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NJBA Obtains Clarification of PRED Registration Requirements for Environmental Remediation Sites

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Late last spring, NJBA formed a working group to address a policy implemented by the Department of Community Affairs' Planned Real Estate Development program relating to the development of certain sites undergoing environmental remediation under the supervision of the New Jersey Department of Environmental Protection (DEP). The Department of Community Affairs (DCA) was not allowing for the unconditional registration of Planned Real Estate Developments (PREDS) (such as residential condominium or fee simple communities having property owners' associations) absent proof that all required remediation had been completed. The DCA was conditioning PRED registrations to preclude the transfer of units until such time as DEP issued a No Further Action letter (NFA). For many projects such conditional registrations were unworkable. Particularly hard hit, were phased projects with remediation programs that would not be completed for many years.

After a series of meetings and exchanges of proposals among our NJBA working group, DCA's program managers and DEP's Office of Brownsfield Reuse, DCA determined that unconditional PRED registrations would be approved if a series of requirements were met. A summary of those requirements can be found at the following website link <http://njba.org/PRED%20Registration%20Procedures.pdf>.

Background

The registration of HOAs is governed by the Planned Real Estate Development Full Disclosure Act (PREDFDA), N.J.S.A. 45:22A-21 et seq. and DCA's PRED regulations, N.J.A.C. 5:26-1.1 et seq. Any PRED that is not exempted by the statute and regulations must first be registered by DCA's PRED unit. Registration includes the approval of the PRED documentation which consists of the Public Offering Statement (POS) disclosure documentation. Typically, once the POS and other PRED documentation are approved by DCA's PRED unit, the PRED is registered, thereby allowing for units to be "offered"

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(contracts taken) and then sold (unit transferred to new owner). In general, units in PRED cannot be “offered” prior to registration unless the project is otherwise exempted by statute and rule.

As explained by the DCA PRED program managers, the imposition of the condition requiring a site-wide NFA before any units could be transferred was based on two primary concerns. First, the DCA’s PRED unit determined that the potential liability to the property owners association and/or unit owners should the Sponsor/Developer fail to complete ongoing remediation was too significant to be transferred. In theory, once the first unit is transferred to a new owner, liability for any required remediation could pass to that new owner as a member of the property owners’ association and/or as the owner of a unit. The DCA’s PRED program was also concerned with the adequacy of disclosure in the POS for sites undergoing remediation.

New Procedures

The new procedures provide the opportunity to obtain full PRED registration under which units can be both offered (contracts taken) and sold (unit transferred to the new owner) even if DEP has not yet issued a full-site NFA. The primary requirement for such unconditional registrations is that the Sponsor/Developer must establish and/or document an existing Financial Assurance (FA) that it has sufficient funds to complete the remediation as approved by DEP (typically in the form of a Remedial Action Workplan (RAW) approval). The form of the FA can be one of a fairly wide variety of assurances as detailed in the summary available at the following website link <http://njba.org/PRED%20Registration%20Procedures.pdf> or any combination of those formats. If established with careful planning, the amount of the FA can be reduced periodically as the remediation work is completed.

Alternatively, the DCA will continue to approve conditional PRED registrations under which units can be offered (contracts taken) but cannot be sold (transfer of the unit to a new owner) until DEP issues a site-wide NFA or there is a subsequent revised registration that includes the establishment of an acceptable FA.

The DCA will also require that the POS include: detail as to the approved RAW, timeframes and cost for completion of the RAW, any interim restrictions on use of the property due to the implementation of the RAW, as well as details of any post-NFA

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requirements, such as the requirements to maintain, inspect and report on the condition of any Engineering Controls (such as environmental caps) or Institutional Controls (such as CEAs) required by DEP.

Developers Should Carefully Coordinate Their Registrations

The new PRED registration requirements for sites undergoing remediation will allow many projects to move forward, albeit under more cumbersome procedures. Clearly, the viability of some projects may become questionable. However, for all PRED sites undergoing remediation, careful planning and coordination will help reduce both complications and costs.

Careful thought should be given to how the RAW is developed so as to maximize the ability for the remediation process to track the development of the site. This is particularly important for phased projects. Our early discussions with DEP Site Remediation Program (SRP) have produced general agreement that wherever possible, case managers will be encouraged to allow developers to break down the remediation program to match the construction program.

Builders developing sites that involve both a PRED and remediation should maximize communication and coordination within their team handling the PRED registration process and those handling the remediation program.

Disclosures in the POS should be carefully drafted to meet the level of detail expected by DCA's PRED staff, but should not be written so as to unnecessarily frighten prospective purchasers. If the site will require post-NFA compliance such as inspection, maintenance and biannual reporting of capping elements, the POS should include references to those requirements and the property owners association budget should include a line item for related costs. Where possible, a proposal from a qualified consultant to undertake those activities should be considered.

Mr. Robins and Mr. Anderson are shareholders in Giordano, Halleran & Ciesla, environmental counsel to NJBA. Mr. Robins's practice includes site remediation matters and Mr. Anderson heads GH&C's PRED group.

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