5% affordable housing development fee being imposed upon non-residential development. The 2.5% fee initially arose as a result of the 2008 legislation commonly known as A500. Subsequent legislation providing for a partial moratorium against the collection of such fees was enacted in the past, and a further extension of the moratorium was most recently proposed in A1907.

However, on September 10, 2014, Governor Christie issued a lengthy conditional veto (CV) of A1907, essentially advising that he will not sign a separate bill providing relief from the 2.5% fee, with the Governor instead demanding legislation providing "broad affordable housing reform" along the lines he proposes in his CV message. No veto override as to A1907 is currently being pursued.

The likelihood of the Assembly, the Senate and the Governor agreeing on the terms of any such comprehensive COAH reform bill appears to be quite small. Indeed, bills along the lines of those proposed in the CV have thus far failed to garner the support of both houses of the Legislature. The CV is complex, but it essentially calls for a new law that would abolish COAH, with all municipal housing issues to be addressed by the Department of Community Affairs. The CV proposes very municipality-friendly "compliance standards," with towns meeting those standards to be considered "inclusionary."

The CV also calls for a 10% mandatory set-aside as to essentially all properties, with very vague language regarding densities and compensatory benefits. For example, the CV would require municipalities to "make a reasonable effort to facilitate the economic viability" of inclusionary developments. Variance applications proposing inherently beneficial inclusionary developments would be permitted only in towns found to be "non-inclusionary," but a bill along the lines of the CV would make it quite easy for towns to be found to be inclusionary.

Given the political realities, a comprehensive "COAH reform bill" appears to be unlikely. Thus, affordable housing development fees will be imposed for the foreseeable future both as to non-residential and residential development. Indeed, A1907 would have applied a moratorium only as to the imposition of non-residential development fees, and such fees against residential development could have continued even if the A1907 moratorium bill was signed by the Governor. Considering both non-residential and residential development fees, many millions of dollars are at stake and, given the current political logjam, litigation against the constitutionality of the fees would appear to be the only possible source of relief in the near future.

In this regard, the U.S. Supreme Court's 2013 opinion in the *Koontz* case provides very helpful precedent if the constitutionality of the fees is challenged. Extending the rulings in prior U.S. Supreme Court cases such as *Nollan and Dolan*, the *Koontz* case expressly holds that the imposition of a monetary exaction in the land use development process can amount to an unconstitutional taking of property. All three of those cases apply the "unconstitutional conditions doctrine." As held in *Koontz*, such a condition in the land use context can survive a constitutional challenge only if "there is a 'nexus' and 'rough proportionality' between the property the government demands [money, in this case] and the social costs of the applicant's proposal." Put another way, the *Koontz* Court stated that a "predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing" during the land development approvals process.

A strong argument can be made that that the government's demand for affordable housing development fees in the land use application context is unconstitutional under the *Koontz/Nollan/Dolan* line of cases. The government's purported "nexus" for the fees is tenuous at best. The federal courts would likely be more receptive to such a challenge than New Jersey state courts.

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

"FAKE FARMER'S LAW" TO HAVE REAL IMPACT ON NEW JERSEY'S FARMERS IN 2015

By C. Justin McCarthy, Esq.

Like any other year, the time is soon approaching for property owners conducting farming operations on their properties to prepare and file their annual farmland assessment application with their local assessor. Unlike years in the past however, a new law known colloquially as the "Fake Farmers Law" is now in effect for the 2015 tax year, which alters and in many respects raises the bar of requirements and reporting obligations for applicants to receive farmland assessment. On April 15, 2013, Governor Christie signed S589 (4R) into law as P.L. 2013, c.43 which revises the Farmland Assessment Act of 1964. The new law took effect on April 15, 2013, except that it is applicable to tax years commencing with tax year 2015. The purpose behind this somewhat controversial law is to weed out 'fake farmers' commonly understood to be land speculators seeking to avoid property taxes by meeting the bare minimum requirements of the farmland assessment act in order to obtain substantial reductions in tax obligations by obtaining the preferential assessments provided for by farmland assessment. The more sensational reporting on alleged abuses of farmland assessment often refer to wealthy public figures, such as Bruce Springsteen, Jon Bon Jovi, Congressmen Jon Runyan and Forbes magazine publisher Steve Forbes as individuals who have taken advantage of the farmland assessment act by hiring third parties to conduct farming operations on their properties and/or estates.

The most glaring change to the law is the increase from $500 to $1,000 of the minimum gross sales requirement of agricultural or horticultural products in a given year. The $500 amount has not changed in the nearly 50 years the Farmland Assessment Act has been in place. Another important change provided by the new law is a requirement that written proofs of sales be submitted along with the annual farmland assessment application. In years past, local assessors were only required to demand the standard farmland assessment application upon which a farmer would list the products grown or cultivated and the amounts of gross income attributable to those sales. Now written proofs, i.e. receipts, letters, invoices, must be provided as proof of sales to meet the gross income requirement of the law.

Additionally, a landowner whose farm management unit is less than seven acres (formerly 10 acres) in size must submit a narrative and a sketch relating to the agricultural or horticultural uses on the farm management unit, including information on the number of acres that will be actively devoted to such uses. The law also imposes a new penalty provision with the intent to give some 'teeth' to the law and to discourage knowingly false applications. A landowner is subject to a civil penalty of up to $5,000 for a gross and intentional misrepresentation on an assessment application.

One aspect of the law that has not changed remains perhaps the most important requirement to obtain farmland assessment. That is the filing deadline of August 1st for farmland assessment applications to be provided to the municipal assessor. This is a strict deadline and failure to file the application on or before August 1st can be the basis to deny farmland assessment, even if the applicant's farming operations have met all of the substantive requirements of the act.

The State requires all assessors to issue letters along with their farmland applications this year in order to inform property owners of the new requirements of the Law. Should you or anyone you know have any questions or require assistance with regard to the filing of a farmland application or appealing a denial of farmland assessment, please contact us for a free consultation.

About the Author:
C. Justin McCarthy, Associate in Giordano, Halleran & Ciesla's Land Use & Development Department, focuses his practice on matters associated with residential and commercial real estate including, but not limited to development, purchases, sales, leasing, 1031 exchanges, property taxation, land valuation, property tax exemption and farmland assessment. He can be reached at 732-741-3900 or jmccarthy@ghclaw.com

WATER QUALITY MANAGEMENT PLANNING UPDATE

By Tony Dilodovico

As Omland Engineering Associates, Inc. reported in December 2013, a Law was enacted on January 17, 2012 allowing NJ Counties and certain Municipalities an additional 180 days to prepare and submit Sewer Service Area (SSA) Maps in lieu of an entire comprehensive Wastewater Management Plan (WMP). This Law also allowed for site specific amendments which had basically been prohibited in most areas under the regulations. The Law, however, was set to expire on January 16, 2014 which could have resulted in the removal of Sewer Service Areas.

As part of the adoption process, the New Jersey Department of Environmental Protection (DEP) decided to not amend proposed SSA Maps if a comment received was a request for inclusion in the SSA based upon the fact that the site did not contain Environmentally Sensitive Areas. Instead, the DEP required the submittal of a formal site specific amendment request to include additional properties within the SSA. Such a request required that one prepare a site plan identifying a specific project even though the property owner was not prepared to develop the site.

The DEP was also limiting Site Specific Amendments for On-site Treatment Projects to single family residential subdivisions or small commercial projects on excessively large lots. As such, DEP was actually discouraging the use of advanced wastewater treatment systems that remove nitrogen.

NEW LEGISLATION

Omland Engineering assisted staff at the NJBA in their discussions with DEP and the Legislature to extend the current Law for another 2 years. On January 15, 2014, Governor Christie signed into law P.L. 213, CHAPTER 188 which provides for the following:

1. Extension of relief from WQMP regulations to January 17, 2016 or upon the adoption of new WQMP regulations, whichever is earlier.
2. Submission of WMP Amendment and Revision Requests for any and all types of development and wastewater treatment that involve less than both 100 acres of land and 50,000gpd of design flow.
3. Limits DEP review of On-site Discharge to Groundwater (DGW) WMP Amendment and Revision Requests to only the regulatory criteria for the delineation of a sewer service area established at N.J.A.C. 7:15-5.24.
4. Submission of WMP Amendment Requests for re-inclusion of sites that are less than 100 acres, into Sewer Service Areas without identifying a specific project.
5. Specific 60, 90 and 180 day review times by the DEP.

IMPLEMENTATION ISSUES

Unfortunately, the implementation of the law has been problematic, particularly in the review of WMP Amendment and Revision Requests submitted. Omland Engineering is working with the Commissioner's Office to resolve the following:

1. DEP has not updated any of the WMP Amendment and Revision Request application forms and guidance to be in compliance with the provisions of the new Law.
2. DEP is requiring information on Site Specific Amendments and Revisions for on-site DGW Projects well beyond the criteria for the delineation of a sewer service area established at N.J.A.C. 7:15-5.24.
3. DEP is requiring detailed Amendment information for simple Revision Requests.
4. DEP is not respecting the review time requirements of the Law.

STATUS OF NEW WQMP RULES

DEP is transferring the responsibility of the WQMP Program from the Assistant Commissioner of Land Use to the Assistant Commissioner of Water Resources and the latter is currently writing the new Regulations. These new rules will emphasize performance based wastewater management strategies as the basis for consistency with the technical merit of specific project solutions for these strategies determined through the permitting program. Currently, the WQMP rules require a proscriptive approach which dictates where sewer service areas can occur and precludes the use of existing permitting programs to justify alternative solutions to wastewater treatment.

Omland Engineering attended the initial stakeholder meeting that was held this year where DEP presented an overview

Continued on page 9

About the author
Tony DiLodovico is Director of Regulatory Services, Omland Engineering Associates, and has over 30 years of technical, regulatory permitting and compliance experience. Tony serves on the Board of the NJBA and Shore Builders Association, is the Vice-Chairman of the Ocean County Soil Conservation District and has been a member of the New Jersey State Soil Conservation Committee since January 2012. He can be contacted at or 732-740-5725 or TonyDEP.llc@gmail.com.

LESSONS LEARNED FROM 10,000 STRUCTURAL CLAIMS

By Walt Keaveny, MS, PE, PG

Structural Claims…every homebuilder dreads receiving calls from understandably livid homeowners describing sheetrock cracks that snake across walls, doors and windows jammed shut, uneven buckled floors, and siding, trim, and mold separations. Or worse…beams, roof structure, or garage door lintels on the verge of collapse. Structural claims are one of a Builder's greatest liabilities, both financially and to hard-earned reputation. What are a Builder's real structural liabilities and what can Builders do to manage these liabilities?

Most Builders want to manage their structural liability by constructing a quality home that will perform well for the long term. But are their efforts correctly focused? Is quality assured by simply following a generic structural design and passing routine building department inspections? The author articulates herein the lessons learned from analysis of the nations' oldest and largest structural claims database containing tens of thousands of claims adjusted over a 30-year period.

First, it's important to understand the risk. A Builder's chances of experiencing structural claims are much higher than most believe. Small Builders often haven't yet experienced structural claims, but as the larger Builders know…it's only a matter of time. In fact the chances of experiencing a major structural claim are about the same as experiencing a major household fire. 25% of all U.S. homes will experience some structural distress over their lifetime, and 5% will experience major structural difficulties.

With the risk in mind, let's explore what causes structural claims? 80% of structural claims are caused by movement of the foundation. The remaining 20% are caused by framing-related deficiencies. Thus the foundation should be the Builder's primary area of focus. Foundation claims are caused by movement of soils that support the foundation. There are two types of soils that cause this movement…*"Active Soils"* and *"Fill Material."*

Active Soils, also known as expansive or swelling soils, cover over 50% of the United States. Active soils cause more property damage in the U.S. than the combined property damage of all floods, earthquakes, hurricanes, and tornadoes. Active soils contain clay that swells when wet and shrinks when dry causing volume changes. These soils move up and down with wet and dry cycles or seasons.

Fill Material, placed under the foundation, is the other primary cause of structural claims. Natural undisturbed soil layers have typically formed over a geologic period of 10,000 to 20,000 years, and therefore are quite dense. On the other hand, recently placed fill material, especially if not properly compacted, contains voids like a sponge that close when subjected to the load of a foundation. This causes settlement.

What is a Builder's warranty liability? Most states have either implied or statutory warranty requirements which define Builder's liability for structural claims. The warranty term is generally 10 years consistent with federal housing standards. Builders commonly believe their structural liability is quickly reduced with each passing year after the sale of the home. In fact, for a typical 10-year warranty term only 30% of claims are received within the first 4 years after the sale. The remaining 70% are received after the 4th year, with peak claims activity occurring in years 4 through 7. Often Builders don't adequately reserve for claims that long after the sale. A small Builder that sells just 10 homes per year at $250,000 each has an aggregate ultimate liability of $25 million after 10 years. Although total home value losses are not common, structural claims are expensive costing an average of $42,500 to investigate and repair.

What can Builders do to reduce their risk of experiencing structural claims? The primary lessons learned from 30 years of adjusting many thousands of structural claims are as follows:

- The foundation is the greatest structural claim liability
- Active Soils and Fill Material are the two main causes of structural claims
- Most structural claims are reported between 4 to 7 years after sale of the home
- Active Soils should be identified and considered in the foundation design

Continued on page 11

About the Author
Walt Keaveny, MS, PE, PG has earned a BS in Geological Engineering and a MS in Geotechnical Engineering. He is licensed as a Professional Engineer and a Professional Geoscientist. He has over 25 years of experience with a focus in Geotechnical and Environmental Engineering. Mr. Keaveny is the Risk Manager for the oldest and largest new home warranty company, 2-10 Home Buyers Warranty®.

PERSONAL AUTO INSURANCE – YOU MIGHT BE SURPRISED BY WHAT IS NOT COVERED

By Anthony Bevilacqua, CPCU

The most recent Department of Transportation figures says there are roughly 255 million vehicles on the road in the United States as of 2013. About 200 million of this figure are private passenger cars and light trucks, SUV's or crossover vehicles used as private passenger cars.

Four insurance companies dominate the personal auto insurance landscape – State Farm, GEICO, Allstate and Progressive. Insurance statistics say about half, or 100 million vehicles, are insured by these four companies. Each day, multiple forms of media advertising from these carriers abound with reasons why their insurance is better than the rest. In each case, their marketing approach is generally "my policy costs less than (fill in the blank)."

Insurance protection is a pretty simple concept – you get what you pay for. If a policy is inexpensive, it is very likely the coverage it provides is not as broad as another policy that costs more. How do these companies find ways to make their policies less costly? One way is to provide less coverage than a standard auto policy sold by the other car insurance companies who insure the other 100 million vehicles. Below are examples of special exclusions contained in half the policies sold in the U.S.

- Undisclosed household residents are excluded – are you a boomerang family (kids move back into your household after being on their own)? Do you have elder family members living with you? Do you have someone living with you who is not a family member? Some insurance companies exclude coverage if these individuals drive a listed vehicle and you failed, intentionally or unintentionally, to tell your insurance company.
- Business use of a non-owned auto is excluded – your car is in the shop for routine maintenance; the dealer provides a loaner for the day. You drive the loaned vehicle to a business appointment. Some policies exclude coverage for damage to the loaned vehicle if involved in an accident. Liability coverage for you the driver may be restricted, too.
- Business use of ANY auto is excluded – do you have a family member delivering newspapers or pizzas? Are you using the car to deliver business documents or products? Watch out for this type of exclusion because of the broad interpretation of the term 'business use', which is generally not defined in the policy.
- Restricted limits for 'permissive users' – unlike the first example where no coverage is provided, some policies will provide coverage to an undisclosed driver, or person who borrows your vehicle, but the amount of liability coverage is reduced to a lesser amount or the state mandated minimum liability limits.
- Street racing exclusion – an accident arising out of the act street racing, and the injuries to people or damage to other's property is not covered. Damage to your car is excluded, too.
- Ride Sharing exclusion – using your car as a driver for Uber or Lyft? The explosion of ride sharing is causing major insurance problems. Almost all carriers now attach exclusion for this activity. Passengers need to be cautioned as well. It's quite possible the car that picked probably doesn't have liability insurance if you are injured in an accident.
- Sales tax not covered in the loss settlement – your $40,000 car is totaled. The insurance company pays you $40,000 for the loss, but won't pay the $2,800 NJ sales tax, and that's in addition to the deductible you had to assume as well. Picayune, but true.
- Theft of vehicle without forced entry is excluded – your car is in the mall parking lot when you entered the store, but it's gone when you return. The police find the car several days later with some damage, but no broken window, no scratched door lock, ignition switch still intact. Some policies will not pay for the damage because there was no 'visible sign of forced entry'. Want to fight that one out with your insurer?
- Loan or Lease claim payment gap – your car is totaled in an accident and the insurance company offers

Continued on page 11

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

TOP FIVE (5) BANKRUPTCY ISSUES FOR CREDITORS - PROTECT YOUR RIGHT TO GET PAID

By Thomas S. Onder, Esq.

As the economy continues to improve, some businesses are filing for bankruptcy to unsaddle debts. Creditors in the building industry must be vigilant and proactive when a bankruptcy filing occurs. Following are five (5) bankruptcy issues to ensure your best possible right to payment.

Getting Paid for Work Prior to Bankruptcy Filing. Bankruptcy Code § 502 allows creditors to assert pre-petition claims to ensure their right to payment. Additionally, the Bankruptcy Court requires that creditors provide appropriate proof of the debt. This means attaching copies of contracts, accountings or other materials that prove amounts owed. Further, it's important to use the Bankruptcy Court's Proof of Claim Form 10B. However, knowing how, when and where to file your claim is key.

Getting Paid for Work After the Bankruptcy Filing. Some creditors will continue to supply goods and services after the bankruptcy filing. Bankruptcy Code § 503 (b) provides these creditors are entitled to priority payment as an administrative claim ahead of other creditors. The reason for this is that post-petition creditors offer vital services to keep debtor's operations going, which benefits the bankruptcy estate. Like the pre-petition claim, it is very important to complete and file the claim right. Sometimes, creditors may need to file a motion to get their claim paid.

Getting Paid for Certain Goods Supplied. Certain creditors, who supply goods, have the right to reclaim those shipped goods. A creditor may attempt reclamation of their goods sold in the ordinary course under Bankruptcy Code § 546(c). But, suppliers must move quickly. Creditors must make a written demand no later than 45 days after delivery. If the 45-day period has not expired as of bankruptcy filing, then suppliers will be provided an additional 20 days to demand reclamation of the goods sold. Sometimes creditors can negotiate that debtors provide priority payment, in lieu of return of the goods.

How the Debtor's Plan Treats Your Right to Payment. When debtors file for bankruptcy protection, they are seeking to either liquidate all assets or reorganize. If debtor's try to reorganize, then they will file a bankruptcy plan. If approved by creditors, the confirmed plan will allow them to pay creditors, dispose of assets and also sometimes acquire assets. As a creditor, it is essential that you know how your claim is being treated in a plan. Debtors will often try to avoid paying certain creditors. If you do not object to the plan, then your rights may be compromised. Failure to have your voice heard could be costly.

When the Bankruptcy Estate Demands Return of Payments. Debtors-in-possession and bankruptcy trustees have authority under Bankruptcy Code § 547 to make a "preference" demand. A "preference" is a payment received from a debtor within 90 days of the filing. It does not matter whether you provided quality work or services. Bankruptcy Code § 547(b) allows avoidance of these payments, if the transfer was to or for the benefit of a creditor on account of an antecedent debt, while the debtor was insolvent.

However, before you cut a check to satisfy the preference demand, it is advisable to seek legal counsel to ascertain if you possess defenses, including:

1) Payments made within the "ordinary course of business;"
2) "New value" provided for the debt;
3) Payments made outside of the 90-day preference period;
4) Settlements during the bankruptcy case; and/or,
5) Payments made via C.O.D.

To determine if you possess any defenses, it is critical to analyze the full payment history ***at least a year before*** the bankruptcy filing. This information includes:

1) All correspondence, contracts, emails with debtor;
2) Copies of all invoices, showing invoice date, terms, and amount;
3) Copy of payments received (i.e. checks, wires, cash deposit slip) and date posted;
4) Number of days elapsed between date of invoice and date payment received; and,

Continued on page 8

About the Author
Thomas S. Onder, Esq. is a Shareholder and member of the Commercial, Retail and Industrial Real Estate, Litigation and Bankruptcy & Creditor's Rights Groups of Stark & Stark. Mr. Onder is a member of the International Council of Shopping Centers and concentrates his practice in the area of commercial litigation, specializing in commercial landlord disputes and secured transactions before state and federal courts in New York and New Jersey, as well as the Federal Claims Court in Washington D.C. He can be reached at 609.219.7458 or tonder@stark-stark.com

DATA BACKUP – YOUR DIGITAL LIFE INSURANCE

By Cathy Coloff

In today's IT environment, most business managers understand just how critical their business data is and are smart enough to put a computer backup in place in their organization. However, as we connect with small and medium businesses, the most common mistake we see is the decision to set up a backup and forget it. Many businesses get the backup going but don't have a consistent system in place to make sure it keeps running correctly.

What could go wrong?

- USB hard drives fail (they are mechanical)
- Tapes fail (mechanical, too)
- Data being sent to the Cloud must pass over miles of network and can easily become corrupt
- Files become locked and stop backing up
- A backup stored only locally at your office would not be accessible if your office suffers a catastrophe such as fire or flood
- Backup software runs into a glitch and stops working
- Your backup storage target runs out of space
- Your storage target, such as an offsite computer, is turned off inadvertently

"Set it and forget it" does not work when it comes to computer backup! Properly monitored backup is critical to your ability to recover from hardware or software failure – or possibly an unexpected human error.

We recommend that you take the time twice a year to review your backup settings and run a test restore regularly to make sure your backup is available when you need it.

- We recommend a local image backup of your most important computers and server as well as an offsite backup of the most critical data and files.
- If you have a data/file backup, make sure it is backing up all the data you need. You should review the folders, programs and data you are backing up.
- If you have made any changes to your data storage locations or procedures since your backup was first set up, your backup may need adjustment.

In particular, if you have a data/file backup and begin storing information in a new or different location on your computer – it might not be in your backup! For example, this could happen if you begin using a new application or database or if you create a new folder share on your server, etc.

What does all this mean? It is essential to review your backup settings to make sure that you are backing up your important data. If you've made any changes, your backup may need adjustment.

Implement a plan for your business. Don't set it and forget it.

- It's important to back up your files and run a test restore as well.
- Review your backup settings.

It would be devastating to make regular backups, only to find that you are unable to restore the files that you need. Take the time to review your backup today – or you may not have the right data available when you need it!

If you are feeling uneasy about your backup, contact the IT Radix team to discuss a backup review.

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 customers to develop their IT best practices without the big corporate price. She can be contacted at 973-298-6908 or itsales@it-radix.com.

WATER QUALITY MANAGEMENT

Continued from page 5

of the new direction the rules will be taking. Unfortunately, DEP did not give specific details on the requirements for performing critical analyses such as sewer service area delineations, existing infrastructure capacity, future wastewater treatment capacity and groundwater nitrate reduction.

Currently, we are assisting the NJBA in its discussions with the Commissioner, Assistant Commissioner and staff on our concerns with the existing regulations and suggesting how to properly develop performance based wastewater management strategies and associated analyses.

DEP hopes to have a rule proposal ready by the end of the year.

DON'T CROSS NEWSPAPERS OFF YOUR MEDIA MIX YET

By Doug Fenichel, APR

Even as homebuilding becomes more sophisticated and technology-oriented, builders still need some basic equipment like the good ol' hammer. Similarly, building and selling homes in the digital age still requires some basic communications tools…like newspapers. But if you're thinking about those big Sunday sections in the Star Ledger and Asbury Park Press, or the days of dedicated and knowledgeable housing reporters…stop.

Whether you are selling a home, convincing a town to allow you to build or looking to accomplish some other goal, you need tell your story to the right people. And while social media can help you establish relationships and distribute your message, newspapers are still a key part of the media mix.

USA Today media columnist Rem Rieder recently talked about changes in newspapers in a USA Today article about the most recent rounds of layoffs at The New York Times, USA Today and the Orange County (CA) Register. Newspapers in New Jersey face similar issues.

"There's no question that the industry faces a daunting challenge as it tries to retool for the digital future," he writes. "If they are to make it in the long run, newspapers will have to heighten their digital footprints and find new ways to attract digital audiences (not to mention digital dollars). If newspapers are going to endure, they'll need a lot of bold experimenting to make it happen."

With these changes, newspapers – traditional and digital – remain an important part of the communications strategy you develop to tell your story, sell your products or point of view, or build and defend your reputation. The key word is strategy.

Facebook, Linked-In, Trulia, e-blasts, direct mail, and the plethora of other communications tools are all tactics to be folded into a strategy with consistent and well-defined messaging that is aimed at the right people. Newspapers definitely belong in that list because of their credibility and their distribution across other social media, including email and Google.

As newspapers adapt to the digital age, though, how we deal with reporters also changes. Those changes are evolutionary, not revolutionary. Here are five examples:

1. **Relationships:** We still have to continue to identify the reporters and editors who are interested in our story and build relationships with them.
2. **Releases** are still the best way to distribute your message to a large group of people, including reporters, but releases have changed. They must be more timely and interesting and must include more elements (photos, illustrations, video and embedded links) to help reporters and readers understand the story. These elements also improve the optimization of the release. We also have to be sure that we are sending the release to the proper person. With newsrooms reduced to skeleton crews, reporters are swamped with releases and we can't count on their good nature to pass them on. Releases also make great content for online newsrooms and distribution across social channels.
3. **Interview preparation:** If we are lucky enough to get an interview or a question about a release, we still must respond promptly and be well prepared, including knowing our key messages. What has changed is that "responding quickly" means minutes, not hours or days. And we must be comfortable talking across all media. If the local reporter shows up, there is a good chance he or she is toting a video camera and your interview is for print and video.
4. **Importance:** Newspapers, printed or electronic, remain important and influential despite the claims of some "experts." They are the main source for news aggregation sites and politicians, customers and your other stakeholders still read and react to them.
5. **No guarantee:** There are no guarantees that your story will appear or appear unchanged. Never has been; never will be. The print news hole is smaller than ever and web readers' attention spans are short. Best advice for getting your story in: Make it real, make it interesting, make it brief.

This isn't an argument against social media. The message here reinforces the need to coordinate social and traditional media outreach. With online editions, newspapers are a key part of your social strategy. It's also a good reminder not to dismiss newspapers as old-school or obsolete. They require an updated approach, but they are still a force to be reckoned with.

Continued on page 13

About the Author.
Doug Fenichel, APR, is an accredited public relations counselor who specializes in helping those in the building industry build, defend and leverage their most powerful sales tool – their reputation – through strategic communications, media relations, social media marketing, community and government affairs, and crisis management. Among those he has helped are D.R. Horton, Meritage Homes, K. Hovnanian, Grant Homes, Greentree Development and other builders and suppliers. He can be reached at (201) 575-1538 • doug@inhousepr.biz or www.inhousepr.biz

REBATE PROGRAM SAVES MEMBERS THOUSANDS!

Since the Member Rebate Program (MRP) has been offered as a free member benefit of the New Jersey Builders Association, it has given participating members a total rebate of $214,654.14. With 41 members participating in the program, that is an average of $5,235.47 per participating member!

NJBA's Member Rebate Program lets builders and remodelers receive cash rebates for using certain manufacturers' products in the building and remodeling of homes. There are currently 46 participating manufacturers covering 36 different product categories.

MRP has heard your requests and claiming has been revamped this quarter. There is a redesigned paper claim form and a new and improved online claim form. A customized EXCEL template has also been added as a new method to submit. You only need to select the manufacturers that were used and an EXCEL template is generated for you with only those selected products.

First you need to register: www.HBArebates.com This tells MRP where to send your rebate check!

Once you are registered, you are eligible to claim on a quarterly basis. Any home, remodeling project, or multi-family unit completed from April-September is eligible to be submitted by the end of November, 2014.

The claiming process is just as simple as registering. An address is ready to be submitted once the entire project is completed. MRP will ask for your company name, the completed address, and the completion date(s). You then complete the information required for each manufacturer used.

Typically:

- Quantity used
- Subcontractor or supplier name
- Model number
- No receipts are needed!

Once a project is completed and the form is filled out, all you have to do is send it in. MRP will process your quarterly information, send it to the manufacturers, and issue you one lump-sum check for all of your rebates!

Nationwide, over 70% of the builders and remodelers who participated last year have received rebates that are valued at more than they paid in annual dues to their HBA.

Get the most of your membership by taking advantage of this free member benefit.

www.HBArebates.com

BANKRUPTCY ISSUES

Continued from page 8

5) Personnel involved with debtor's account, so they can advise how payments were made, applied and any unique issues with debtor.

These are just some of the issues that are essential to properly address and analyze as a creditor in the building industry. A well-thought out response to these issues with sound counsel can ensure your right to payment is preserved in a bankruptcy filing

For more information on defending a preference action, or bankruptcy issues, please feel free to contact Tom Onder, member of Stark & Stark's Bankruptcy & Creditor's Rights Group, at (609) 219-7458 or via email a tonder@Stark-Stark.com.

LESSONS LEARNED

Continued from page 6

- Fill Material should be compacted and tested per engineering specifications

Don't lose sleep worrying about structural claim liability. Ensure that your homebuyers are the best source of referrals. Limit liability, protect reputation, and experience peace of mind by constructing to essential code standards specific to your site. Also, utilize an express warranty program with adequate claim reserves, or effectively pass your liability to a reputable, third-party, insurance-backed warranty company.

For additional information on how you can limit your liability for structural claims, please contact:

Judith Jacovelli
856.723.0109 • jjacovelli@2-10.com
Phil Dunlevy
609.760.4669 • pdunlevy@2-10.com
John McGrath
848.459.9935 • jmcgrath@2-10.com

PERSONAL AUTO INSURANCE

Continued from page 7

a payoff less than the loan balance or lease residual payment. The insurance company has no obligation to pay the loan balance or residual value unless a special rider is added to your policy compelling them to do so.

These examples illustrate some reasons why insurance policy premiums differ from insurance company to insurance company. The best defense against an unexpected gap in coverage is to engage your salesperson, professional agent or broker with questions, lots of questions. Only then can you decide if the cost you are being asked to pay is worth the paper it is written on. Sounds familiar, doesn't it?

PROPOSED CHANGES IN CONGRESS COULD AFFECT ENGINEERING FIRMS

By Paul Gergel, CPA

Engineering firms with over $10 million in revenue need to be aware of two proposals in Congress that may fundamentally change the way income is reported for federal tax purposes. House Ways and Means Committee Chairman Dave Camp (R-MI), in his tax reform discussion draft, has proposed limiting the use of the cash basis method of accounting to Firms with less than $10 million in gross receipts. Former Senate Finance Committee Chairman Max Baucus (D-MT) released a similar proposal. Forcing businesses to convert from the cash to accrual basis of accounting could raise more than $23 billion in tax revenue over the next decade.

Currently, most engineering firms use the cash method of accounting, but new proposals would force taxpayers with gross receipts greater than $10 million to use the accrual method of accounting. Such a change in accounting method would force firms to accelerate the recognition of taxable income. For instance, a firm's accounts receivable and work in process may become immediately reportable under these proposals (rather than reportable when actually received, as under the cash method of accounting).

Engineering firms that are structured as partnerships or S Corporations do not recognize income themselves, but instead the firm's income is passed-through and recognized by the firm's owners. This change would force the owners of such firms to pay taxes on their share of the firm's accounts receivable and work in process in the year in which all events have occurred

that fix the right to receive such income, and the amount thereof can be determined with reasonable accuracy. Because firms likely have a fixed right to receive fees when performance occurs, rather than when due or received, these amounts would need to be recognized immediately. Nevertheless, nearly 85% of the average engineering firm's costs are attributable to labor and related taxes and benefits. Thus, firms must regularly pay their employees even if they are not paid by their clients for several months. This could cause some firms to experience serious cash flow problems. However, this burden is eased by the section 481(a) adjustment which allows the recognition of this income in the year of conversion to the accrual method to be spread over a four-year period known as the adjustment period.

Because partners and S Corporation shareholders will likely have a very large tax burden upon conversion to the accrual method of accounting (or during the four-year adjustment period if elected), firms may need to consider cash distributions or other means to ease this burden. Firms may distribute cash to the owners in an amount equal to the cash to accrual conversion amount, or could assist the owners in securing loans. Firms need to consider the time it may take to secure financing and should plan ahead. Partnership and Shareholder agreements may need to be amended to record modifications in the firm's income recognition, tax treatment and distribution policies.

Determining when income is accrued is another area of complexity because it is not always clear when the right to receive income becomes fixed. The issue is whether income is accrued when the whole project is complete, or whether income becomes fixed at separate stages of the engagement.

Uncollectible accounts also create additional complexity. Under the accrual method, a receivable would be initially reported as income. If it were to become wholly or partially uncollectible, the firm would deduct it. Calculation of the amount and timing of the deduction needs to either be self-tested or fall under one of six safe harbors.

Because these changes will significantly affect a firm's tax reporting, firms should consider process changes to match these potential tax changes. Firms will want to collect more of the billing sooner, and should discuss billing arrangements with clients such as requiring additional fees paid in advance. Firms will also need to analyze their existing books and records to determine income, accrued expenses and bad debt deductions.

The American Council of Engineering Companies (ACEC) has joined in a coalition with five other organizations

Continued on page 13

About the Author

Paul V. Gergel, CPA, CFP®, is a partner based in WithumSmith+Brown, PC's Princeton, NJ, office and is the Practice Leader of the firm's Professional Services Group. He maintains a specialty in personal financial planning services and can be reached at 609.520.1188 or pgergel@withum.com.

GREENBAUM, ROWE, SMITH & DAVIS LAUNCHES REDEVELOPMENT & LAND USE DEPARTMENT; NAMES ROBERT S. GOLDSMITH AND MERYL A.G. GONCHAR AS CO-CHAIRS

Jack Fersko to Co-Chair Real Estate Department with Thomas J. Denitzio, Jr.

Greenbaum, Rowe, Smith & Davis LLP is pleased to announce the formation of its new Redevelopment & Land Use Department, with Robert S. Goldsmith and Meryl A.G. Gonchar to lead as Co-Chairs. The firm has concurrently appointed Jack Fersko to join Thomas J. Denitzio, Jr. as the new Co-Chair of its Real Estate Department.

Greenbaum has realigned its real estate practice to reflect a growth in demand by the firm's clients for sophisticated redevelopment and land use counseling, and in response to the changing nature of economic development in New Jersey. High demand among millennials and others for city living has led many developers and investors to focus on the redevelopment of older urban centers and downtown areas. The new Redevelopment & Land Use Department will devote itself to counseling both private and public clients throughout the redevelopment process, from arranging state and local government financial support for projects designed to bring economic revitalization to areas ripe for redevelopment, to negotiating and drafting ordinances and redevelopment plans and securing local land use approvals for a variety of projects.

Greenbaum Rowe Smith & Davis LLP
COUNSELORS AT LAW

MASTER SPONSOR
Defending Our Industry
NEW JERSEY BUILDERS ASSOCIATION

"We are delighted that Bob and Meryl are leading this critical effort on behalf of the firm and our clients," commented Co-Managing Partner W. Raymond Felton. "Developer clients are increasingly seeking specialized legal advice on navigating the redevelopment process and the more complex land use issues that arise in urban redevelopment," Mr. Felton continued. Co-Managing Partner Mark H. Sobel adds that "Meryl and Bob are leaders in New Jersey's land use and redevelopment bar. They each have decades of experience guiding the firm's clients through the development process, and we are confident that their team's sharpened focus will give our clients an edge over their competitors."

The Redevelopment & Land Use Department will be supported by the firm's well-respected Real Estate Department. Jack Fersko, a leading real estate practitioner, will now serve as Co-Chair of the Real Estate Department, succeeding Meryl Gonchar in that role. He joins Thomas J. Denitzio, Jr., who will continue as Co-Chair, leading the firm's expansion of its transactional real estate and finance practice beyond the "brick and mortar" and into alternative energy, tax incentive financing and other areas to help clients leverage their existing portfolios into greater investment returns.

To learn more about the firm's real estate related practices, please visit: www.greenbaumlaw.com.

PROPOSED CHANGES

Continued from page 12

representing the nation's accountants, architects, dentists, farmers and S corporations in opposing the proposals made by Camp and Baucus. Recently it was reported that more than half of the House is pressing lawmakers to preserve the use of the cash basis of accounting for engineering firms operating as partnerships and S Corporations as well.

Of course, these changes are merely proposals, and even if adopted, the effective date is unknown (maybe the 2015 tax year). However, firms should still consider the potential impact of the changes. They should begin assessing what amounts their pass-through owners might have to recognize over the adjustment period and discuss the potential means to address these burdens. Engineering firms should contact their tax advisors, who will continue to monitor the proposals and provide guidance regarding the changes.

For more information on the effects of the proposal to your business, please contact your local WS+B advisor or Paul Gergel, CPA, Partner, Practice Leader, Professional Services at pgergel@withum.com.

NEWSPAPERS

Continued from page 12

They are also another reason that you need expert counsel to help with your communications strategy and execution, especially during a big announcement or a crisis.