

# DIMENSIONS

Newsletter of the New Jersey Builders Association



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*Dimensions* newsletter is produced by the New Jersey Builders Association (NJBA). NJBA is a housing industry trade association of builders, developers, remodelers, subcontractors, suppliers, engineers, architects, consultants and other professionals dedicated to meeting the housing needs of all New Jersey residents and facilitating 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](http://www.njba.org).

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



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## PRESIDENT GEORGE VALLONE'S FAREWELL MESSAGE



George T. Vallone  
NJBA President

It is hard to believe that a year has passed since I took the reins as the 65th President of this esteemed group of Builders and Associates who are dedicated to providing the most essential element of the American dream – a home. Here are my parting reflections

I have been a member of this Association for 34 years and like many of you, the relationships with family, friends, and business colleagues are the most important part of my life. These relationships become the foundation upon which we build richness in our lives each and every day.

My most important relationships are with my family. My parents (Dixie at age 87 and George at age 95), continue to offer their love, guidance, and support. My wife of 30 years, Christine, is my absolute best friend, the mother of my three amazing children (Lauren, George, and Julia), and my peaceful safe harbor throughout the decades in this tumultuous cyclical industry.

My relationship with Daniel Gans began as friends at Gettysburg College in 1972 and evolved into a business partnership in 1979 when we bought our first brownstone in Hoboken for \$20,000. Looking back on our partnership of 37 years, I am eternally grateful to Daniel for his consistent, disciplined work ethic as we strive to create the best redevelopment projects in Hoboken, Jersey City and other urban locations throughout New Jersey, Pennsylvania, and Massachusetts.

Without a doubt, my relationship with NJBA has contributed to my personal and professional development in countless ways. I am blessed to be able

to have had many of our past leaders as mentors and friends. To name just a few, I must thank Barry Rosengarten who was the first NJBA member Dan and I met while finishing up graduate school in the late 70s and looking for the place to start our business. Barry went on to become a great NJBA President and we have been friends ever since. Soon after joining, I met Frank Farinella, Sam Herzog and Lenny Sendelsky; all of whom played an invaluable role in guiding my professional development. All three are resting in peace and will forever remain pillars of our Association and the homebuilding industry.

I have had the privilege to work with the amazing staff that we are so fortunate to have supporting our efforts. I'd like to thank Patrick O'Keefe, my first CEO, who led our Association for decades and contributed greatly to the tremendous reputation we now have as a political powerhouse focused on championing pro-housing legislation. Patrick was followed by Tim Touhey, who as CEO, guided NJBA through the most perilous years of the housing recession. Tim resuscitated us financially by creating a financing affiliate which brought us back to fiscal stability. Today, we are so fortunate to have Carol Ann Short, Esq. as our current CEO. I saw first-hand as I travelled with Carol throughout the Statehouse, the Assembly, the Senate, the DEP and DCA how her work over these past decades leading our legislative and regulatory lobbying efforts have made her a force to be reckoned with. Quite simply, Carol is very well known and respected throughout the halls in Trenton. These folks must be acknowledged and thanked for their amazing leadership, fortitude and political insights which taken together have allowed us to become the most recognized and effective trade association representing the housing industry.

All of our past and present CEOs and the NJBA membership at-large

must thank one of our most important staff members, Lisa Obolsky, whose institutional knowledge of the rules, regulations, and traditions that knit our Association together is unsurpassed. I cannot acknowledge and thank Elizabeth George Cheniera, Esq. and Jeff Kolakowski enough, as our regulatory and legislative experts for the outstanding job they have done continuously fighting back the onslaught of negative forces that wish to restrict the supply and increase the cost of housing in New Jersey. Most of the success of the Atlantic Builders Conference, our number one source of revenue and a showcase of our pride as an industry, we owe to Diane Nicolo-Pocino. Over this past year as President, I have become much more intimately aware of the tremendous amount of effort it takes to make this event an outstanding success. Diane would surely join me to acknowledge the able assistance Cindy Spicer and our newest staff member Grant Lucking have brought not just to the conference but in moving forward all of the internal and external efforts that need to be shepherded on a daily basis. And I would like to acknowledge and thank Pauline Magnotti for her vigilant management of our financial affairs, as well as her contributions year after year to a tremendously successful Sales and Marketing Awards Program at the convention. Finally, I'd like to thank Sabrina Delgado for her amazing ability to keep everyone and everything on track. I especially want to thank her for keeping me on track throughout the entire year.

I'd like to thank my fellow Officers for their time, effort, and dedication to our Association. Based on my experience working with Dwight Wesley Pittenger, Esq. on the executive ladder over these past five years, I am confident that he, will do a fantastic job for NJBA as President of the Association. I have no doubt that Dwight's calm and thoughtful demeanor, although

*Continued on page 14*



## ANATOMY OF A TRANSITION CONSTRUCTION DEFECT CASE

By: Mitchell Frumkin, PE, RS

### Introduction

The water is coming in through the roof and around the windows. While this isn't necessarily a construction defect, it is probably one of the most common results of a construction defect -- water infiltration due to poor construction. This article deals with the Anatomy of a Construction Defect. While most people are familiar with the results of a defect such as water infiltration, the cause of the defect can go back to well before construction even started. This article will review a worst case example of this type of problem. While the names have been removed to protect the guilty, the story is based on the facts of a real construction defect. It all started when the Developers decided that they were going to build.

But first, what is a construction defect? The definition based on the International Risk Management Institute (IRMI.org) is, "a deficiency in the design or construction of a building or structure resulting from a failure to design or construct in a reasonably workmanlike manner, and/or in accordance with a buyer's reasonable expectation." However, many states have more specifically defined the term "construction defect" or "structural defect" for purposes of applying statutes that dictate processes for remedying and ultimately litigating construction defect claims. These statutory definitions vary by state.

While a manifestation of the construction defect in many instances is not seen for a long period of time after construction, the defect may be caused by things which take place even before construction starts. In a community association, this period of time can roughly be defined as "Transition," although the time of discovery of the defect can take place well after the



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Transition period is over which may create even more of a problem for those who live in the community. For the purposes of this paper we will define Transition as the period of time which begins when the Developer decides to build a community association and ends after all of the homes are sold and the homeowners are fully in control of the community.

The Transition period will be divided into four phases.

1. The first is the Document Development Phase when the governing documents are prepared along with the design drawings for the new community. In this phase, the developer is also receiving whatever governmental approvals are needed for the construction and selecting the contractors that will be performing the actual construction.
2. The next phase is the Construction Phase, during which time the community is actually being built. In many instances, new homeowners can also be moving into the community as the progress of construction continues.
3. The third phase is the Turnover Phase and typically occurs after 75% of the homes have been sold, and the new board takes control of the community.

4. The fourth and last phase is the Post Turnover Phase, -- the period of time when all of the homes are sold and the developer is no longer on the board of the new association.

We should also note that community associations are even more at risk for construction deficiencies (both for the developer and homeowners) due to the concept of common elements. In a community association, while certain physical portions of the home are the responsibility of the homeowner, many portions of the home and grounds, known as the common elements, are the responsibilities of the community association and are governed by the board of trustees. The extent of these common elements varies by association type. The primary risk with the common elements is that any deficiencies with them are not quantified until after the homeowner has purchased the home and moved into the community. This is in reverse of the classical method of performing due diligence inspections prior to purchasing, rather than after. As a result, this can lead to the unrealistic expectation of construction being perfect while in the classical process most deficiencies are identified prior to purchase, with negotiations regarding deficiencies undertaken in advance.

Our discussion of Construction Defects will be divided in to the four phases of the Transition process and will use examples from an actual construction defect claim.

### Document Development Phase

In the Document Development Phase of a community association, a number of things take place which are all initiated and directed by the developer. It starts with the initial decision to build a community association. When making

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#### About the Author:

Mitchell H. Frumkin PE, RS, CGP, is the founder of Kipcon, Inc. He is a Licensed Professional Engineer in eighteen states, and holds the Community Associations Institute's (CAI) Reserve Specialist designation. Additionally, the National Association of Home Builders (NAHB) named him a Certified Green Professional. He can be reached at (732) 220-0200.

# DIMENSIONS

## NEW JERSEY'S VERSION OF TAX INCREMENT FINANCING – KNOWN AS “ERGG” – SUCCESSFULLY CLOSING CONSTRUCTION FINANCING GAPS ON PROJECTS ACROSS THE STATE

By: Ted Zangari, Esq. and Cecilia Lassiter, Esq.

New Jersey's residential “ERGG” program enacted in 2013 has been so successful that some “buckets” of the allocated \$600 million in tax credits are empty and others are quickly depleting. However, a prominent legislator recently introduced a bill to re-fund and re-calibrate the program, as discussed below.

*What is ERGG and why is it so successful?* The Economic Redevelopment and Growth Grant (“ERGG”) program, codified at N.J.S.A. 52:27D-489a et seq., and known as Tax Increment Financing or “TIF” in other states, is a developer subsidy that has already successfully closed construction financing gaps on shovel-ready projects throughout the State. The ERGG program is actually two distinct programs, each with different requirements: one ERGG program is for “predominantly” residential projects, including multi-family residential and dormitory units for purchase or lease, and the other ERGG program pertains to commercial projects, which may include retail, office or industrial uses (and even mixed-use including some residential housing) for purchase or lease. The New Jersey Economic Development Authority (“NJEDA”) administers the ERGG programs and has established regulations for the programs at N.J.A.C. 19:31-4.1 et seq.

*ERGG Program Eligibility Requirements Applicable to Both Residential & Commercial Projects:* To be eligible for an ERGG, a developer must not have commenced construction on the project site prior to submitting an application to NJEDA and must invest non-borrowed equity equal to at least 20% of the

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project cost. In addition, all other public and private sources of funds must first be pursued to the fullest extent possible, including obtaining or trying to obtain a local property tax exemption. If, after inserting the above funds into the construction pro-forma, and utilizing a modest rate of return (usually 11-14%) and a realistic construction budget, there remains a project financing gap, NJEDA may award an incentive amount to effectively close the gap, up to a percentage of project costs as detailed below. All construction work associated with the project must meet certain prevailing wage, affirmative action, and green building requirements.

*Residential ERGG Program:* The greatest feature of the residential ERGG is the way the incentive amount is disbursed -- in the form of tax credits payable in equal increments over 10 years. Because the tax credits are pledgeable and transferrable, developers have been able to successfully utilize them as a source of upfront collateral or venture contribution in the course of attracting

debt and equity investments in their projects.

The incentive amount for residential projects can equal up to 20% of project costs, or up to 30% of project costs if at least 10% of the project units are reserved as affordable housing units. (If the residential project includes newly-constructed residential units, developers are required to reserve at least 20% of those units as affordable housing units consistent with the Council on Affordable Housing [“COAH”] affordability controls, unless the municipality in which the project is located has received substantive certification from COAH or a judgment of compliance or repose and such reservation is not required under the approved affordable housing plan.)

Residential projects must meet a minimum project cost requirement: (i) \$17,500,000 if the project is located in a municipality with a population greater than 200,000 according to the latest federal census (i.e. currently Newark and Jersey City); (ii) \$10,000,000 if the project is located in a municipality with a population less than 200,000 according to the latest federal census or the project is a disaster recovery project; or (iii) \$5,000,000 if the project is located in Camden, Trenton, Paterson, Passaic or Atlantic City known as Garden State Growth Zones (“GSGZ”). Applications must be submitted to NJEDA by no later than July 1, 2016.

*The Lesniak Solution:* With tax credits under the residential ERGG program

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### About the Author:

Ted Zangari is Chair of the Real Estate Department and Redevelopment Law Practice Group at the Sills Cummis & Gross law firm based in Newark & Princeton. Cecilia Lassiter is an Associate in the group and concentrates on land use and public finance of redevelopment projects. They can be contacted at (973) 643-7000.

## ONE YEAR LATER: MOUNT LAUREL CASES IN THE POST-COAH ERA

By: Thomas F. Carroll, III, Esq.

One year ago, in March of 2015, the New Jersey Supreme Court issued its opinion removing exclusionary zoning disputes from the Council on Affordable Housing (COAH), and directing that New Jersey's trial courts resolve exclusionary zoning cases arising under the state's "Mount Laurel doctrine." This article provides the status of those cases, including a summary of an important recent opinion addressing the "gap year" need controversy.

### Overall Status of the Cases

Over 300 declaratory judgment (DJ) cases involving Mount Laurel issues have been filed in the wake of the Supreme Court's decision. Judges in the different counties are handling the cases in different ways, with some judges handling them more aggressively than others.

The judges handling the DJ cases involving Ocean County towns have been among those "out in front" in terms of dealing with the global issues, like numerical fair share obligations. The original scheduling in Ocean County called for a county-wide trial on fair share numbers in mid-November, with fair share plans meeting the obligations to be filed by early December. However, certain key players involved in the process had health setbacks. As a result, the mid-November trial on fair share issues did not occur, and a new schedule was put into place.

On a statewide basis, these developments resulted in judges extending the time frames within which towns must file fair share plans, with the judges also commensurately extending the "immunity" from builder's remedy suits as to the towns involved in DJ



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cases. A trial on the global issues in the Ocean County cases is now likely to occur in June of this year. It is possible that such a trial in a Middlesex County case may occur this May.

Other counties that are likely to be among the early counties in addressing the global issues are Monmouth County and Mercer County. The New Jersey Builders Association (NJBA), aided by legal counsel and expert consultants, is actively involved in the quest for court rulings establishing reasonable fair share numbers and the compliance standards that will guide municipalities in putting together fair share plans. After those global issues are resolved, towns throughout the State will be obligated to adopt final fair share plans providing for a reduction in exclusionary zoning, and the provision of more lower income housing and the affordable market rate housing that accompanies the lower income housing in inclusionary developments.

### Judge Troncone's "Gap Year" Opinion

On February 18, 2016, the Honorable Mark A. Troncone, J.S.C., issued a very significant ruling in the consolidated Mount Laurel declaratory judgment lawsuits involving Ocean County municipalities. The central issue

before Judge Troncone was whether municipalities must satisfy fair share obligations that accrued during the period of 1999-2015, known as the "gap years." The issue arose because COAH failed to establish lawful fair share obligations for the gap years. The decision has statewide implications.

Municipalities had asserted that no such gap year need can be lawfully established. In essence, municipalities were seeking to reduce their "third round" (post-1999) Mount Laurel obligations by approximately 60%. Largely accepting the arguments made by the NJBA and the Fair Share Housing Center, Judge Troncone disagreed with the municipalities, ruling that municipalities must provide for satisfaction of the gap year need, as well as their prior round need, the present need, and their prospective need. Judge Troncone also issued certain rulings related to the "1,000 unit cap" issue, and possible municipal requests to "defer" up to one-half of their gap year need to the "fourth round" (which will begin in 2026).

Judge Troncone's rulings are technically binding only within Ocean County. However, a number of judges throughout the State have indicated that they were awaiting Judge Troncone's rulings on the "gap year issue," and it is hoped that the decision will effectively put an end to municipal efforts to avoid satisfaction of some 60% of their third round fair share obligations. There will be further proceedings on fair share issues in the Ocean County cases and elsewhere, but Judge Troncone's opinion goes a long way toward the establishment of statewide fair share

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#### About the Author:

The author is partner-in-charge of the Land Use Division of Hill Wallack LLP, Land Use Counsel to the NJBA. Hill Wallack LLP, based in Princeton, represented the NJBA when playing a lead role in the COAH regulation litigation, and has also represented the NJBA and individual builders in many of the DJ actions discussed in this article. Hill Wallack LLP keeps records on the filings and status of all New Jersey towns. Please contact the author should you have questions about the status of any particular towns, or any other questions.

# DIMENSIONS

## MITIGATING RISK ON CONTAMINATED SITES- VAPOR INTRUSION CONTROLS AND BARRIERS

By: Wayne Ingram, P.E., P.L.S., P.P.

Building on contaminated sites presents many interesting challenges, whether it is residential or commercial. Limiting future risk and responsibilities on these sites is key to a successful project. Increasing attention has been paid to the issue of Vapor Intrusion (VI) and Mitigation since the Environmental Protection Agency (EPA) first released their Draft VI Guidance in 2002 and has continued with the EPA's 2015 Guidance Document and the New Jersey Department of Environmental Protection's (NJDEP) 2013 Vapor Intrusion Technical Guidance. On contaminated sites that either contain existing development or are proposed for new construction, an investigation and potentially the implementation of a mitigation system are now virtual requirements.

Whether testing reveals the need for a VI system to comply with environmental regulations or if the developer simply wants a protective measure installed to prevent future liability, it is important to be educated about the available options. The cost for design and installation of vapor barriers and controls are less expensive than most would expect, typically ranging from \$2.50-4.00 per square foot for new construction and \$3.00-5.00 for retrofitting existing structures.

The most appealing system for the owner or developer is the passive vapor mitigation system. These systems are generally less costly than active systems and have no ongoing electricity or demand of expenses. They also have the lowest maintenance components and do not generate noise. Passive systems generally consist of two parts- a vapor barrier and a passive venting component.



The most common and effective passive barriers tend to be spray applied asphaltic mixtures such as Geoseal. The barrier is a three part system consisting of a "Base" fabric laid over a gravel layer across the building foundation followed by the spray applied "Core" layer and completed by a final "Bond" layer which provides protection for the system and on top of which the building slab is poured. These barriers are specifically designed to prevent vapor migration into the building and have a proven track record of success. For existing buildings, epoxy sealant products, such as Retro-Coat, can be applied to the entirety of a slab surface, thereby sealing cracks and penetrations that might otherwise allow harmful vapors to penetrate into the building interior.

The second component often installed on a VI system is the system venting. Many options exist from perforate piping networks to specifically designed low-profile venting media which are placed under the slab and connected to vertical piping and conveyed to the rooflines of the buildings. The piping generally terminates in rooftop turbine ventilators. For active systems, the ventilators are swapped out for fan systems which can be as simple as a radon fan but can become much more

intense depending on the extent of vapor concern.

With proper engineered design, these systems can effectively mitigate most vapor concerns on contaminated sites. As with any system though, a product is only as good as its installation, and therefore it is generally advisable to have the products installed only by certified contractors and overseen by the design engineer. Once installed, monitoring of the system is essential and required. New Jersey guidance requires that passive systems' performance be evaluated via indoor air sampling to ensure there are no contaminant exceedances within the building. Active systems have the option of testing system functionality via vacuum testing. Proper design of a passive system will typically involve creation of a system that can be easily converted to active should the indoor air sampling determine that a concern still exists.

More and more, passive systems are also being installed on fully remediated sites and other urban properties that have no known concern as a proactive measure by the developer in an effort to avoid any future issues with vapor intrusion. Progressively more cases are being litigated regarding vapor intrusion claims. IBM recently settled a \$100 million lawsuit from residents in upstate New York regarding trichloroethylene (TCE) contamination in addition to installing over 300 vapor mitigation systems. General Mills is currently facing a lawsuit over another TCE vapor intrusion claim and has already installed 150+ systems. With the threat of litigation being so real, the cost of installing a proper VI system would seem to pale in comparison to the possible damages that can result from an unmitigated contaminant.

### About the Author:

Wayne Ingram is Vice President of E&LP and focuses on the civil engineering design and permitting of all manner of site plans and subdivisions. He has been designing vapor mitigation systems as part of various residential, commercial, and industrial redevelopment projects for over ten years.



## CONSTRUCTION LIABILITY INSURANCE MARKET REPORT

By: Anthony Bevilacqua, CPCU

Providing construction liability insurance for builders and contractors was once a pretty simple process. Underwriters were willing to insure homes, condos, apartments, mid-rise structures, high-rise structures, commercial buildings, industrial buildings all under a single liability policy. Wrap it all together, negotiate the rate, propose the coverage, and then bind the account. Neat, clean, no fuss, no crazy exclusions. Every aspect of construction was covered by a single policy.

Like everything else, times have certainly changed! Over the past 20 years, court cases around the United States have re-interpreted policy language that has stood the test of time. New products were introduced that resulted in unforeseen lawsuits and case settlements. Add to this lawsuits that scrutinized every aspect of the ways and means of construction led insurers to throw up their hand and retreat from the market for liability insurance.

Builders and contractors are challenged every day to procure comprehensive coverage at affordable rates.

Our take on the marketplace of construction insurance looks like this:

### Market Availability

The market has bifurcated the construction industry into two distinct sectors – commercial construction and residential construction. If you are exclusively in commercial construction as a builder or tradesman, coverage is available among a wide swath of underwriters eager to put together a competitive rate and comprehensive coverage deal.



If, however, you are focused in the residential market, the picture is not rosy. The number of interested underwriters shrinks by 90%. Even though rates are lower than 3 years ago, the coverage contracts are riddled with exclusions, limitations, exceptions and challenging warranties of coverage that, if not fully complied with, result in a denial of coverage. Buying liability insurance as a residential contractor is truly 'caveat emptor' – let the buyer beware.

### Pricing Trends

Liability rates have stabilized over the past 24-30 months. Some experts predict as 2016 unfolds, rates will decline. It is even possible to reasonably predict cost of coverage for long term – greater than 12 month – construction projects with a reasonable degree of accuracy.

The bigger issue is rate management. Since the market has separated construction insurance into two distinct buckets, rates are markedly different in each. With the number of players willing to participate in commercial

construction, rates are competitive as you might imagine. It is not unusual to realize a 10% or greater rate reduction on commercial liability accounts at renewal, assuming a favorable loss history.

Residential construction is a different story, in three parts. Remodeling contractors who retain most of their work can still find numerous competitive programs to choose from. Once you cross into the realm of a general contractor who subcontracts more than 50% of your operations, the market shrinks, and rates rise. Underwriters then dig further to ascertain if you build single family detached homes or multi-family attached. Simply put, multi-family construction rates are generally 30-50% higher than single family construction rates.

There is good news for apartment construction projects. Underwriters view apartment construction as commercial construction. Therefore, rates for apartment construction mirror commercial construction rates.

### Court Cases

Courts throughout the United States continue to grapple with weighty issues of policy language – what is, or is not, a construction defect? Is it an occurrence as defined by the policy? Is it not?

Can damage to other contractors work be covered by the general contractor's liability insurance? What are the coverage triggers for a party that seeks additional insured status under another party's liability policy?

Each state is refining and defining these questions. Recently, New Jersey Appellate Court rendered a very

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#### About the Author:

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



## DUE DILIGENCE AND THE BERMUDA TRIANGLE: GETTING IT DONE

By: Marc D. Policastro, Esq., and Melissa A. Clarke, Esq.

Due diligence can make or break a deal, and there is a lot on the line for those charged with getting it right.<sup>1</sup> From an environmental perspective in New Jersey, that can be daunting. The Bermuda Triangle of diligence occurs when on-site sources, off-site sources and “unknown” sources converge. Diligence “death traps” become more than manageable when the developer takes a disciplined approach, staying within the ambit of the Site Remediation Reform Act (SRRRA) regulations and the various guidance documents provided by the New Jersey Department of Environmental Protection (NJDEP).<sup>2</sup>

### Off-Site Source Groundwater Investigation

One of the most commonly encountered scenarios in due diligence occurs when contamination is found proximate to a contiguous parcel, where the contamination is subject to a prior approval which, miraculously, stopped exactly at the property boundary line. Although the developer’s Licensed Site Remediation Professional (LSRP) is empowered to issue a final approval where the contamination is from an “off-site” source, investors will generally demand that the contamination be cleaned up prior to construction.

Regulatory requirements for determining the presence of an off-site source of contamination are outlined in N.J.A.C. 7:26E-3.9. During an off-site source investigation, a Preliminary

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Assessment (PA) is required to evaluate whether the observed contamination is from an on-site source or the result of contamination migrating onto the site from an offsite source. An investigator should consider current and historical use of off-site properties in addition to the on-site property usage, as well as the degradation of compounds and the resulting products. The investigator should also determine ground water flow direction in all relevant water bearing zones or aquifers involved in the off-site source investigation.

### Commingled Plumes

A commingled plume is the condition that exists when ground water contaminated from two or more temporally or spatially discrete discharges have mixed or encroached upon one another to the extent that the remediation performed on one plume will necessarily affect the remediation of the other contaminant plume(s). The presence of commingled plumes may pose issues for remediating parties

in achieving upcoming timeframes (including the statutory timeframe to complete remedial investigation by May 7, 2016).

To comply with N.J.A.C. 7:26E-3.9, the investigator must demonstrate that potential on-site sources are not contributing to the ground water contaminant plume by performing a PA and, if necessary, a site investigation if potential Areas of Concern (AOC) are identified. When investigating potential contribution from on-site AOCs, ground water samples should be collected in areas that are proximal to and hydrologically downgradient of the AOC; however, the presence of an upgradient plume may make it difficult to differentiate between impact from on-site and off-site sources. The investigator should therefore review the conceptual site model, paying particular attention to flow direction, contaminant degradation, potential pathways, and fate and transport modelling before choosing sampling locations.

### Guidance Documents

The NJDEP Off-Site Source Groundwater Investigation Technical Guidance provides information on the investigation necessary to determine if contaminated ground water is migrating onto a site from an off-site contaminant source, tools and strategies to aid the investigator

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1. Landowners seeking to avoid liability under the Spill Act for prior discharges of hazardous substances can attempt to do so by affirmatively establishing the elements of the “innocent purchaser” defense. For purchases made on or after September 14, 1993, the Act requires a showing that owners neither knew about the contamination at issue, nor had reason to know of the contamination, when they purchased the property. This requires a showing that the owner undertook “all appropriate inquiry into the previous ownership and uses of the property,” prior to acquisition, which is defined as “the performance of a preliminary assessment, and site investigation, if the preliminary assessment indicates that a site investigation is necessary.” For purchases prior to September 14, 1993, owners need only show they neither knew, nor had reason to know, about the contamination at the time of purchase, and undertook, “at the time of acquisition, all appropriate inquiry on the previous ownership and uses of the property based upon generally accepted good and customary standards.”

2. NJDEP’s guidance documents are designed to help the party responsible for conducting remediation comply with the Department’s requirements established by the Technical Requirements for Site Remediation (Technical Rules), N.J.A.C. 7:26E.

#### About the Author:

Marc D. Policastro is a land use attorney and Chair of the Environmental Department at Giordano, Halleran & Ciesla, P.C. Melissa A. Clarke is an associate in the Environmental Department at Giordano, Halleran & Ciesla, P.C. They can be reached at (732) 741-3900.

## DELIVERING THE ELECTRONIC RESIDENCE – MANAGING THE RISKS

By: Carl G. Roberts, Esq. and Barbara Casey, Esq.

As the residential market continues to improve, builders are trying hard to distinguish their offerings and attract more buyers. Consumer studies show many buyers want homes with systems that improve comfort, efficiency, ease of operation and use, and general user friendliness. For Millennials and other buyer groups as well, immediate, efficient, and comprehensive access to and delivery of digital information are vital selling points.

In response, advertisements for new homes extol state-of-the-art appliances, energy efficient heating, cooling, and air quality systems, technologically advanced security and home entertainment systems, and remote access and control features. Online and printed marketing brochures tout how multiple consumer electronics and home systems work together.

Amidst the excitement, builders should recognize the serious risk and liability implicated by the very connectedness that appeals to buyers and enables smart systems and devices to work together. The heart of all smart systems is a computer. Any computer that touches the Internet – even one embedded in a device like a smart refrigerator – is susceptible to hacking and attempts at unauthorized access. The same applies for systems that use other frequency bands to communicate, such as Bluetooth. Even systems that are hard-wired and completely detached from external networks can be breached and infected through the equipment used for installation, setup and servicing.

Unfortunately, those who seek unauthorized access usually have nefarious purposes. Typical targets include private information such as the residents' identification code numbers, credit card information, health information, or personal habits. Hackers may want the ability to circumvent security systems and unlock doors, or to install malware-ransomware combinations to undermine the very operation of the systems in the home. The computing power in smart appliances can be used to carry out coordinated denial-of-service attacks on distant targets. Any of these events will likely turn a new home buyer's excitement into disaffection, especially if the damage is not covered by the homeowner's insurance policies.

For builders, problems with smart systems may lead to liability under new-home warranties. In consumer friendly states like New Jersey, consumers may resort to the consumer fraud laws if they believe their sellers over-represented their product or failed to warn of potential issues. Several federal agencies, notably the Federal Trade Commission, Federal Communications Commission, and U.S. Department of Energy, have issued strong statements expressing their expectations that consumers will be protected by everyone in the sales chain – regulations to back up these pronouncements are likely just over the horizon.

A careful builder will take steps both during and after construction to minimize its and its customers'

exposure. While the specific steps will vary with the circumstances, here are some suggestions:

- Review how data security is implemented on the builder's own business systems and any sophisticated tools the builder might employ.
- Review the builder's insurance policies to make sure they cover cyber issues such as loss of data, damage to data integrity, remedial steps for data breaches, and the kinds of non-tangible losses that result from cyber-damage.
- Train employees in the need for data security and best practices.
- Require strong passwords on the builder's systems, place limitations on access to consumer data, and compartmentalize customer data.
- Provide customers with notice of what data is collected and why. Give customers the choice to opt out of data collection. Limit what data is collected and retained and dispose of it promptly when no longer needed.
- Review both physical and electronic security around residential construction sites and take appropriate steps to protect the eventual owner. Many subcontractors and vendors have ready access to the building during construction and systems are wide open while vendors configure the settings during the installation. Use vendors and subcontractors who

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### About the Author:

Carl G. Roberts is Senior Counsel in the Litigation Department of Ballard Spahr LLP, based in the firm's Philadelphia, PA, office and Barbara A. Casey is a partner in the nationally acclaimed Real Estate Department of Ballard Spahr LLP, based in the firm's Cherry Hill, N.J., office. Mr. Roberts has been involved in a wide variety of commercial and construction litigation matters around the country and previously lead the firm's Real Estate and Construction Litigation Practice Group. He also has significant experience in litigation regarding computer software development. He can be reached at 215.864.8120 or [cgroberts@ballardspahr.com](mailto:cgroberts@ballardspahr.com).

Ms. Casey represents a variety of clients in a range of real property matters such as acquisition, development, sales, leasing, commercial lending, and land-use approvals, including development of mixed-use, condominium and homeowners' association, and time-share projects. She can be reached at 856.761.3430 or [caseyb@ballardspahr.com](mailto:caseyb@ballardspahr.com).

## SUCCESSION PLANNING IN THE CONSTRUCTION INDUSTRY

By: Paul Kuhl, CPA, CITP, CGMA

At some point in the life cycle of a construction company, the owner will start to think about how and when he would like to cash out. This decision may be the result of their desire to retire and spend more time with their family and grandchildren, to travel, or for finally getting serious about their golf game. Their decision could also be based on their perception that it is the right time to sell because it is a “good market”, or it could be due to a life changing event which has forced them to sell their company and retire. Whatever the reason is, there are various issues in the construction industry which will impact the succession plan, potential buyers and valuations of the company.

### The Issues and Problems

The industry has a disproportionate share of closely held/family owned businesses. Issues relating to this include questions about who is the potential buyer. Is management interested in/or able to acquire the company, or does the next generation want to take over the company? There have been estimates that less than 1/3 of family owned businesses survive to the second generation. Many closely held businesses are unable to survive the loss of the founder. There are also the risks associated with the industry and the question is whether banks or private equity firms want to finance a transaction and at what price? Finally, what is the business worth, and who prepares the business valuation?

### Recent Activity

In the past few years’ strategic buyers of construction companies have been looking to enter the North East, including the New York City and New Jersey markets. The reason for this is the continued strength of the New York

City market and significant projects which are being planned for the region. Several recent transactions have involved the acquisition of construction companies by foreign companies, or the consolidation of manufacturing and construction companies.

### The Succession Planning Process

The succession planning process can be a long and involved process for the current owners of a construction company. The first step is to understand the difference between succession planning versus estate planning versus exit planning. Succession planning is the process of transferring leadership to successor management. The purpose of which is to ensure the ongoing viability of the company. Estate planning is the process of transferring ownership (wealth) from the current owners of a construction company to the successor owners or to family members/heirs in the most tax advantageous structure allowable by law. Exit planning is the process that the current owner(s) go through to determine their plan to leave the company. It involves the transition of both ownership and management of the company and this phase should be done before the succession and estate planning.

Once the decision has been made to start exit planning the following items should be considered:

1. What are the current owners’ views including objectives, timing and personal matters (i.e. what happens to long-time employees of the company?
2. Who are the potential new owners (family members, current management, the employees, or others) and are they capable of

managing the business? If they are family members or current management, groom them early on for the potential transition.

3. What will be the roles of current family members who are in or out of the business?
4. What are the financial needs of the current owners and what will they need to support those needs in the future?

Frequently, family members may want to take over the business from their parents, but find themselves incapable of running the business profitably, thus hindering their ability to pay-out their parents. Can the next generation effectively and efficiently continue the current business and enable it to thrive going forward is a very difficult question that the current owners and key management should address early on in this exit planning phase.

Once an exit strategy has been arrive at, the next step in the process is to start preparing for succession and estate planning. This would include the following:

1. Meet with outside advisors such as your CPA and attorney, and with key internal personnel.
2. Determine if the company has accurate and timely internal financial reporting that has been audited or reviewed by a reputable independent accounting firm.
3. Verify who the key management is, and whether they are a strong and capable team.
4. Review the “owners perks” and

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About the Author:

Paul Kuhl is a Senior Manager in the Princeton office of WithumSmith+Brown, PC. He is a team leader in the Firm’s Construction Services Team. Paul is on the Board of Directors and Past President of the New Jersey Chapter of the Construction Financial Management Association. He can be reached at (609) 520-1188.



## THE OVERLAP OF RECREATION AND REDEVELOPMENT: HOW BROWNFIELDS CAN BE GREEN ACRES

By: Catherine M. Ward, Esq.

Although this is not a new issue or recent development, the topic of this article is not widely known and it presents a situation which could derail a much-needed redevelopment project. A section of the Green Acres Land Acquisition and Recreation Opportunities Act, N.J.S.A. 13:8A-35 et seq. (the "Act"), states that any land used for recreational purposes within a municipality that receives Green Acres funding automatically comes under the jurisdiction of the Green Acres program and therefore subject to the Green Acres requirements that the land be held for conservation or recreation. A parcel that is situated within a designated redevelopment area and subject to a redevelopment plan, can nonetheless be determined to be limited to parkland or active recreation uses if the municipality does not take appropriate action. This situation arises when such a parcel designated for redevelopment does not find a redeveloper or is being held by the municipality pending the acquisition of additional sites or when there is disagreement over the appropriate future use and while these issues are being worked out, the parcel is used as a pocket park or a ball field or for other public recreation. This is exactly what occurred in the court case which prompted the legislature to amend the Act in response.

The City of Plainfield sought to remove a parcel from its Recreational and Open Space Inventory (ROSI) so that the land could be redeveloped. The parcel was located in a designated redevelopment

area and subject to a redevelopment plan, but was being used as a public park until a redeveloper could be found and a redevelopment project approved. During the eight year period that the parcel was used as a park, it was listed on the City of Plainfield's ROSI as open space. When a redevelopment project materialized, the City sought to have the parcel removed from the ROSI on the basis that it had been listed erroneously. NJDEP allowed the parcel to be removed from the ROSI but citizens groups appealed. In the resulting Appellate Division case, *In the Matter of Amendment to Recreation and Open Space Inventory of the City of Plainfield*, 353 N.J. Super. 310 (2002), the Appellate Division reversed the NJDEP's finding and held that the City of Plainfield had not proven that the parcel was erroneously listed, because the parcel had in fact been used as a park for eight years, even though it was also found that the City had actively been looking for redevelopment projects for the parcel and had upgraded the park to attract redevelopers. Despite the intent to redevelop the land, however, the City of Plainfield had included it on their ROSI submitted to NJDEP.

The impact of the decision confirmed that all lands used for recreation or open space held by a local unit (the entity receiving Green Acres funding, in this case, a municipality) are under Green Acres jurisdiction once the municipality receives Green Acres funding. Further, the intent of the municipality in

holding land pending redevelopment was no longer relevant. Only the actual use of the land matters. Once public land owned by a municipality receiving Green Acres funding is used for recreation or conservation purposes, the land must be listed on the municipality's ROSI. Any change in use of the land will require a diversion application. It is not just land which has been acquired or improved with Green Acres funds which becomes subject to Green Acres restrictions.

Upon the issuance of the Appellate Division decision on July 18, 2002, the legislature promptly amended the Act to address the City of Plainfield situation by excepting from the foregoing restrictions land which is the subject of a redevelopment plan adopted prior to July 18, 2002 (the date of the court decision in the *City of Plainfield* case). Redevelopment plans adopted after that date will not exempt lands from the jurisdiction of Green Acres. Thus, a municipality considering an interim recreation use for land which the municipality ultimately wants to develop commercially should undertake such action after careful consideration of the Act and the City of Plainfield case. Likewise, a redeveloper which has identified a publicly-owned parcel for redevelopment but which is being used for what could be considered a recreational use would be advised to meet with the Green Acres program of NJDEP to determine whether N.J.S.A. 13:8A-47, as amended, applies.

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About the Author:

Stradley is a full service firm with offices in Philadelphia, Cherry Hill, Malvern, Harrisburg, Washington, DC, New York and Chicago. The author's practice focuses on environmental and related regulatory issues in redevelopment, energy, industrial and land use situations.

## IC-DISC – TAX SAVINGS FOR INTERNATIONAL A/E FIRMS

By: Michael Yarrow, CPA

Is your firm providing services on an overseas project? If so, you may be missing out on a potential tax savings.

Engineering and architectural firms providing services to projects outside the U.S. have a tax savings opportunity under the current U.S. tax structure at their fingertips which can provide significant benefits to firms and their shareholders.

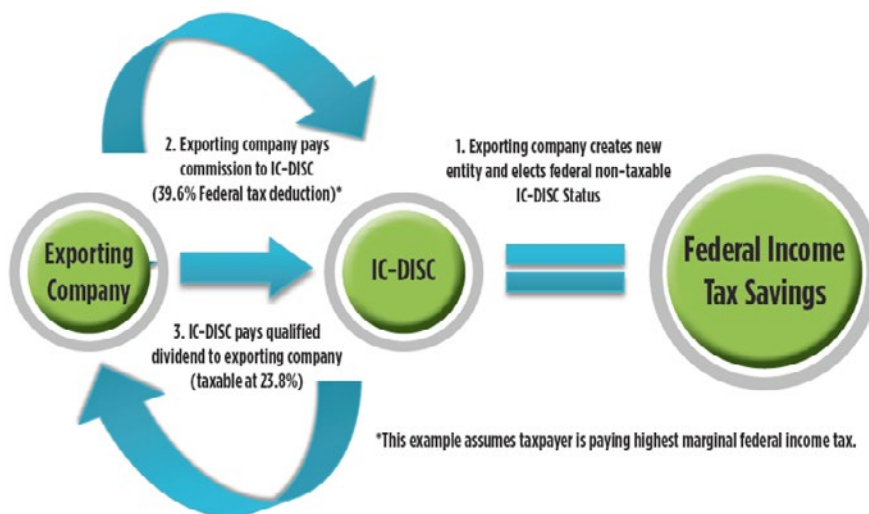
An IC-DISC (Interest Charge-Domestic International Sales Corporation) is great tax savings strategy for engineering and architectural firms that provide qualified services for a project located, or proposed for location outside the United States. Although the project is located outside the U.S. the qualified services performed for these projects can be within the United States.

Engineering services would include consultation, investigation, evaluation, planning, design or supervision of construction for purpose of compliance with plan specifications and design. Architectural services include consultation, planning aesthetic and structural design, drawings and specifications, or supervision of construction or erection in connection with a construction project. These services include a feasibility study for proposed sites even if the project is not initiated.

An IC-DISC is generally a non-taxable entity. An entity elects IC-DISC status through the filing of Form 4876-A, Election to be Treated as an Interest Charge DISC. The IC-DISC does not pay tax on the income it generates if certain

conditions are met. These conditions include, but are not limited to the entity being a domestic U.S. corporation, having minimum capital of \$2,500, a single class of stock, maintaining a separate set of books and records and the 95 percent test is met with respect to the IC-DISC's qualified export receipts and assets. If these conditions are met, the income generated by the IC-DISC is not subject to corporate tax and the IC-DISC shareholder(s) enjoy

- The firm deducts commission from ordinary income taxed at rates up to 39.6%.
- IC-DISC pays no tax on the commission income.
- Shareholders of IC-DISC must pay income tax on dividends at qualified rates up to 23.8%.
- Results in a 15.8% permanent tax saving.



tax favored qualified dividend rates when the income is distributed by the IC-DISC.

So how does the IC-DISC strategy work?

- Owner-managed engineering/architectural firm qualifies for and creates a tax-exempt IC-DISC.
- The firm pays the IC-DISC a commission on the sale of qualified services.

If your company has export receipts of \$1M and you have positive taxable income, an IC-DISC strategy may be an opportunity for you. To take advantage of this tax savings opportunity, a new entity must be formed and the IC-DISC election made within 90 days from the start of the entity's fiscal year. For assistance in forming the IC-DISC or additional information on the topic please contact: Michael Yarrow, CPA, [myarrow@withum.com](mailto:myarrow@withum.com).

About the Author:

Michael Yarrow, CPA, is a Senior Manager at WithumSmith+Brown, PC. He can be reached at [myarrow@withum.com](mailto:myarrow@withum.com).

## NJBA PRESIDENT MESSAGE

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somewhat different than my own managerial style, will be highly effective and I wish him tremendous success. Looking further into the future, I can attest that with future leaders like John Kirkenir, Tom Troy, and Corey Wescoe, the tradition of outstanding leadership will continue to bear fruit.

I also thank Jeannie Tomlinson and John Healey who could not possibly have been better Associate leaders on my team. I'd like to particularly acknowledge their efforts and the results they produced with our membership numbers;

Membership as of July 1, 2015	921
Bottom # Membership 2012	846
# New Members Increase since Bottom in 2012	124
% Increase New Members since Bottom in 2012	15%
Loss of Members as of 8-1-2015	212
# Make Up Loss + New Members Since Bottom in 2012	336
% Make Up Loss + New Members Since Bottom in 2012	40%

Not only has Jeannie's and John's efforts increased our membership by 40% since the bottom of the recession but they have established an incredibly enthusiastic, energetic, and dedicated Membership Committee made up of the best Associates representing all of our Locals. Of course, we could not have accomplished what we did at the State level without the consistent support of our local EO's and Presidents. I'd like to thank BRAANJ EO Kathleen Kurpiel and President Don DiNovi, Shore EO Gina McNamara and President Tom Bovino, South EO RickVan Osten and

President Nate Russo, and Metro's new EO Doug Fenichel (who replaced one of our most effective local EO's - KT Caitlin who left to care for her elderly parents in Florida) and Metro's President Phil Calinda.

Finally, I'd like to relate a short but inspirational story from a book I recently finished called "The Boys in the Boat" by Dan Brown. This is a true story about nine American boys from the University of Washington (UW) crew team which won the Gold Medal at the 1936 Berlin Olympics. Senior Joe Rantz, one of the most talented members of the UW crew, was in a major performance slump after his crew had won the US Olympic Trials and were preparing for Berlin. Head rowing Coach Al Ulbrickson was so concerned that he asked George Yeoman Pocock who, to this day, is the acknowledged master builder of the very best racing skulls (and whose shop was on the second floor of the UW Boat House) to sit Joe down and give him some sage advice to try to get him out of his slump.

What follows are his exact words, "He suggested that Joe think of a well rowed race as a symphony, and himself as just one player in the orchestra. If one fellow in an orchestra was playing out of tune, or playing at a different tempo, the whole piece would naturally be ruined. That's the way it was with rowing. What mattered more than how hard a man rowed was how well everything he did in the boat harmonized with what the other fellows were doing. Therein lies the secret of successful crews. Their "swing", that fourth dimension of

rowing, which can only be appreciated by an oarsman who has rowed in a swinging crew, where the run is uncanny, and the work of propelling a shell a delight." He concluded with this inspiring piece of advice, "Joe, when you really start trusting those other boys, you will feel a power at work within you that is far beyond anything you've ever imagined. Sometimes, you will feel as if you had rowed right off the planet and are rowing among the stars."

Joe Rantz came out of his slump and his phenomenal UW crew team overcame all of the dirty tricks Hitler pulled to give the German Crew an advantage over the USA crew. In a phenomenal come-from-behind victory in the last few seconds of the race, USA propelled themselves across the finish line 6/10ths of a second ahead of the field to capture the Gold Medal. To this day, they are widely acknowledged to be the best nine man crew team ever assembled.

In conclusion, I'd like to thank all of you for the opportunity to be a part of a winning NJBA crew and say that I have totally enjoyed this past year as your President. Working in harmony with the state and local leaders, our phenomenal members, and the incredible staff, I can definitively say that the NJBA certainly has "swing". I cannot imagine assembling a better and more capable crew to win the American dream of a quality affordable home for all of New Jersey's families.



## ANATOMY OF A TRANSITION

Continued from page 4

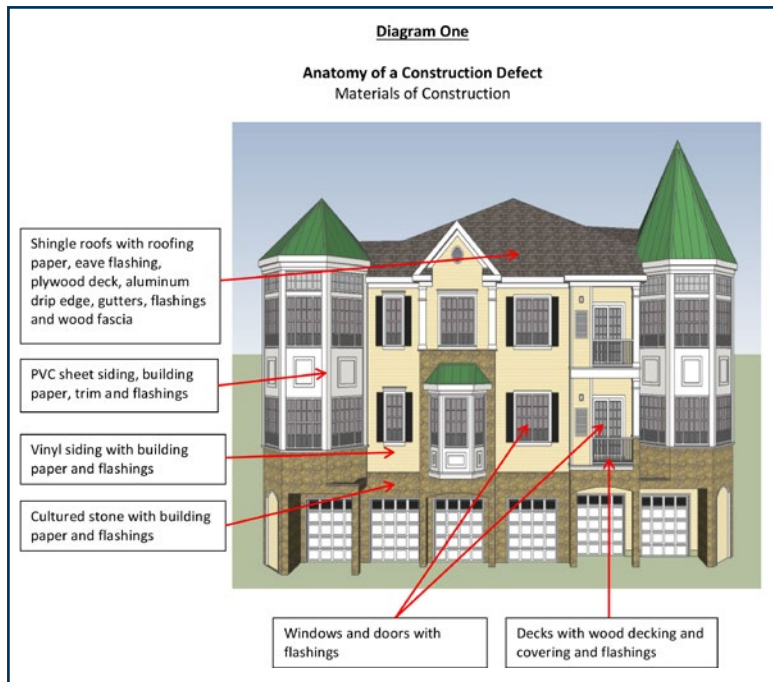
this decision, the type of community association is chosen. From a risk perspective for both the developer, as well as the new homeowners, the potential for construction defects is defined by the extent of the common elements which they are responsible for.

For example, let's assume a condominium form of ownership is selected. In this case, the association is generally responsible for the buildings, extending from the walls of the units outwards, as well as all site-related components such as roads, sidewalks, lawns, any public amenities such as a clubhouse, and any recreational facilities such as pools and tennis courts. By contrast, in a homeowners association the association is typically not responsible for the buildings, but only the site related components.

In the example used for this paper, a condominium comprised of multi-story buildings is the general makeup of the community. In making the decision to use this type of ownership, the developer's risk for construction defects includes extensive building related common elements. A typical elevation of one of the buildings can be seen in **Diagram One**, which also shows the various materials used in the construction of the exterior of the buildings.

Another critical task that takes place in the Document Development Phase

is the preparation of the architectural and engineering drawings and specifications for the community. In many instances, these documents are the source of future construction defects if the drawings are not correct or do not include enough information for construction to be performed correctly. An example of this can be found in our example community



where a variety of different materials were specified for the exterior of the buildings although in some cases, not enough detail was provided to show how the interface between the materials should be constructed). This omission is one cause of improper construction, leading to ongoing moisture infiltration problems and significant damage to the underlying structure of the buildings.

### Construction Phase

The Construction Phase is a critical stage because this is when the defects are actually nested into the construction.

During this phase, the first pivotal steps are to select the contractors that will be performing the work, develop the contracts for each, and decide how the

construction quality will be monitored during the construction process. In our example, **Diagram Two (p.16)** shows a breakdown of the number of contractors on this project along with their scopes of work. Examples of the problems that can take place with these selections are, again, the interface of the various materials between the contractors and what is included in each contractor's scope.

For instance, consider the building paper which goes under the various siding materials. While strategic contractor scopes clearly indicate that this paper should be installed by one contractor over the entire building face (due to the need for proper lapping of the paper from top to bottom of the building), in our example the installation of the paper was separated because with it being the responsibility of each contractor based on the different siding types. This led to an improper interface between the majority of the materials as well as inconsistency in the application of the paper throughout the buildings, which resulted in significant moisture infiltration at the interfaces of these materials.

When preparing the contracts for each of the various contractors, another critical aspect is to make sure that all material interfaces are assigned to a contractor so that no materials are missed. In our example, one of the most important interfaces was between the vinyl siding and the cultured stone. The drawings clearly indicate how this interface is to be flashed, although when the contracts were prepared and the contractors were selected, this critical piece of flashing was not included. This caused significant damage behind the cultured stone because the moisture which flows down the building from above was directed behind the stone rather than out of the building face.

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## ANATOMY OF A TRANSITION

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The most critical decision made involves how the ongoing construction will be monitored for quality workmanship. This decision includes how each of the contractors will be monitored and -- most importantly -- how the interface between each of their scopes of supply will be coordinated. In our example, it was clear from the extent of the deficiencies is caused by improper construction with deficient oversight. With good construction oversight, it would have been recognized that the critical piece of flashing was shown on the design drawings but not in anyone's contract. (See Diagram Two)

The conclusion is that depending on the type of construction and the schedule of the construction the oversight of the project by one or more qualified people is critical to minimize construction defects!

### Turnover

We now move into the phase of Transition where the tasks which are performed fall to the association as it performs due diligence to ensure that the construction is in general conformance with the design drawings and good workmanship. During this process, the association must identify and report any uncovered deficiencies. In most instances the association is guided in this process by management as well as their legal counsel and engineers.

In our example, the following is the process which has taken place:

As part of the association's due diligence process, an engineering firm was retained to prepare a Transition Study to visually observe the common elements for general conformance to the design documents as well as good workmanship. As a result of the visual observations, it was noted that in various locations, the as-built installation of the façade of the buildings were not in general conformance with the design

drawings as well as manufacturer's installation guidelines. This phase did not include any invasive testing.

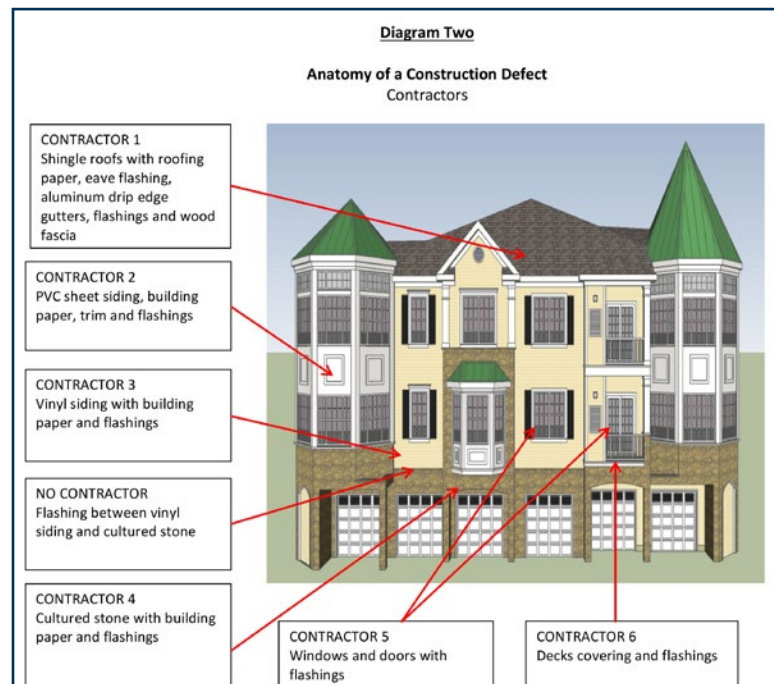
At the recommendation of the engineer, the association decided to move forward with moisture probes to determine if, based on the visual observations, underlying moisture infiltration had taken place and, if it had, if any damage was a result of the moisture. The moisture probes indicated that moisture had in fact penetrated the

that corrective action to all of the buildings would require approximately \$10,000,000 in work. During the process, the association took legal action against the developer which has resulted in approximately \$3 million in legal expenses to date for the association as well as approximately \$1.5 million in expert reports. The developer has, in addition to hiring its own legal counsel and retaining their own expert, brought into the case all of developer's contractors. They, in

turn, in turn retained legal counsel, as well as technical experts. As of now, while all parties are in agreement with the damages, the question of the total remedial cost is one of the two primary issues remaining.

In addition, the question of the appropriate distribution of costs between all parties

has not been decided. The primary reason for this is the complexity of the interrelationships of defect and responsibility. For example, consider the situation in which the water from above is infiltrating behind the stone below due to the missing flashing. Although the stone has not been installed correctly, the primary reason for the moisture is the missing flashing -- which was not included in anyone's contract. While the stone installer has agreed to remove and replace all of the stone, he contends that the correction of the moisture damage behind the



building envelope in many locations with excessively high moisture readings. At this point, the association authorized invasive removal of the façade in a number of locations to determine if underlying damage was present. These tests found extensive damage which led to more extensive moisture probes and invasive testing at all buildings. In conclusion, it was found that the cause of the moisture infiltration was primarily due to the improper installation of the building envelope in most locations.

In order to quantify the estimated cost of repair, the engineer prepared a cost estimate which concluded

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## “ERGG”

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running dry, Senator Raymond Lesniak recently introduced a bill (S894) that would amend the program to allocate up to \$600 million in additional tax credits to encourage developers to build affordable housing in “distressed neighborhoods”. A “distressed neighborhood” means “a census tract, located within a distressed municipality, in which the median family income does not exceed 80 percent of the Statewide or applicable metropolitan median family income, as reported in the most recently completed decennial census published by the United States Census Bureau.” To be eligible for these newly proposed tax credits, at least 20 percent of the residential units would have to be reserved for low- to moderate-income housing and at least another 20 percent of the units would have to be reserved for workforce housing. The legislation can be found here: [http://www.njleg.state.nj.us/2016/Bills/S1000/894\\_11.PDF](http://www.njleg.state.nj.us/2016/Bills/S1000/894_11.PDF)

**Commercial ERGG Program:** Unlike the residential program, the ERGG award on commercial projects is disbursed not in tax credits but in cash which is paid-out only if and to the extent certain tax revenue is actually generated at the completed project. The award amount can equal up to 30% of project costs and is paid to the developer over time (up to 20 years), drawing on up to 75% of the net new tax revenue generated by the project (the foregoing percentages are 40% and 85%, respectively, if the project is located in a GSGZ). Potential tax revenue streams to fund the ERGG award include sales taxes, utility taxes, hotel taxes, and business taxes.

There is no minimum amount of project cost for commercial ERGG eligibility; however, the developer must demonstrate that its project provides an overall net economic benefit to the State. Applications for commercial projects must be submitted to NJEDA by no later than July 1, 2019.

## MOUNT LAUREL

*Continued from page 6*

obligations that municipalities must meet through their fair share plans.

### Settlement Discussions Ongoing

A number of settlements of DJ cases have already been reached, and settlement discussions in many more towns are ongoing. Those settlements typically result in the municipal obligation to adopt rezonings, including rezonings for inclusionary developments that will provide both market rate and lower income housing, with the goal of bringing towns into compliance with their fair share obligations. Such settlements at this preliminary stage can result in benefits for municipalities, especially since trial courts have flexibility in making fair share determinations as to towns that settle at this juncture. Builders are participating in the DJ cases as intervenors or “interested parties,” seeking zoning relief by way of settlement or, if negotiations fail, litigation of the issues.

### Some Towns Now Subject to Builder’s Remedy Suits

Various categories of towns are potentially susceptible to builder’s remedy suits. The towns most exposed to such suits are those towns that never filed a fair share plan with COAH, and never filed a DJ case in the trial courts. Further, some towns filed fair share plans with COAH, but never filed DJ cases. In addition, a number of towns filed DJ cases, but have since dismissed them. Such towns may be susceptible to builder’s remedy suits and what the Supreme Court labeled “constitutional compliance cases,” a novel category of case in which rezonings could be pursued.

## Conclusion

The next few months will be pivotal in bringing about judicial implementation of the “rules” that will guide the process going forward, and the adoption of fair share plans that will greatly reduce the exclusionary zoning that exists in New Jersey. Builders who are not yet involved in the process are well-advised to explore the possibilities provided by the Mount Laurel doctrine.

## CONSTRUCTION LIABILITY

*Continued from page 8*

favorable decision to builders and contractors of what is an occurrence under a commercial liability policy in the Cypress Point Condominium v Adria Towers LLC case in July 2015. This case essentially reversed a very unfavorable builder coverage lawsuit decision handed down in 2012 by the Pennsylvania National Mutual Casualty Insurance Company v Parkshore Development Corporation decision. I am not an attorney so I suggest you discuss these cases with your attorney for clarification why they are so important to the liability coverage you buy as a builder or contractor. From my point of view as an insurance and risk management professional, the Adria Towers case is a breath of fresh air to an industry rocked by unfavorable rulings and stripped-down coverage offerings by construction underwriters over the past 15 years.



## ANATOMY OF A TRANSITION

*Continued from page 16*

stone is not their responsibility, as it is due to the missing flashing which was not the stone installer's responsibility. It is estimated that the developer and its experts and legal counsel have expended close to \$6 million in defense costs which -- when added to the association's expenses of \$4.5 million -- come a total of \$10.5 million which is equal to the total claim cost.

One of the most significant challenges in reaching a settlement over a construction defect claim is the cost to cure the problems. While in many instances all parties are in agreement that a defect exists, it is rare that there is agreement as to how much it will cost to correct the deficiency. This problem can be compounded by the presence of consequential damages that cannot be seen or quantified. An example of this would be damage to underlying plywood on a roof or an exterior wall caused by a deficiency in the roofing or siding installation. While moisture probes and invasive testing show that the conditions exist, the only way to determine the extent of the problem would be to totally remove the portion of the building envelope which covers it. The way in which the extent of the problem is estimated is by the extensive use of minimally invasive moisture probes and the selective use of more invasive testing in all areas of similar defective construction. This problem can even become more complex if the cause of the problem, such as improperly installed flashing, cannot be seen either --- which again would require even more extensive testing.

Now that the extents of the deficiencies and the resultant damages have been quantified as extensively as possible, the cost estimate will need to be prepared. While the preparation of a specification for the replacement work and actually receiving bids from contractors to complete the work is the most accurate, due to the expense and time required

to do this, it is generally not used. The most common cost estimates are based on the use of nationally recognized estimating standards. While these types of standards are readily available, their use requires expertise in understanding not only how things are constructed but also how things are taken apart since in all cases the remedial work includes the removal of both the deficiently-installed component (and the damage behind it) but also the integration of the new work into the existing building parts that are not being replaced. In some instances a firm that specializes in cost estimating will be used.

Unfortunately, no matter how the damage is calculated and estimated, extensive deposition time will take place to vet the estimates, as one side seeks to minimize them, and one side seeks to maximize them. It is generally an extensive process that also involves a distribution of the costs to the various parties involved in the construction of each deficient component but can also involve those whose work was installed correctly but affected adversely by the improperly installed components.

In conclusion, the best strategy is to document the claim and present it in a factual way.

In conclusion and speaking from the perspective of the new community the following suggestions are recommended.

- Perform an analysis of the as built construction as soon as possible in the transition process.
- If deficiencies are visually identified perform moisture probes and invasive testing so that both the cause of the deficiency as well any consequential damages can be identified. It is important to understand that this process can take time and one step will most likely lead to the next step. It can be like opening a can of worms!

- For each identified deficiency the cause should be clearly identified such as not matching the design drawings, not matching manufacturer's installation instructions a code violation etc.
- For each identified consequential damage, the cause should be clearly tied to the deficiencies identified.
- Make sure to perform enough invasive testing in order to be used as a basis for a cost estimate in terms of the quantity of remedial work that will need to be performed.
- Prior to entering into litigation evaluate on a cost basis the cost of correction vs., the cost of litigation.
- Consider some type of Alternative Dispute Resolution such as mediation before litigation.

These are just a few examples, but in all cases be objective as to the deficiencies and the cost of recovery and remember to handle the findings in a business fashion rather than a personal fashion! It is our job as the professionals to guide our associations objectively.

## THE BERMUDA TRIANGLE

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in developing lines of evidence to document off-site contamination, administrative procedures for notifying NJDEP of the condition, and guidance on obtaining a Remedial Action Outcome (RAO). A Commingled Plume Technical Guidance document, expected to be released later this year, will provide guidance to environmental professionals when faced with a ground water plume originating from an off-site source that has combined with another ground water plume originating from an on-site source.

### Conclusion

If an off-site source is demonstrated and there are no on-site contributions to the contamination, the party responsible for conducting the remediation is not required to remediate the contamination migrating onto its site. If an off-site source is demonstrated but there is also an on-site source contributing to the plume (or cannot be ruled out as contributing to the plume), then the investigator should refer to the Department's Commingled Plume Technical Guidance (scheduled to be issued later in 2016). If an off-site source is demonstrated and there is contamination from an on-site source that does not commingle with the off-site plume migrating onto the site, then the party responsible for cleanup is required to remediate only the contamination associated with the on-site source [N.J.S.A. 58:10B-12g (5) and N.J.A.C. 7:26E-3.9(b)].

## DELIVERING THE ELECTRONIC RESIDENCE

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are known, experienced, and careful.

- Examine and carefully evaluate product specifications and warranties. Many smart systems and sensors lack even the most basic security capabilities. Even those that can implement strong security are often delivered with generic passwords. Configuration should include setting up strong security for the new owner.
- Advise new home buyers to take advantage of opportunities for education about customizing home systems for secure and effective operation.
- Advise new home buyers to investigate homeowner insurance that addresses potential cyber-related risks such as ransomware attacks or the hacking of entry systems.

Integration of smart technology into homes is increasingly common and will almost certainly continue to intensify. By taking steps to minimize their and their customers' risks, builders and developers can maximize the rewards of this exciting frontier in homebuilding.

## SUCCESSION PLANNING

*Continued from page 11*

identify if they are reasonable business requirements and expenses, or do changes need to be made.

5. Clean-up "issues" on the financial statements such as the completion and finalization of "problem contracts".
6. Develop a plan (both succession and estate), which is periodically reviewed and communicated to the appropriate people.

### The Role of the Company's CFO

The Company's CFO, should that position exist in your business, plays a key role in this entire process from start to finish. The CFO has access to the

"inner sanctum" and will need to provide an objective viewpoint throughout this process. At times, this may be difficult because he will be juggling family/owner issues and trying to respond to questions from a prospective investor or buyer. The CFO is the person who should be responsible for coordinating all of the work that needs to be done by the various outside advisors, such as the lawyers, CPA's (financial statement auditors and tax consultants) estate planners, valuation firms, etc. In addition, the CFO will be responsible for coordinating all of the documents which will be needed by the various outside advisors.

### Keys to Success

Succession planning is part of the overall strategic overview of the Company. As discussed, there are numerous factors which must be considered in the development and implementation of a successful succession plan. Succession planning is a process that, if done correctly, can take several years to complete. The owners should start planning early and not wait until a triggering event such as a serious illness, etc. occurs. If that happens the survival of the business may be in jeopardy. Throughout the process there must be clear communications and buy-in amongst all of the parties regarding their current and future roles in the company. Early in the process the issue of liquidity and the desire of the current owners to move on must be addressed because this may take time to agree on what is needed and how it will be funded. Finally, please remember that this is a process that will evolve over time and may change before it is finalized.