

DIMENSIONS

Newsletter of the New Jersey Builders Association



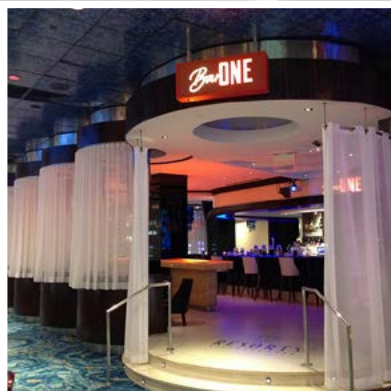
New Jersey Builders Association Presents

Atlantic Builders Convention

Conference & Expo March 25-27, 2014

WHERE BUILDING BEGINS

Atlantic City Convention Center | Atlantic City, NJ



The newly renovated... Resorts Casino Hotel

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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 Irene Opitz at iopitz@njba.org.

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.

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THE ABC COUNTDOWN!

By Eileen Monesson, Principal, PRCOUNTS, LLC

The **65th Annual Atlantic Builders Convention (ABC)** is just three weeks away. If you have not yet registered to attend the Convention or made your hotel reservations at Resorts Casino Hotel, please visit www.ABCConvention.com today. This is one convention that you will not want to miss.

The Exhibit Floor will be open from 10:00 AM until 5:00 PM on Wednesday, March 26 and Thursday, March 27. We are very pleased to let you know that more than 60 new exhibitors will be at ABC for the first time – mostly showcasing building products. In addition, many companies that have not exhibited for a number of years are returning. More than 400 exhibitors will be on-deck to demonstrate new products offering you the opportunity to learn about innovations in construction. In addition, exhibitors that are looking to hire staff will be identified for job seekers to connect with.

The Exhibit Hall will also feature: the VIP Lounge for use by the NJBA Master Sponsors, Spikes and 2+ Club members, a Business Center for private meetings or a quiet workspace, College Row to learn more about educational and certification programs, the NJBA Zone, Health and Wellness Zones and the ever popular ABC Prize Booth.

This year's seminars are designed to enhance your knowledge of regulatory, legal, land use and environmental issues, as well as how to increase productivity and profitability. Educational programs will begin on Wednesday, March 26 at 9:00 AM. Continuing Professional Education (CPE) will be available in the following disciplines: Architects: AIA & HSW, Professional Planners: AICP CM, Realtors: CE, Attorneys: CLE, Engineers: CPC, Interior Designers: IDCEC, Remodel Contractors: NARI, Electricians: NJEC, and Kitchen & Bath Designers: NKBA. The seminar topics are:

- Current Issues Affecting How You Run Your Business (AICP CM, CLE)
- Fire Rated Cementitious Coated OSB in Wall & Roof Sheathing Applications (AIA, HSW)



- Legal Trends I – Land Use Law (AICP CM, CLE, CPC)
- Legal Trends II – Environmental Law (AICP CM, CLE, CPC)
- Lighting Energy Audits & ROI Analysis (AIA, NJEC)
- Site Remediation Regulatory Updates (AICP CM, CLE, CPC)
- Build a Better House at Lower Cost by Controlling Infiltration (AIA/LU, HSW)
- Affordable Housing Overview (AICP CM, CLE, CPC)
- Commercial Wood Window Installations Systems (AIA/CES LU, HSW)
- Financing Programs for Residential Projects (AICP CM, CLE)
- The Great Marketing Debate – Digital & Not So Digital!
- The Growing Trend of Mixed-Use Developments (AICP CM, CLE, CPC)
- All You Can Learn About Mold (CE)
- Leveraging Code Compliance by Designing for ENERGY STAR (AIA)
- Rebuilding After Sandy (AICP CM, CLE, CPC)
- Universal Design – Age in Place (AIA/CES LU, HSW, IDCEC, NKBA, NARI)
- Annual Environmental Review (AICP CM, CLE, CPC)
- Be Our Guest – Providing that Magical 5-Star Customer Experience
- Braced and Shear Wall Requirements in the IRC Building Code (AIA/CES LU, HSW)
- Modern & Green Building Design (AICP CM)
- Workforce Development & Job Opportunities (CEU, CPE)
- Presenting Development Applications to Local Boards – Ethical and Professional Considerations (AICP CM, CLE, CPC)

New this year in the Exhibit Hall is a Learning Center to enhance your building, management, training, social media,

marketing and PR skills. Presentations will be given on the following topics:

- Breakthrough in Deep Pile Foundation Technology for NJ Shore Houses – Corky Kelleher, Ph.D. and Tim Ferguson, Hale Built House Raising
- Creating and Funding an Employee Training Program – Leah Pontani, MBA, Director, Mercer Institute
- Crisis 101 – Doug Fenichel, APR, In-House Public Relations
- Enviro-Dri Better Alternatives to House Wraps – James R. Wells, Ph.D., Technical Director, Tremco Barrier Solutions. Sponsored by: Professional Stone & Stucco Sliding Applicators
- How to Outsmart and Under-spend the Competition and Win the Digital Marketing Battle! – Larry Bailin, Founder and CEO, Single Throw Internet Marketing
- The Social Building Professional – Eileen Monesson, MBA, CPC, Principal, PRCOUNTS, LLC

Key events scheduled for Tuesday, March 25 include the NJBA Board of Directors Meeting, the Annual Economic Forecast with David Matthau, Veteran Correspondent for 101.5 News Radio as Moderator; and the President's Installation Dinner. The Industry Awards Luncheon will be on Wednesday, March 26.

After the Exhibit Hall closes there are plenty of events to celebrate the building industry and network. The Builders Reception (open only to Builders) hosted by the Master Sponsors will be on Wednesday, March 26 and the grand finale of the convention will be the Sales and Marketing (SAM) Awards Dinner on Thursday, March 27.

Visit www.ABCConvention.com for the seminar and Learning Center schedules, as well as information on the nightly after-hours receptions and networking events. Plan now to get as much as possible from your investment in ABC 2014 – *Where Building Begins!*

NJBA ANNOUNCES ANNUAL INDUSTRY AWARD WINNERS

The NJBA Industry Awards Program was created more than 40 years ago to recognize outstanding accomplishments in the building industry. While the categories have evolved over the years, the concept is still the same - to honor building industry professionals and what they symbolize in our industry. Join us on Wednesday, March 26, 2014 at 1:00 PM on the ABC Exhibit Floor, NJBA Zone for the presentation of these awards. Show your support for those who have done so much for your industry. Place an ad in the Awards Program or sponsor a table. To learn more about sponsorship opportunities, [click here](#).

AWARD	NAME OF RECIPIENT	COMPANY	LOCAL
Builder of the Year	Robert J. Fallone	Fallone Group, LLC	Metro
Associate of the Year	Michael Borodinsky	Sun Home Loans, a Division of Sun National Bank	Metro
Remodeler of the Year	Charles Kojeski	Kojeski Construction Company	BLSJ
Builder Hall of Fame	William Asdal	Asdal Management, LLC	Metro
Associate Hall of Fame	William C. McNamara	Cowan, Guteski & Co., P.A.	SBACNJ
Builder Continuing Service (2 recipients)	Arnold E. De Masi, Jr. Frederick Patterson	De Masi Construction Co., Inc Robertson Douglas Group	BRANNJ SBACNJ
Associate Continuing Service	John Cioletti	Reno's Appliance	BRANNJ
Silver Hammer	Dean R. Mon	D.R. Mon Group, Inc.	Metro
Silver Handshake	Michael Kurpiel	Universal Supply Co.	BRANNJ & SBACNJ
Spike Advocate (new award)	Edward Walters, Jr.	The Walters Group	SBACNJ
Special Service (new award) (2 recipients)	Danny McKearan Victoria Reczkowski	Ducky Johnson Home Elevations, LLC Ferguson Enterprises	SBACNJ BRANNJ
Affordable Housing (2 recipients)	George Vallone Saint Joseph's Carpenter Society	Hoboken Brownstone Company Pilar Hogan Closkey, Exec. Dir.	BRANNJ N/A
Distinguished Service for Outstanding Political Action	Carl J. Goldberg	Roseland Property Company	Metro
Preservation of the American Dream	Edward Walters, Jr.	The Walters Group	SBACNJ
Associate Appreciation Award	Michael J. Kokes	The Kokes Organization	SBACNJ
Ironman Award	Perri Wachter John Cioletti Eric Keller Stephanie Shaffery	Paparone Homes of New Jersey, Inc. Reno's Appliance Omeland Engineering Associates, Inc. Flair Marketing Group	BLSJ BRANNJ Metro SBACNJ
Distinguished Service (2 recipients)	Senate President Stephen Sweeney Senator Raymond Lesniak	New Jersey Senate New Jersey Senate	
Sponsors Choice Award		Mon Group Properties, Inc	Metro

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SMART GROWTH IN THE HIGHLANDS REGION

By Guliet D. Hirsch, Esq., Archer & Greiner, P.C.

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Buried in the Highlands Act, both figuratively and literally, is a provision which mandates that the Highlands Council adopt a “smart growth component” as part of the Regional Master Plan (“RMP”) for the region. The Act requires that this smart growth component include an assessment of opportunities for appropriate development, including an identification of undeveloped areas in the Highlands Planning Area which are not significantly constrained by environmental limitations and are located near or adjacent to existing development and infrastructure. Highlands Water Protection and Planning Act, N.J.S.A. 13:20-11(a) (6). The Highlands Council, in the RMP, has targeted smart growth, as well as regional housing needs, for “designated centers”:

Smart growth is an approach to resource planning and management where growth and development are concentrated and organized around “centers” with compact, walkable, bicycle-friendly land use patterns, typically including mixed-use development with a range of housing choices. RMP at page 197.

Although there are twenty centers in the Highlands region designated by the State Planning Commission, all have expired. The RMP calls for reassessment of these expired centers—both to protect Highlands resources and to provide areas for growth. RMP at page 371.

Restrictions on Development and Economic Growth in the Highlands Area

In contrast to the Pinelands Comprehensive Management Plan (CMP), the Highlands RMP does not provide areas for regional growth.

The 415,000 acre Preservation Area is off-limits for all but extremely large lot development, since the DEP Highlands Rules prohibit public sewer and water service and permit new septic systems on lots of 25 to 88 acres. N.J.A.C. 7:38-3.4.

In the Planning Area, the major tool to enforce RMP conformance is sewer and water policy. N.J.A.C. 7:38-1.1(k) and N.J.S.A. 58:1A-15.1. The RMP restricts public sewer and water service primarily to the Existing Community Zone. The Existing Community Zone comprises 17% of the Highlands Region, and only 11% of this zone (@16,000 acres) is available for development. See, RMP at p. 113. Where public sewer and water are not available, development on septic systems is permitted only on very large lots:

- Protection Zone: 19.9 to 43.6 acres;
- Conservation Zone: 7.7 to 16.8 acres; and
- Existing Community Zone: 7.2 to 14.1 Acres.

(Source: March 2010, *Highlands Council “Average Lot Size per Septic System by Land Use Capability Zone for Conforming Municipalities in the Planning Area of the Highlands Region.”*) Non-residential development is also restricted based upon septic flow. For example, a new 70,000 square foot supermarket in the Existing Community Zone would require a minimum of 201 acres.

Thus, the practical impact of the DEP Highlands Rules and the RMP is that no more than 16,000 acres of the 859,000 acre Highlands Area region may, in theory, be developable at reasonable densities on public sewer and water.

Designated Centers

To date, there has been minimal interest by towns in the designation of centers for future growth. Of 45 towns which have obtained Highlands conformance approval, only eleven (11) have requested center designation. These eleven centers are to an extent illusory, planned but not

yet implemented, since zoning has not been proposed or adopted.

The Highlands Council has approved plans for centers in the following municipalities: Byram Township, Wharton Borough, Alpha Borough, Hackettstown Borough, Pohatcong Township, Phillipsburg Borough, Lopatcong Township, Hopatcong Township, Washington Township (Morris County), Randolph Township and Oxford Township. The narrative center descriptions suggest that many of the designated centers are designed not to allow new development, but to revitalize an existing business district or to allow the redevelopment of an older industrial or brownfield site. A careful search of the eleven conformance reports containing centers shows a total of 229 acres which appear to be vacant and developable within designated centers in six (6) towns.

Compliance with the Smart Growth Mandate?

A plan which allows development in less than 2% of the Highlands region and the designation of a 229 acre “smart growth area” is inadequate to meet the needs of the Highlands region for economic growth and a variety and choice of housing, including affordable housing. The problem is exacerbated by the fact that zoning has not been implemented in any of the eleven towns with designated centers. The result is that, almost a decade after passage of the Highlands Act, there are no areas presently available for smart growth pursuant to the Highlands Regional Master Plan.

About the Author:

Guliet D. Hirsch is a partner in the Land Use, Environmental Permitting and Regulatory Compliance Group of Archer & Greiner, P.C. She specializes in complex land use litigation as well as planned development approvals and affordable housing. Ms. Hirsch previously served as in-house counsel to the Hills Development Company and H. Hovnanian Industries. She can be reached at: ghirsch@archerlaw.com or 609-580-3790.

THE ABCS OF AD&C: FINANCING FOR-SALE AND FOR-RENT PROJECTS

By: Stanley Koreyva, COO, Amboy Bank & Stephen Patron, Paradigm Realty Alliance & Harvestate Group

The banking world today looks differently than it did two years ago and looks a lot different than it did back in 2007. Acquisition, Development and Construction (AD&C) financing over the last several years has been a challenge for builders and a hot topic with regulators.

To understand the issues with AD&C lending you first must understand that not all banks are created equal. There are major policy differences between a national bank and a localized community bank. If you are not a major builder or developer you will most likely find AD&C funding from community banks headquartered in New Jersey that are more in tune with the local market. The bad news is that these community banks were not immune to the housing market declines of the last several years and many are reluctant to enter the AD&C market. The good news is that some community banks have done a good job dealing with their issues and stand ready and willing to lend. The challenge for the building community is two-fold. First, you must understand the new lending parameters of those banks that are again providing AD&C funding; and second, you must know what banks are in the market of lending to the homebuilders.

Let's break down the pieces. The "A" piece is acquisition. Getting a land loan on a vacant land is probably not going to happen unless you have additional cash-flow generating assets that can be pledged as collateral for the loan. What is obtainable is a land loan that is part of an overall development funding package when the land is ready to be put into production.

Now let's look at the "D" which stands for development. A lender will generally require a first position on your land but understands that in order to monetize your development opportunity you



must complete site improvements. Generally a development loan is obtainable under two scenarios: first, as with the land loan, as part of an overall AD&C financing package; and second, as a stand-alone where the "take-out" is the sale of finished lots to a homebuilder. Projects should contain multiple phases. It will be a lot easier to find financing for 5 sections of 20 lots each than it will be to finance the infrastructure for 100 lots at once.

Finally we have "C", construction financing. Construction financing for For-Sale projects looks different than it does for For-Rent projects. In a traditional For-Sale project, and as part of the AD&C package, a lender will typically fund the construct of a model or two. After that, construction financing will be limited to homes pre-sold (under contract with the contingencies removed).

Construction financing of townhouse developments, as with the detached single product, will typically be provided on a rolling basis. Funding is provided for the first building, which normally includes the model(s), but will not be provided for building #2 until there are a certain percentage of presales in building #2 and building #1 is significantly sold. Typically, 50% pre-sales are required to obtain financing.

What is very difficult, if not impossible, to finance today through conventional lenders are for-sale condominiums mostly because the entire building must be complete before you can close your first unit(s). Unless there are significant pre-sales and the ability to carry built but unsold condominiums through the life of the project, financing for these type projects is generally not available. There are two possible solutions. First, try to minimize the exposure by building smaller buildings. If you have a 60 unit project, rather than put all 60 units in one building, try to design three buildings of 20 each; or, better yet, design one building of 10 units and two buildings of 25 units. The 10 unit building can be built first to test the market. The second alternative, and definitely the best solution, is to model your condominium project as a for-rent project. If it works on a for-rent basis, you will find it much easier to obtain financing. Build in a per-unit release number so you can still sell units.

The single bright spot in the homebuilding world over the last several years has been the rental market. Lenders today are aggressive in providing permanent financing for stabilized, cash-flow generating rental projects. What is a little trickier is finding that lender that will provide AD&C financing for a rental project with a permanent take-out. You are more likely, and better advised, to work with a bank that provides the entire AD&C package with a permanent take-out than just seeking construction financing or acquisition financing or any single piece of the financing package.

Finally, no project gets done today without some equity requirement. That need not be by developer cash. It could be in the form of equity in the land or it could be provided by a third

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THE IMPORTANCE OF OBTAINING A ZONING PERMIT

By Donna M. Jennings, Esq., Wilentz, Goldman, & Spitzer, P.A.



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It cannot be overemphasized the importance of securing a zoning permit before closing a real estate transaction or prior to constructing or altering an existing structure or building. A zoning permit is a document signed by the administrative officer (a) "which is required as a condition precedent to the commencement of a use or the erection, construction, reconstruction, alteration, conversion, or installation of a structure or building" and (b) which acknowledges that the proposed or existing use, structure, or building complies with the provisions of the local municipal zoning ordinance and/or that the appropriate variance or variances have been previously granted authorizing such use, structure or building. N.J.S.A. 40:55D-7. The obvious purpose of a zoning permit is to ensure that the use an applicant proposes is permitted and/or that the existing building has been constructed in accordance with the local municipal zoning ordinance.

Before a zoning permit can be issued, the applicant must provide the designated administrative officer of the pertinent municipality as much specific information as possible regarding the proposed use for which the permit is sought so as to avoid problems in the future. For example, if an applicant knows that he wants to operate a warehouse in an existing building with an accessory retail component but he merely indicates on the zoning permit application form that he intends to use the property for a warehouse, the zoning permit will only be valid for the use that was so stated on the application form. If after closing the deal, applicant seeks to use a portion of the building for retail and retail uses are prohibited in that zone, the applicant will then be required to obtain a use variance from the zoning board of adjustment before he will be permitted

to operate the retail component of his business. A future denial of a use variance application could be fatal to the success of the applicant's business. A situation everyone should seek to avoid by providing the designated administrative officer with as much pertinent information about the proposed use prior to the issuance of a zoning permit.

Once an application for a zoning permit is filed, the designated administrative officer has 10 business days to act on said application. Failure to act on the application within 10 business days means the zoning permit is automatically approved. N.J.S.A. 40:55D-18. When an application for a zoning permit is denied, it is the duty of the designated administrative officer to specify the ordinance sections that are violated and what variances would be required before a zoning permit can be issued.

Importantly, once the designated administrative officer either approves or denies the zoning permit application, any interested party has 20 days to appeal that decision. N.J.S.A. 40:55D-72.a. An appeal is taken directly to the zoning board of adjustment by filing a notice with the designated administrative officer specifying the grounds of such appeal. At minimum, a party challenging the designated administrative officer's decision should identify with particularity the decision one wishes to appeal, the date of the decision, and the name and title of the municipal official who made it. The designated administrative officer

is then required to transmit all papers constituting the record to the zoning board of adjustment. Any appeal to the zoning board of adjustment will occur at a fully noticed public hearing.

It is equally important that one appealing the grant or denial of a zoning permit file said appeal within the 20 day appeal period as that time period has been strictly construed. N.J.S.A. 40:55D-72.a. For example, in *Asarnow v. City of Long Branch*, 2013 N.J. Super. Unpub. LEXIS 1051, when plaintiff learned that a zoning permit had been issued to defendant, instead of appealing to the zoning board of adjustment as required by statute, he commenced a letter-writing campaign in an attempt to have the permit rescinded. Seven months later, plaintiff filed a verified complaint seeking, among other things, to void the zoning permit issued by the city's zoning officer permitting the owner of adjacent lots to continue to operate a paving company. In dismissing plaintiff's complaint, the court explained that:

[T]he statutory requirement contained in N.J.S.A. 40:55D-72a, that an appeal from an administrative officer's determination must be taken within twenty days of that determination, is jurisdictional in nature; and that the twenty-day time period begins to run from the day a party knew or should have known of the issuance of the permit.

As a practical matter, every real estate contract should contain a due diligence provision that provides the Buyer with sufficient time, to at minimum, secure a zoning permit prior to closing the deal. As stated above, the designated administrative officer must render a decision on a zoning permit application within 10 business days. The fee for

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By: **Cathy Coloff, President, IT Radix**

With the closing of the 2014 Olympic Winter Games, we are reminded that speed, performance and the right equipment make for a winning team! In the same way, organizations perform at their highest when provided with the right equipment and tools. One of those critical business tools is Internet access.

But how do you decide which Internet Service Provider (ISP) you want to give your team? Be sure to go for the Gold!

Speed

When it comes to the Internet, usage is increasing daily, try to avoid Internet access like Digital Subscriber Line (DSL) which will only hinder your employees. Staying with DSL is like giving your team 10-year-old equipment when the other team is all up to date! Give your team access to at least cable service (such as Cablevision or Comcast) or fiber service (such as FIOS) which can offer up to 150 Mbps down and 35 Mbps up.

With the growing use of online backup, you'll need faster Internet service to ensure your offsite backups will complete off-hours. If you're moving more of your business computer services to the Cloud, adequate Internet speeds will be required for acceptable performance. In general, internet speeds of 20 Mbps or higher are adequate for most cloud-based applications but be sure to check it out before moving to the cloud.

How do you know if you're getting what you ordered? You can test your Internet bandwidth at www.speakeasy.net/speedtest - keep in mind, test results can vary widely. The best approach for testing your Internet bandwidth is to test when no one else, including online backup software, is using your Internet connection and the computer is wired to your network. Internal network switches, firewalls, and wireless connections will all impact the results achieved.



Some organizations need a guarantee of higher quality Internet service than cable or FIOS can provide. In these cases, an enterprise-class fiber optic (e.g. Lightpath) or bonded T1 solution may be in order. With these types of services, the provider has higher service level standards (SLAs) that they must adhere to in terms of uptime and performance.

Backup

Organizations today rely so much on their access to the Internet that the most professional are making a sound investment in a backup Internet connection. This connection should be from an alternative service provider than your primary (such as an inexpensive cable connection or DSL) and can seamlessly keep your organization working when or if the first-team ISP's service goes down. In this case, the special features of your network firewall can make this failover to the special team seamless.

When it comes to Internet access and your network there are other things to consider as well - not all ISPs or options are created equal; you might think they are the same, but in the field of play they are quite different. So, when selecting your Internet services keep the tips above in mind and if you're still confused or unsure, ask us! We're here to help you ensure you have the best Internet service for your business so that your business is positioned for the Gold!

About the Author:

Cathy Coloff, is a Managing Member with [IT Radix, LLC](http://ITRadix.com). She has 20+ years of experience in networks 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.

THE ABC'S OF AD&C

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party equity contributor. More and more deals today are a combination of builder (with the expertise) and equity investor (with the cash).

When looking for an AD&C package you should keep these percentages in mind: 50% for approved land, up to 75% for site improvements and up to 100% of construction. Those are reasonable loan to value percentages for an AD&C loan. Some soft costs can be included as well.

The building community has retooled their business models and adjusted to the new realities. So have the community banks. Financing is again available but typically under a new set of parameters. In order to be time effective, and to give your projects the highest probability of funding success, identify a bank that understands your project - both in terms of geography and product type, and is in the business of AD&C lending. Put together a package that fits within the appropriate lending percentages and equity requirements. Before dollar one goes in you'll need a very good business plan as to how the last dollar gets repaid.

About the Authors:

Stanley Koreyva is Chief Operating Officer of [Amboy Bank](http://AmboyBank.com) which is a 125 year old Community Bank based in central New Jersey with assets of \$ 2.2 billion and the capacity to lend up to \$50 million to individual builders/projects. The majority of Amboy financing is to the residential building community including both "for sale" and "rental" construction. Mr. Koreyva can be reached at 732-970-2003 or skoreyva@amboybank.com.

Stephen Patron is President of Paradigm Realty Alliance and is a second generation developer in New Jersey. He is a Past President of NJBA. Mr. Patron is also the Managing Member of Harvestate Group which is an asset recovery group working with lenders and developers in repositioning failed projects and providing equity in recapitalizing developments. He can be reached at 609-658-6004 or spatron@paradigmcompanies.com.

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NO DAMAGE FOR DELAY AND LIQUIDATED DAMAGE CLAUSES IN PUBLIC CONSTRUCTION CONTRACTS

By Jason T. Shafron, Esq., Archer & Greiner P.C.

A general contractor has entered into a construction contract with a public entity in New Jersey and the work commences. As seems to always be the case, there are delays on the project. Very often, the public entity seeks to collect damages from the general contractor for such delays while the contractor seeks extra time. Less often, as will be considered here, it is the general contractor who seeks damages as a result of delays and contends that those delays were caused by the public entity's actions or inactions.

A review of the contract reveals two key terms that address this issue. The first states that the contractor cannot recover for delay damages unless the actions of the governmental entity fall into certain limited circumstances ("no damage for delay" clause). The second relevant clause states that if the case falls into one of those limited circumstances, such delay damages are fixed at a per calendar or working day amount ("liquidated damage" clause). The question then becomes whether the contractor can recover any damages for delay and, if so, how much it can recover.

A "no damage for delay" clause, which provides that a party will not be entitled to any damages strictly as a result of the other parties' delay, can be considered an exculpatory clause. An exculpatory clause in a construction contract is valid and enforceable only if: (1) it does not adversely affect the public interest; (2) is not the result of the exercise of unequal bargaining power; and (3) is not otherwise unconscionable.

In the public contract area, New Jersey has two statutes which address the enforceability of a no damage for delay clause. N.J.S.A. 2A:58B-3 relates to contracts with the State of New

Jersey. More recently, in 2001, N.J.S.A. 40A:11-19 was enacted relating to Local Government contracts.

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N.J.S.A. 40A:11-19 invalidates and makes unenforceable a clause which limits "a contractor's remedy for the contracting unit's negligence, bad faith, active interference, tortious conduct, or other reasons un contemplated by the parties that delay the contractor's performance, to giving the contractor an extension of time for performance under the contract." In other words, the governmental contracting party cannot enforce a no damage for delay clause if its conduct falls into one of the categories stated. If the no damage for delay clause is unenforceable, then the issue becomes whether the fixed amount set in the contract for such delays is enforceable as a liquidated damage provision.

A valid liquidated damage provision is different than a "penalty", which is the sum a party agrees to pay in the event of a breach, but which is fixed, not as a pre-estimate of probable actual damages, but as a punishment, the threat of which is designed to prevent a breach. A contract that attempts to set a penalty for its breach is unlawful in New Jersey. A liquidated damages clause providing for an unrealistic sum, in a case where real damages are certain or readily reducible to certainty by proof, is deemed a penalty and is not enforceable. A liquidated damages provision is therefore enforceable only if: (1) the actual damages resulting from a breach are difficult or impossible to

ascertain; and (2) the damages agreed upon have a reasonable relationship to probable loss. Some New Jersey case law also states that a court may consider the reasonableness of the clause at the time of the breach, in addition to, or instead of, at the time of entering into the contract.

Typically, if the no damage for delay clause is unenforceable, the party who suffered from delays is seeking to recover the per day liquidated damage amount in the contract, rather than having to prove at trial the actual amount of damage it suffered as a result of the delays caused by the other party. An interesting issue arises where the liquidated damage provision is being enforced by the breaching party as a shield in the calculation of damages.

Thus, in a delay case, if the liquidated damage provision provides for fixed delay damages which turn out to be much less than the actual delay damages suffered, the non-breaching party may argue that such a "reverse" liquidated damage clause is actually a penalty to it, rather than to the breaching party and should therefore not be an enforceable liquidated damage provision. These issues must be carefully considered both at the time of contract negotiation and when considering options upon the occurrence of delays.

About the Author:

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DIMENSIONS

TAX APPEALS FOR CONSTRUCTION PARTIALLY COMPLETED AND STRADDLING TAX YEARS

By: **C. Justin McCarthy, Esq. and John A. Giunco, Esq., Giordano, Halleran & Ciesla, P.C.**

New Jersey has 566 municipalities, 21 counties, 188 fire districts and 611 school districts, the budgets for which are financed largely by ever increasing property taxes. For builders and developers of real property the threat of rising tax obligations is especially menacing in the context of an ongoing development site, especially where the construction time frame from start to finish will extend through multiple tax years. The looming concern that builders and property owners face as construction occurs is the imposition of higher assessed property values, which inevitably leads to higher carrying costs. What then can developers do to limit what will likely be an increasing tax burden as new residential, commercial or industrial construction is completed?

The short answer is two-fold. First, file a regular tax appeal to reduce the assessed value of property. Second, rigorously defend against asserted assessment increases imposed by a municipality.

As structures that are part of a development project are completed, the owner of such property should expect that the assessed value may be adjusted upwards by the local assessor. The municipal assessor may increase the assessments of real property in the regular course by re-assessing as of October 1st of the pre tax year or by utilizing the statutory procedure for added assessments. To better understand the assessing process that often applies to new construction, the scheme for added assessments (N.J.S.A. 54:63.1 et seq.) must be understood. The underlying purpose of added assessments is to allow for the taxation of real property which was improved or became taxable during the tax year after the regular pre-tax year assessment date of October 1st. When any parcel of real property contains any

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building or other structure which has been erected, added to, or improved after October 1, the municipal assessor shall determine the taxable value of such parcel as of the first of the month following such completion. If the new value exceeds the value as of the prior October 1st date, the assessor then enters an added assessment against the parcel in the added assessment list for the tax year.

This process allows the municipality to levy tax against the value of structures and improvements completed during that tax year that were not originally included in the pre-tax year assessment. The applicability of an added assessment corresponds directly with the assessor's determination of when a structure(s) is "completed". This has been interpreted to mean when they are ready to conduct their intended use.

Taxpayers have a right to appeal an added assessment to the applicable county board of taxation or the Tax Court by December 1st of the year in which the assessment is made or 30 days from the completion of the municipal tax collectors bulk mailing of the added assessment tax bills, whichever is later. For regular assessment appeals, the

statutory deadline to file a tax appeal is April 1st of the tax year. The appeal deadline for both regular and added assessment appeals is strictly enforced and failure to file a timely appeal is a fatal defect for the appeal.

While each situation is often unique there are a few common areas of dispute as they relate to added assessments. The first involves the interpretation of what constitutes "complete" structures. The Tax Court has held that a property is "complete" and therefore subject to assessment and taxation when it is able to be used for its intended purpose. While one would assume the issuance of a certificate of occupancy would govern this determination, the Tax Court has found that the issuance, or non issuance, of a certificate of occupancy alone is not a determinative factor. Where licenses are required for the operation of a particular structure, the 'completion' of the structure may be determined by the date of the receipt of the necessary licensing. This is a fact-sensitive determination that varies from situation to situation.

The definition of what constitutes "erected, added to or improved" to qualify for added assessment is also an area of common conflict. This term has been subject to multiple interpretations by the Tax Court.

A third area of frequent disagreement with regard to added assessment appeals is the application of the "Freeze Act", N.J.S.A. 41:51A-8. Where there is a 'change in value' during that freeze act period, such as the construction and completion of additional structures, a municipality may attempt to change the assessment and overcome the application of the freeze act to the assessment. The municipality must bear the burden of showing a "change

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DIMENSIONS

REVISED UNIFORM LIMITED LIABILITY COMPANY ACT

"A DEAL MAY NOT BE A DEAL"

By George J. Tyler, Esq. and Matthew J. Krantz, Esq., Tyler & Carmeli, P.C.



Beginning on March 1, 2014, all limited liability companies ("LLC") become subject to the Revised Uniform Limited Liability Company Act ("RULLCA"). RULLCA was adopted as law on September 19, 2012 to replace to original legislation authorizing the creation of LLCs in New Jersey, which became effective in 1994. New LLCs created after March 18, 2013 have been subject to RULLCA since formation. At the same time, existing LLCs had the option to become subject to RULLCA by amending their operating agreement. Existing LLCs that took no action when the law was first passed will automatically become subject to RULLCA as of March 1, 2014, and their operating agreements may well change.

RULLCA is the first full comprehensive revision of the laws governing LLCs in New Jersey since LLCs were first authorized by statute, and it attempts to combine the best areas of the existing law governing LLCs, as well as other business entities, with legal developments over the past two decades. As with the previous law governing LLCs, RULLCA establishes default terms for LLCs. A LLC may depart from most of the default terms by addressing the subject of the default term in its operating agreement. *However, where the operating agreement does not address the subject of a statutory default term, the statutory term will apply.* As discussed below, many of the default terms have changed with the adoption of RULLCA. Therefore, all LLCs should immediately have their operating agreements reviewed to ensure that previous agreements and understandings remain in effect. Business practices should also be evaluated to ensure consistency with the new law. In other words, by operation of law one may find an existing business arrangement has changed automatically and perhaps not to that person's liking. If inconsistencies are identified, then the LLC must amend its operating agreement or its business practices to maintain compliance.

One significant change is that profits and losses under RULLCA will be distributed per capita, that is, in equal shares among members, if not otherwise stated in the operating agreement. This is true even if contributions to the LLC were not equal. Under the previous New Jersey Limited Liability Company Act ("NJLLCA"), profits and losses were allocated in accordance with the operating agreement, but if the operating agreement was silent, then the profits and losses were allocated based upon the agreed value of the contributions by the members.

In addition, under RULLCA, members that resign from the LLC will not be entitled to receive the fair share of the value of their interest at the time of resignation unless otherwise specified in an operating agreement. Instead, the resigning individual will be dissociated as a member and will retain only the rights of an economic interest holder.

Moreover, under RULLCA, members owe a duty of loyalty and duty of care to the LLC and other members. These duties prohibit the member from, among other things, competing with the LLC and require the member to account to the LLC for any profit derived from the member for appropriating an opportunity of the LLC. To the extent that such action is not "manifestly unreasonable," RULLCA allows for these duties to be expanded and curtailed by the terms of an operating agreement.

Under the NJLLCA, a LLC may choose

to indemnify its members or managers. However, the failure to address the issue in the operating agreement left members and managers unprotected except to the extent allowed by the Courts. RULLCA provides that all company agents, including members and managers, will be entitled to indemnification by the LLC unless such requirement is limited by the operating agreement

Under RULLCA, LLCs will no longer have a limited life unless otherwise specified by the operating agreement. Instead, LLCs will have perpetual existence unless specified otherwise by the operating agreement. LLCs will also have the ability to file Statements of Authority with the Department of the Treasury in order to limit the ability of, or authorize, certain individuals or entities to bind the LLCs to third parties. Furthermore, RULLCA allows for operating agreements to be oral, written or implied based on the way the LLC has operated. Previously, operating agreements were required to be in writing.

In addition, RULLCA also includes provisions addressing deadlock amongst members and oppression of minority owners.

Given the extent of these changes and their impact on members and managers, LLCs that have not yet done so should immediately have their operating agreements evaluated and make amendments to ensure that previous agreements between the members have not been drastically altered by this new law.

About the Author:

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THE IMPORTANCE OF OBTAINING A ZONING PERMIT

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such an application is usually nominal at best (i.e., \$25). A small price to pay to buy your client some peace of mind before moving forward with a real estate purchase.

About the Author:

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TAX APPEALS FOR CONSTRUCTION

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in value" by demonstrating an internal or an external change occurred after the base year assessing date which meaningfully increased the property's value.

It is important that builders remain vigilant with regards to the imposition of regular and added assessments against property that is under construction with substantial pending improvements or even property that has pending or recently received subdivision approvals. An assessor could easily 'jump the gun' and assign substantial taxable value to a property for which approvals are

pending but not yet received, or where construction is ongoing but not yet completed.

About the Authors:

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