

October 17, 2007



DIMENSIONS

Newsletter of the New Jersey Builders Association

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Breakfast with DCA Commissioner Doria

NJBA Master Sponsors will be hosting a breakfast with DCA Commissioner Joseph Doria on Wednesday, October 23, 2007, at 8:30 am at Forsgate Country Club in Monroe Township, NJ.

The event is free of charge and is an excellent opportunity for NJBA members to meet the new commissioner and hear about his ideas for balanced solutions to the state's many challenges. NJBA members may invite guests from their companies to attend as well.

To register for the breakfast, please submit the online form available at http://njba.org/contact_form2.asp no later than October 19th. Contact Stefanie Loh at (609) 587-5577 if you have any questions regarding the breakfast.



What is the Highlands Council up to now?

By Joanne Harkins, PP, AICP

When the Highlands Act was signed into law in 2004, it contained a number of exemptions that would allow certain land use activities to occur in the Preservation Area, where they are otherwise prohibited. Two of these would allow pre-existing lots to be used (1) for the owner or a family member to build a house for their own use or (2) allow a house to be built for sale, but with impervious cover and site disturbance limits.

At the September 20, 2007 Highlands Council meeting, the Council released an abstract, "An analysis of the impact and implications of Highlands Act

exemptions." It determined that there are 22,554 lots with the potential to exercise either of the two exemptions described above.



However, more than one-half of these lots are not in the Preservation Area. 12,716 of them are in the Planning Area, where no exemptions are needed. The draft vision statement released at the same meeting actually contains the erroneous statement "that there are over 22,000 parcels of land which are subject to an exemption for

a single family dwelling on vacant land."

There surely must be a reason why the Highlands Council is going out of its way to significantly overstate the impact of these two

exemptions provided for in the Act. It is possible that the Highlands Council is following the lead of some proponents of the Act who appear to be laying the groundwork for an initiative to reduce the exemptions by way of amendment to the Act.

There is another possibility. The Highlands Council may be intending to create zones in the Planning Area that will not permit the construction of homes on pre-existing residential lots when the municipality chooses to enter into the conformance process with the Highlands Regional Master Plan (RMP). There was the hint of such an approach in the 2006 draft RMP, which is now in rewrite.

Regardless of intent, the release by the Highlands Council of such misleading information is not a good omen for what is to follow.



2007 Clean Water Council Hearing on "New Jersey's Water Infrastructure"

By Elizabeth George-Cheniara, Esq.

The Clean Water Council of New Jersey serves as an advisory board to the New Jersey Department of Environmental Protection (DEP) to improve the Water Pollution Control Program.

The Council is required to hold a public hearing annually on issues regarding water pollution and report its recommendations to the Commissioner of DEP. The topic of this year's public hearing is "New Jersey's Water Infrastructure." The hearing is scheduled for Tuesday, October 23, 2007, from 9a.m. to 1p.m. in DEP's public hearing room. Written comments are due by November 16, 2007.

The Council has invited DEP Commissioner Lisa Jackson to speak on water infrastructure. The public hearing will follow presentations and a panel discussion among different interest groups. Eight discussion topics and related questions have been posed on infrastructure's objectives, impacts, standards, management, needs, priorities, and funding.

The hearing brochure notes that water infrastructure provides both

major benefits and imposes costs on society and the environment. The brochure further states that "New



Jersey needs to explore the benefits and services of infrastructure that it wants as a society; the maintenance and management of existing infrastructure; infrastructure choices and issues for new growth; and infrastructure choices and issues regarding urban/suburban/town center redevelopment potential."

Although NJBA's comments on the 2006 Clean Water Council public hearing on "Improving Water Quality Planning & Management" is not found among the hearing record, NJBA will nevertheless submit comments emphasizing the importance of water infrastructure to development and redevelopment.

The Council consists of eighteen members: seven members from state departments, the Delaware River Basin Commission, five public members, and six members from various organizations, including the State Chamber of Commerce, League of Municipalities, and New Jersey Society of Professional Engineers, Inc.

More information, including questions on the eight topics, is available at the following link: <http://www.nj.gov/dep/cleanwatercouncil/hearing2007.htm>



NJBA MASTER SPONSORS



Mark Krugar
19-01 Route 208 N
Fair Lawn, NJ 07401
201-599-7024 ph
201-599-7063 fax

Jack Ganglull
White Horse Rd. at Echelon Rd.
Voorhees, NJ 08043
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856-772-0304 fax

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jerry.thompson@buildersfirstsource.com

Site Remediation Legislative Stakeholder Process Explores Potentially Dramatic Changes That Can Stop Brownfield Redevelopment

By Andrew B. Robins, Esq.
Giordano Halleran & Ciesla

New Jersey's Site Remediation Program (SRP) within the Department of Environmental Protection (DEP) has supervised and approved thousands of cleanups over the past twenty years.

More recently, the SRP has approved remediation efforts as part of Brownfield Redevelopment projects that have provided much needed housing. Throughout, NJBA has advocated simplification of the SRP process and increases in government support for Brownfield Redevelopment. However, recent highly publicized events were used by anti-development groups to develop support for legislation that would essentially put an end to redeveloping most Brownfield sites.

Irene Kropp, Assistant Commissioner of the Site Remediation Program, was tasked by Commissioner Jackson to assemble various "stakeholders" to discuss legislative reform to the SRP. I represented NJBA in the stakeholders' process.

Previously, Commissioner Jackson had offered a few possible changes in testimony before the Legislature, http://www.state.nj.us/dep/commissioner/102306_srp.pdf. A list of the stakeholders, discussion topics and summaries

of those discussions can be viewed at <http://www.state.nj.us/dep/srp/stakeholders>.

As expected, the regulated community and environmental representatives focused on different sets of priorities.

By and large, the regulated community stressed that the system could work well under the existing statutory scheme if DEP refocused the program with changes in the review process and with the addition of additional staff. Further, we stressed that Commissioner Jackson's suggested changes were not necessary and many would have a detrimental impact on the progress of remediation through redevelopment.

Proposed changes that would positively impact Brownfield redevelopments are:

Addition of staff.

Details were provided of the massive backlog of SRP cases due to DEP's understaffing. The stakeholders unanimously supported additional hires. The regulated

community also recommended changes in SRP's approach to cases.

Use of outside consultants to speed reviews.

Other DEP programs have at times hired outside consultants to conduct application reviews so that more timely determinations are made. The idea was opposed by the SRP staff's union and also environmental

groups, who felt the reviews would be too favorable towards the applicants. Pressure from these groups may cause DEP to back down from this idea.

Shifting certain cases away from SRP based programs.

The focus here is on homeowner underground storage tank cases, which represent about one-third of the SRP caseload. The regulated community encouraged DEP to expand the Clean-up Start program that allows consultants to certify sites are clean under auditing by DEP.



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Builder Sales Division

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Chase Home Finance
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Red Bank, NJ 07701

Telephone: 732 945 2019
Facsimile: 732 345 7192
Cellular: 732 241 7750
william.i.hendricks@chase.com

Site Remediation Legislative Stakeholder Process Explores Potentially Dramatic Changes That Can Stop Brownfield Redevelopment *continued*

Other stakeholders opposed these concepts again under the premise that “privatized” reviews would not be sufficiently stringent.

Use of Licensed Site Professionals (LSPs).

A number of states permit site remediation to be entirely directed by an outside independent consultant who qualifies as “LSP’s” A LSP’s work is reviewed by the agency, which reserves the right to require additional work. The regulated community supported appropriate “privatization” of remediation while other stakeholders opposed due to the impression that the reviews would be less vigorous.

Changing attitudes and moving to a “Performance-Based” review process.

Currently, SRP reviews are based on strict adherence to DEP’s Technical Rules for Site Remediation, N.J.A.C. 7:26E (the “Tech Rules”). The Tech Rules are a “*prescriptive*” program, mandating certain steps regardless of their actual need. The regulated community provided examples of how the Tech Rules are applied with a strict approach under which deviation is not allowed even when it does not alter how the site is remediated. While there is a variance procedure, it is exceptionally time-consuming

and rarely encouraged. The “performance-based” approach was also discussed, which focuses on those steps needed to approve of a cleanup, not strict adherence to

afforded by using caps is integral to Brownfield redevelopment.

Requiring financial assurance or insurance for Engineering Controls .

DEP Deputy Commissioner Adam Zellner presented the Commissioner’s concepts of requiring parties that use caps provide funding for perpetual maintenance, inspection and reporting of caps. While a requirement for basic costs of inspection and reporting may not be significant for most sites, however, the concepts discussed involved substantially greater costs. In most, if not all instances, these greater costs would be duplicative of normal maintenance costs. It remains to be seen if the Department persists in this approach.

Prohibiting Voluntary Cleanups or requiring financial assurance.

Some environmental stakeholders wanted the Department to revert to only enforcement based cleanups. DEP, however, will likely retain the Voluntary Cleanup Program (VCP) but may require that approved cleanups be backed by posted financial assurance.



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investigation details that are not relevant to the ultimate remedy. Predictably, the environmental representatives disapproved of the ideas and the Department remains resistant to considering a different approach.

The environmental groups focused on the following concepts, each of which threatens the ability to successfully redevelop Brownfield sites:

Limiting the use of Engineering Controls .

Notwithstanding the fact that 90% of all cases in DEP’s Office of Brownfields use Engineering Controls (caps), the environmental and community groups stakeholders and Commissioner Jackson remain opposed to allowing their continued use. The regulated community continued to stress that the flexibility

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BALLARD SPAHR ANDREWS & INGERSOLL, LLP

Attorneys at Law
Plaza 1000 - Suite 500
Main Street
Voorhees, NJ 08043-4636
856.761.3400

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Imposing requirements for removing "Hot Spots".

DEP and the environmental and community groups remain concerned that capping covers contaminants with concentrations that are "too high". The effort to require such removals continues despite the admitted lack of a scientific basis for determining what is "too high".

Accounting for "cumulative impacts".

This concept is being pushed by the community groups to address "environmental justice" issues. The stakeholder process failed to clarify what would be a practical way of doing so.

Public notice and public participation.

The discussions and DEP's public notification proposal blur the lines between simple notice provisions and active public participation. No clarity was provided as to how active public participation would assist DEP in determining that a remedy is protective of human health and the environment. Obviously, generalized opposition to redevelopment projects could abuse a public participation process. (NJBA's comments on the DEP's proposed notification regulations can be found at <http://www.njba.org>.)

Remedy selection.

Commissioner Jackson has already indicated that DEP should have greater discretion to mandate

specific remedies rather than the current system where DEP approves all remedies that are "protective of human health and the environment". The stakeholder process failed to shed light on why greater authority is needed. If the Department can reject a remedy that is otherwise protective at the end of the process, remediating parties will have no ability to anticipate what the costs of remediation would be. Hence, private capital would be unlikely to get involved in Brownfield redevelopment.

Mandating site remediation reviews for all new development.

The concept pushed by environmental and community groups would be to mandate review for possible contamination for all sites undergoing development. No explanation was given why proposed new uses present a greater risk than existing uses or how such reviews would occur given the SRP's understaffing.

NEXT STEPS

Moving forward, we can expect that the stakeholders' process will be used by DEP to prepare legislative and regulatory changes to address real and perceived flaws in the SRP. Commissioner Jackson has already adopted the environmental groups' slogan of stopping "pave and wave" which inaccurately characterizes capping as simply covering

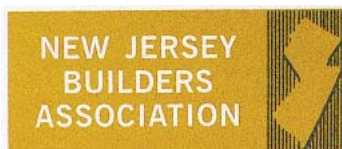
contamination over and forgetting about it. They ignore the fact that the alternative "dig it and dump it" elsewhere has its own set of risks and is frequently economically impossible. The challenge for the regulated community will be in educating our Legislators and other policy-makers as to the more complex realities facing the need to encourage the use of private capital to address contaminated sites.

Andrew B. Robins is a shareholder in Giordano Halleran & Ciesla, NJBA's environmental counsel. Mr. Robins serves as NJBA's representative in the SRP Legislative Stakeholder process. He can be reached at arobins@ghclarw.com. Giordano Halleran & Ciesla is an NJBA Master Sponsor.

DATES TO REMEMBER

OCTOBER

18	EAM Green Building Webinar
23	Breakfast with Commissioner Doria
	Pinelands Subcommittee
	MS/New Exhibitor Marketing Tool Pgm.
24	Member Mobilization Committee
	Codes Seminar
25	Legal Action Committee
	ABC Committee
30	Redevelopment Committee
	Legends Awards Committee



**500 Horizon Center Dr.
Suite 530
Robbinsville, NJ 08691
609-587-5577
www.njba.org**

Dimensions newsletter is produced by the New Jersey Builders Association (NJBA). A housing industry trade association of 2,000 member firms including builders, developers, suppliers, engineers, architects, consultants and other professionals, the NJBA is dedicated to providing safe, healthful homes for New Jersey residents. The Association is committed to finding balanced solutions to the state's critical housing shortage.

The NJBA Annual Report, as well as archived copies of past issues of *Dimensions*, are available at www.njba.org. Questions or comments may be sent to Susan Evans, Director of Public Information, at sevans@njba.org.

EDITOR: SUSAN EVANS CONTRIBUTING STAFF: STEFANIE LOH